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# NEW YORK SUPPLEMENT

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A TABLE OF STATUTES CONSTRUED IS GIVEN IN THE INDEX.

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THE

# New York Supplement

## VOLUME 98,

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# New York State Reporter,

## VOLUME 132.

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### SMITH v. MANHATTAN RY CO.

(Supreme Court, Appellate Division, First Department. April 6, 1906.)

1. MASTER AND SERVANT—INJURY TO SERVANT—OBVIOUS DANGER.

The danger of an employé receiving an electric shock while clearing snow from an elevated railroad with an iron shovel, in consequence of the same coming in contact with the electrically charged third rail and another iron connected with the track, thereby producing a short circuit, is not an obvious danger, and is one which a layman is not likely to know unless specially instructed, or unless he happened to observe the effect.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 310, 316½, 610–618.]

2. SAME—NEGLIGENCE OF EMPLOYER—QUESTION FOR JURY.

In an action for injuries to an employé, evidence considered, and *held*, that the question whether the employer was negligent in failing to furnish the employé with a wooden shovel instead of an iron one, with which to clear snow from an elevated railroad, or in failing to instruct him as to the danger of striking the shovel against the third rail and another piece of iron on the track, was for the jury.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 1046, 1047.]

3. SAME—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Whether the employé was guilty of contributory negligence *held* for the jury.

4. SAME—ASSUMPTION OF RISK—QUESTION FOR JURY.

The question whether the employé assumed the risk *held* for the jury.

5. APPEAL—RESERVATION OF GROUNDS OF REVIEW—HYPOTHETICAL QUESTIONS.

Where, in a personal injury action, the evidence showed that molten iron was precipitated into plaintiff's eye, the error in allowing a medical



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**expert to testify in answer to a hypothetical question based on molten lead being precipitated into the eye was not reversible error; the attention of the court not being called to the fact that the question assumed that the metal was lead.**

Appeal from Appellate Term.

Action by Alexander Smith against the Manhattan Railway Company. From a judgment of the Appellate Term (95 N. Y. Supp. 529), reversing a judgment of the City Court in favor of plaintiff, he appeals. Reversed.

Argued before O'BRIEN, P. J., and McLAUGHLIN, PATTERSON, LAUGHLIN, and HOUGHTON, JJ.

Frank V. Johnson (Max S. Bevins, on the brief), for appellant.

Sherrill Babcock (Alfred E. Mudge, on the brief), for respondent.

LAUGHLIN, J. On the 29th day of December, 1902, the plaintiff, while in the employ of the defendant, and engaged in shoveling snow off the track and from around the rails with a shovel having a wooden handle and an iron scoop or bowl, pursuant to the direction of his foreman, touched the iron bowl of his shovel against the third rail, which conveys the current of electricity by which the trains are run, known as the "positive pole," and at the same time brought it in contact with a bolt projecting from a tie which communicated with the earth, which is the negative pole, thus bringing the positive and negative poles together, and thereby causing a short circuit, resulting in an explosion and flash which burned him and injured one of his eyes. This action is brought to recover for the damages thus sustained.

The learned Appellate Term by a majority vote reversed the judgment and order denying a motion for a new trial, and in the opinion placed the decision upon the ground that plaintiff voluntarily assumed the risk of injury from using the iron shovel as he used it. We are unable to agree with the learned Appellate Term. The plaintiff was a member of the electrical repair gang, and had worked in that capacity nearly six months. When snow fell which impeded the work of the repair gang, it was the duty of the members thereof to remove the snow. Plaintiff had assisted in such work before, but with a broom, and not with a shovel. He knew that the third rail conveyed a current of electricity, but, according to his testimony, he was not familiar with short circuits, and did not know what would produce a short circuit, or that one would be produced by an iron surface coming in contact at the same time with the third rail and a projecting bolt, and he had not been instructed on that point. He testifies, and in this he is corroborated, that he was specifically directed by the foreman to use the shovel with an iron blade and wooden handle, and to do the particular work at which he was engaged when he sustained the injuries. He understood—and the undisputed evidence shows it to be a fact—that there was ordinarily no danger in touching the third rail. The only danger was in touching it with iron which at the same time touched another iron connected with the ground. The evidence shows that no injury would result from bringing even an iron shovel in contact with the third rail so long as it did not at the same time come in contact with another iron connected with the track. This was not an obvious danger.

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It was one which a layman would not be likely to know or discover unless specially instructed, or unless he happened to observe the effect. See Hall v. U. S. Radiator Co., 52 App. Div. 90, 64 N. Y. Supp. 1002; Davidson v. Cornell, 132 N. Y. 228, 30 N. E. 573; Kain v. Smith, 89 N. Y. 375. According to the testimony of the plaintiff, he was instructed to be careful, but he was not warned of this danger, and he had not discovered it by observation. It seems that wooden shovels or brooms which were used for removing the snow from the rails are nonconductors, and that rubber gloves were worn to prevent a shock; but while the plaintiff doubtless knew that wooden shovels and rubber gloves were sometimes used, he did not, according to his testimony, know the reason why they were thus employed. The foreman of the defendant over plaintiff was familiar with this danger, and testifies that he warned plaintiff and the other members of the electrical repair gang thereof. Manifestly, it was the duty of the defendant to furnish plaintiff with a broom or a wooden shovel, especially in the absence of instructions as to the danger of causing a short circuit. See Gates v. State, 128 N. Y. 221, 28 N. E. 373; Brennan v. Gordon, 118 N. Y. 489, 23 N. E. 810, 8 L. R. A. 818, 16 Am. St. Rep. 775; McHugh v. Manhattan Ry Co., 179 N. Y. 378, 72 N. E. 312; Braunberg v. Solomon, 102 App. Div. 330, 92 N. Y. Supp. 506; Pantzar v. Tilly Foster Iron Mining Co., 99 N. Y. 368, 2 N. E. 24. The jury were justified in finding that the foreman directed plaintiff to use the iron-bladed shovel without furnishing him gloves, or informing him how a circuit might be produced, or warning him of the danger of injury therefrom. The questions, therefore, of plaintiff's contributory negligence and assumption of the risk and of defendant's negligence were for the jury. See section 3 Employers' Liability Act; Rosin v. Lidgerwood Mfg. Co., 89 App. Div. 245, 86 N. Y. Supp. 49; Ward v. Manhattan Ry. Co., 95 App. Div. 437, 88 N. Y. Supp. 758.

It is claimed that the court erred in allowing a medical expert to testify in answer to a hypothetical question that the injury to plaintiff's eye might have been caused by molten lead. There was evidence that the metal precipitated into his eye was molten iron, not lead. The hypothetical question was objected to generally on the ground that it assumed facts not proven; but the attention of the court was not called to the fact that the question assumed that the metal was lead, whereas the evidence did not disclose the nature of the metal. It is manifest that this was an inadvertence, and that the injury did not depend upon whether the metal was lead.

We have considered the evidence relating to the question of damages, and are of opinion that the verdict was not excessive. It follows, therefore, that the determination of the Appellate Term should be reversed, with costs, and that the order and judgment of the City Court should be affirmed, with costs. All concur.

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## NIAGARA COUNTY IRRIGATION & WATER SUPPLY CO. v. COLLEGE HEIGHTS LAND CO. et al.

(Supreme Court, Appellate Division, Fourth Department. March 7, 1906.)

1. NAVIGABLE WATERS—OWNERSHIP OF WATERS—TITLE OF STATE.
The state has no property or ownership in the waters of the Niagara river, within Const. art. 3, § 20, prohibiting the appropriation of public property to private use, without the assent of two-thirds of the members of the Legislature, though it has dominion over the same and power to regulate the use and division thereof.

2. SAME—WATER COMPANIES—POWERS—BED OF STREAM—TITLE OF STATE.
Laws 1891, p. 483, c. 259, creating a corporation to maintain a public waterway from a point in the Niagara river and supply water to the villages and inhabitants thereof, merely confers power to do what is necessary to carry out the purpose of the act, without giving the corporation a right to use any property of the state in the bed of the stream.

3. STATUTES—APPROPRIATION OF PROPERTY OF STATE—ENACTMENT.
Laws 1891, p. 483, c. 259, creating a corporation for the maintenance of a public way from the Niagara river to supply water to villages and the inhabitants thereof, as the state has no property in the waters of the river, and the act gives no right in any property of the state in the bed of the stream, did not require the assent of two-thirds of the members elected to each branch of the Legislature to its enactment, under Const. art. 8, § 20, providing for such assent to every bill appropriating public property to private use.

Appeal from Special Term, Niagara County.

Proceedings by the Niagara County Irrigation & Water Supply Company against the College Heights Land Company and others to condemn land. From an order denying a motion to dismiss, defendants appeal. Affirmed.

Argued before McLENNAN, P. J., and SPRING, WILLIAMS, NASH, and KRUSE, JJ.

De Witt V. D. Reiley and James H. Hanson, for appellants.

J. Boardman Scovell, for respondent.

WILLIAMS, J. The order should be affirmed, with costs.

The order was made on presentation of a petition by plaintiff asking to condemn certain real property of the defendants for the construction and maintenance of its works. The defendants filed objections and moved to dismiss the petition. The court, by the order, overruled the objections, denied the motion to dismiss, directed the service of the answers to the petition, and ordered the issues raised by the petition and answers to be tried at the Equity Term of the court. While four objections were made to the petition, it seems that only the fourth one is to be considered on this appeal; the other three having been waived by stipulation of the parties. Both parties so state in their points. The stipulation is not printed in the record, however. The fourth objection is:

"(4) That said act [incorporating plaintiff] is unconstitutional and void, in that said act did not receive the assent of two-thirds of the members elected to each branch of the Legislature which passed the same."

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The respondent concedes in its points that the act in question did not receive the assent of two-thirds of such members. The provision of the Constitution alleged to have been violated was section 9, art. 1, of the Constitution of 1846, which is the same as section 20, art. 3, of the present Constitution of 1894, and is as follows:

"Sec. 20. The assent of two-thirds of the members elected to each branch of the Legislature shall be requisite to every bill appropriating the public moneys or property for local or private purposes."

The act in question is chapter 259, p. 483, of the Laws of 1891. The purposes of the corporation, as stated in section 3, are:

"The construction and maintenance of a public water-way from a point in the Niagara river between the west bank of Cayuga creek and the east line of lot 71 of the Mile Reserve, so-called, as may be most convenient, which water-way may be constructed as a canal, ditch or tunnel as shall be necessary and convenient for the proper operation thereof and the uses for which it is constructed. The supplying from said water-way and conduits, ditches, canals, tunnels and pipes leading therefrom of pure and wholesome water to the village of Lewiston and the inhabitants thereof, and to any other city or village now or hereafter located in the towns of Niagara, Lewiston or Porter in the county of Niagara, and the inhabitants thereof. The storage, accumulation, conduct, supply, lease and sale of water for fire, sanitary, municipal, mechanical, commercial or agricultural purposes, including the purpose of irrigation."

Section 4 provides that:

"Said corporation may, for the purposes of its corporation, take water from the Niagara river between the points hereinbefore specified, and may discharge such water into the Niagara river at such points within or adjacent to the towns of Lewiston or Porter as it may select. * * * It may build, erect, construct, dig and lay any canals, raceways, ditches, locks, piers, inlet piers, cribs, bulkheads, dams, gates, sluices, reservoirs, aqueducts, tunnels, conduits, pipes, culverts or other works, machinery or buildings of every kind and description whatsoever, that may be necessary and convenient for any of its purposes."

And the latter part of section 6 provides that the corporation—

"May construct, operate and maintain its said canals and other works for the purposes of said corporation as hereinbefore specified, provided that in case of pipes or tunnels under the waters of the Niagara river they are so laid and constructed as not to interfere with the navigation of said river."

There is no doubt that the purposes of the corporation are local and private. So that the question is narrowed down to the inquiry whether by sections 4 and 6 of the act there was an appropriation of public property for the purposes of the corporation.

1. The state has no property or ownership in the waters of Niagara river within the provision of the Constitution in question, although it has dominion over the same and power to regulate the use and division thereof and encroachments thereon as navigable waters of the state. Sweet v. City of Syracuse, 129 N. Y. 317–334, 27 N. E. 1081, 29 N. E. 289; Waller v. State, 144 N. Y. 579–599, 39 N. E. 680. So far, therefore, as the act may be said to appropriate the water of the river, it does not violate the provision of the Constitution in question.

2. The only question remaining is whether the act permitted the construction of conduits, etc., necessary to take the water from the river so as to appropriate any property in the bed of the river, in violation

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of such constitutional provision. The state was in a certain sense the owner of the bed of the river. It held the title, not as a proprietor, but as a sovereign, in trust for the public. Saunders v. N. Y. C. & H. R. R. R. Co., 144 N. Y. 75–85, 38 N. E. 992, 26 L. R. A. 378, 43 Am. St. Rep. 729. There is a view taken of such acts as the one in question, which seems reasonable, that the Legislature does not transfer any title to the bed of the river to the corporation, and does not even license the use thereof, but merely confers the power upon the corporation to do what is necessary to carry out its purposes. It does not confer any right upon the corporation to take or make use of the property of other persons or of the state until it has acquired such property in a legal way. Matter of N. Y. & L. I. Bridge Co., 90 Hun, 312–326, 35 N. Y. Supp. 920, same case reported on appeal, 148 N. Y. 540–555, 42 N. E. 1088. In this view the act is not to be regarded as appropriating any property of the state to the use of the corporation, either in the water or the bed of the stream, in violation of the provision of the Constitution in question. It has designated the general powers of the corporation, and if any property rights are required from the state, involving the appropriation of property, they must still be acquired in a manner provided by law, under the Constitution. We do not think a necessary construction of the act requires us to hold it violates the constitutional provision in question.

**Order affirmed, with $10 costs and disbursements. All concur.**

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(49 Misc. Rep. 65.)

## CURRY v. EMPIRE LIFE INS. CO.

(Supreme Court, Trial Term, New York County. December, 1905.)

INSURANCE—PROVISIONS OF POLICY—WAIVER.

That the beneficiary in a policy of insurance on the life of her husband was advised by a representative of the insurance company, two months after his death and after she had furnished proofs of loss, to take the policy with her to Mississippi, and that when it was approved she would receive her money, and that the company had three months to approve the policy, is not a waiver of the condition requiring action to be brought within six months after the death of the insured, where after the three months the company notified the beneficiary that the claim had not been approved and within five months disclaimed its liability.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 1551.]

Action by Sallie A. Curry against the Empire Life Insurance Company. Complaint dismissed.

Francis G. Caffey, for plaintiff.
Blandy, Mooney & Shipman, for defendant.

COCHRANE, J. A serious question arises by reason of a discrepancy between the age of the assured as stated by him in his application for the policy and as stated by the plaintiff in the proof of death submitted to the defendant. A question is also raised by the defendant that the assured gave false answers as to his former condition of health and medical attendance. It is unnecessary to consider these questions, for

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the reason that the action must fail because it was not brought until nine months after the death of the assured, whereas the policy requires that it should have been brought within six months thereafter. Plaintiff contends that the defendant has waived this provision of the contract and is estopped from asserting the same. I shall confine my discussion to this feature of the case.

The assured died September 20, 1902. Proof of death was submitted to the defendant October 10, 1902, which proof was accepted by the defendant as satisfactory. In the following month plaintiff saw a representative of the defendant, and stated to him that she was going to Mississippi, and asked him what she should do with her policy. He told her to take it along with her, and as soon as it was approved she would receive her money. He also stated:

"You have got plenty of time and all the time you want. We have—the company has—three months to approve it."

This statement of the defendant's representative must be given a reasonable construction. It would be folly to assert that he intended thereby to waive any provision of the contract, or that the plaintiff understood him to make any such waiver. Such a statement, made near the close of the six-months period, might have a very different effect than when made, as was this statement, near the beginning of such period. The entire conversation shows that all that was meant was that the absence of the plaintiff in a distant state would not interfere with the payment of the policy; that the policy would not become payable until three months from the time of the submission of the proof of death and that such period of three months would be "plenty of time and all the time you [meaning the plaintiff] want." At the time of this conversation, it was probably the expectation of both parties that the policy would be paid, and the conversation in question was not had in reference to any objection raised by the defendant to such payment. Such conversation did not mislead the plaintiff, as is manifest from the subsequent history of events.

Plaintiff thereupon went to a distant state and remained there. Immediately after the expiration of the three months after the submission of the proof of death, and in response to a letter from the plaintiff, defendant wrote to her stating that her claim had not been approved because of the discrepancy in the age of the assured above alluded to, and because of his statement as to his physical condition, and concluding as follows:

"Some disposition of the matter however will be made very shortly and you will be duly notified of our Executive's action."

On February 2, 1903, in response to another inquiry of the plaintiff, the defendant again wrote her as follows:

"Your favor of the 19th ult. duly received; but, as I wrote you a short time ago, your claim arising through the death of your late husband has not been approved. The company, however, will probably meet this matter half way, in other words, will allow $2,500, in settlement of your claim, not that the company considers you have any rights under the policy by reason of the misrepresentations in the application, but simply to avoid the annoyances incident to a long and possibly vexatious lawsuit, and also for the reason that he had been a member of the company for some time, and we feel disposed to treat the matter in a fair and amicable way."

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This letter contained a complete disclaimer of liability on the part of the defendant. There was no equivocation or doubt as to its attitude. The defendant definitely announced its position. It fully and fairly apprised the plaintiff of its contention that it was not liable. It suggested a compromise, not because of any liability, but simply to avoid litigation, and distinctly placed the suggestion of compromise on that ground. And the correspondence ceased with that letter. Plaintiff was not misled. She fully understood the attitude assumed by the defendant and conducted herself accordingly; for she thereupon placed her claim in the hands of an attorney in Birmingham, Ala., who was also her brother-in-law.

On the 4th of March, 1903, 16 days before the expiration of the 6 months, this attorney's law firm wrote to the defendant, stating that they had been employed by the plaintiff to collect the policy and that they desired to ascertain if the defendant cared to settle amicably. This letter was not a continuation of the old correspondence. It was not called for by anything which the defendant had previously written. The status of the respective parties had been fixed by the defendant's prior letter to plaintiff of February 2d. Had the plaintiff or her attorneys pursued the subject of compromise suggested by the defendant in its letter of February 2d, and had the correspondence between the parties proceeded on those lines, a different question might arise. But the matter was apparently dropped after that letter. And the letter on March 4th was written by plaintiff's attorneys of their own volition, and not as a result of anything which had previously been said or written by the defendant. On March 7th the defendant acknowledged the receipt of the letter of March 4th from the plaintiff's attorneys, saying that their representative who had the matter in charge was out of the city, and that on his return such matter would be taken up, and that the plaintiff's attorneys would be communicated with relative thereto. March 10th the defendant made a definite answer to the letter of the plaintiff's attorneys of March 4th, stating its objections to the claim as it had previously stated such objections in a prior letter to the plaintiff, and renewing its suggestion of a compromise; disclaiming, however, all liability, and placing such suggestion of a compromise, as before, on the desire to avoid litigation. This letter left the matter precisely where it had been left by the defendant's letter to the plaintiff of February 2d. It contained no new suggestions and invited no further correspondence. On March 13th, one week before the expiration of the time for instituting the action, plaintiff's attorneys again wrote the defendant, stating that they would "institute suit at once unless the full amount of the policy is paid." No answer was made to this letter, and the action was not instituted until June 20, 1903, more than three months thereafter, and without any effort in the meantime to institute such action.

It will be observed that every letter written by the defendant was in answer to one written either by the plaintiff or her attorneys. The defendant did not seek or encourage any correspondence. It was under no obligation to reply to the letter of March 13th, of the plaintiff's attorneys. It had on two previous occasions definitely announced its position. The plaintiff surely could not procure an extension of

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time simply by writing to the defendant a few days before the expiration of such time as was done in this case. The reply of the defendant to the letter of March 4th, was made within a reasonable time. It did not mislead the plaintiff's attorneys or lull them into a feeling of security that the defendant would comply with their demands and pay the claim in full. If, as above stated, these attorneys had acceded to the defendant's suggestion of a compromise, the question might be different. Nor can it be said that the mere suggestion of a compromise, which was all that was made in this case by the defendant, deprives it of a part of its contract provisions. If that were the case, it would be dangerous for a defendant, in a matter of this kind, to attempt to compromise. All that passed between the parties, by letter or otherwise, can scarcely be characterized as negotiations for payment or settlement. But, even if it can be so characterized, "the mere pendency of negotiations or the fact that occasional interviews are had in regard to the adjustment or settlement of a loss 'will not of themselves operate as a waiver of the stipulation or be an equitable estoppel.' " Allen v. Dutchess County Mut. Ins. Co., 95 App. Div. 86, 89, 88 N. Y. Supp. 530, 532. The following cases cited by the plaintiff are not helpful:

In Robinson v. Metropolitan Life Ins. Co., 1 App. Div. 269, 37 N. Y. Supp. 146, the defendant retained the policy, and the plaintiff, who was an ignorant man, had no knowledge of the provision in question. The court said:

> "To keep this policy and then refuse to pay, on the ground of lapse of time, would operate as a fraud."

In Magner v. Mutual Life Ass'n, 17 App. Div. 13, 44 N. Y. Supp. 862, the defendant wrote to the beneficiary that her claim would be considered on a certain date, and was therefore under obligation to inform her of the result of such consideration. It did not give her such information until three days before the expiration of the six-months period. The action was begun promptly and within four days after the expiration of said six-months period. Here the action was not commenced until three months after the time limit had expired. No effort was made, in the meantime, to commence the action. Plaintiff, it is true, was in a distant state; but the matter was in the hands of her attorneys, and her presence within this state was not essential for the commencement of the action.

In Bowen v. Preferred Accident Ins. Co., 82 App. Div. 458, 81 N. Y. Supp. 840, the matter had been under consultation and negotiation until after the time limit had expired, and thereafter the defendant's counsel informed plaintiff's attorney, who, pending negotiations, was about to leave the locality, that the matter could remain until he returned; and this was held to be inconsistent with the intention to assert that "the claim whose merits were still under advisement had been lost by the length of time devoted by the parties to its consideration." The cases thus referred to are clearly distinguishable from the one now under consideration.

In Walker v. Phœnix Ins. Co., 156 N. Y. 633, 51 N. E. 394, the principle of waiver and estoppel is stated as follows:

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"While express waiver rests upon intention, and estoppel upon misleading conduct, implied waiver may rest upon either; for it exists when there is an intention to waive unexpressed, but clearly to be inferred from circumstances, or when there is no such intention in fact, but the conduct of the insurer has misled the insured into acting on a reasonable belief that the company has waived some provision of the policy. * * * While the principle may not be easily classified, it is well established that, if the words and acts of the insurer reasonably justify the conclusion that with full knowledge of all the facts it intended to 'abandon or not to insist upon the particular defense afterward relied upon,' a verdict or finding to that effect establishes a waiver, which, if it once exists, can never be revoked."

The rule as above stated is probably as strong in favor of plaintiff as can be desired; but, applying it to this case, I can find nothing here indicating either a waiver or an estoppel.

Plaintiff also refers to a conversation between herself and the defendant's representative in June, 1903, just prior to the commencement of the action. That conversation had reference to two policies in different companies. The defendant's representative said, evidently referring to both policies, that they had not been approved on account of "certain conditions." As he did not specify what the "conditions" were, it cannot be inferred that he intended to abandon any defense afforded by the policy.

I am aware that the courts are reluctant to facilitate such a defense as this; but it seems to me that this is clearly a case where the plaintiff has slumbered on her rights, apparently quite oblivious to the provision of the contract requiring the action to be brought within six months. I find that the defendant has not waived such provision and is not estopped from asserting the same.

Complaint dismissed.

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(49 Misc. Rep. 74.)

## MIDDLEWORTH v. ORDWAY et al.

(Supreme Court, Trial Term, Washington County. December, 1905.)

1. ADOPTION—CONTRACT—CONSTRUCTION—RIGHTS AS HEIR.

Where a child was adopted under a contract to feed, clothe, educate, and provide for it, if she should remain with the adopting parents and subject to their government until she arrived at 18 years of age, when she should be entitled to her "dower right to the property" as if she were their own child, it was the intent of the parties that on the performance of the condition she should be entitled to the same interest in her foster father's property as his own lawful child would have had in case of intestacy.

2. SAME.

Where a contract of adoption provided that, if the adopted child should submit to the government of her foster parents until she arrived at 18 years, she should be entitled to the rights of a child in the property of her foster parents, the status as the child of her foster parents began when she arrived at such age, but not the time for the enjoyment of such rights.

3. SAME—EXTENT OF INTEREST.

Where husband adopts a child, with a provision that if she remains with him until she becomes 18 years of age she shall be entitled to the interest of a child in his estate, the contract must be enforced in subordination to the rights of the widow in her husband's estate, which he cannot impair.

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Action by Sarah Middleworth against Mary M. Ordway and others for specific performance of a contract of adoption. Judgment for plaintiff.

Erskine C. Rogers, for plaintiff.
Ashley & Williams (Edgar T. Brackett, of counsel), for defendants.

SPENCER, J. This action is brought by the plaintiff against the widow and next of kin of James M. Ordway, deceased, to compel specific performance of a contract of adoption, dated November 25, 1879, made by George B. Stanton, her father, with James M. Ordway, the defendant's intestate.

There are few contracts that appeal more strongly to a court of equity than those which provide for the adoption of children. The one at bar is no exception. It was made in behalf of the plaintiff, by her father, when she was about 15 months old. He was a laboring man, in straitened circumstances, who had been left, by the recent death of his wife, with the care of a large family, most of whom were of tender years. The other party to the contract was a man of mature age, in affluent circumstances, and at the height of an active and prosperous business career. But his home was childless. He sought, by the adoption of the plaintiff, to bring into the lives of himself and wife the benefits and pleasures that come from the presence of a healthy, growing child. It is impossible to mistake the fact that by this arrangement the benefits and obligations were mutual It was not simply an act of charity; but, even if it were, a man may not freely assume, or be lightly discharged from, the obligations which he takes upon himself when he voluntarily assumes the relation of parent to an infant child. He may not bring it up in idle luxury, partaking of the pleasure which its infantile sports supply and enjoying the society of its budding youth, and incur no responsibility for its future welfare. Especially, if a girl, he ought to make such provisions for her as may be in his power. No reasonable man will disclaim this duty. If this were not so, the conduct of the priest and Levite, who passed by on the other side, would be a kindness in comparison. The recent and repeated animadversion of our highest court in cases dealing with contracts for the adoption of infants must not be regarded as having application to the contracts themselves, or as characterizing the adoption of children as a dangerous practice or against public policy, but as directed solely to the tendency to permit the establishment of such contracts by the oral testimony of interested witnesses. Hamlin v. Stevens, 177 N. Y. 39, 69 N. E. 118; Mahaney v. Carr, 175 N. Y. 454, 67 N. E. 909. It has laid down a safe principle that, because contracts of this character may be easily fabricated, they must be sustained by the best and most reliable testimony. With this I am in hearty accord. The introduction of a waif into a family of affluence speaks of the benevolence of the family that receives it; but its long continuance in the home, its treatment by its foster parents, and their well-established declarations as to its status with respect to their property may well support a finding that an agreement existed in that regard. But this, like all other claims presented against

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the estates of deceased persons, must be supported by competent and convincing proof.

Fortunately, the contract in suit is in writing and as to the matter of adoption is reasonably clear. Unfortunately it is somewhat ambiguous in respect to the property rights intended to be conferred. On the trial it was thought necessary to illuminate this part of the agreement by proof of the circumstances attending its execution. This was objected to by the defendants on the ground that whatever ambiguity existed in the agreement was clearly patent and not open to explanation by oral proof. But I think any one who will make a careful examination of the vast number of decisions in this and other states, where the application of the rule as to patent and latent ambiguities has been attempted, will be convinced that, if that rule ever had any justification for its existence, it has long since outlived its usefulness. Without, therefore, attempting to determine whether the ambiguities of the present contract are latent or patent, I am of the opinion that its meaning is not, in some respects, clear and certain, and that the court, in aid of its construction, was justified in receiving oral proof of the circumstances attending its execution. The court must be careful not to vary or contradict its terms in respect to those matters where it is clear and certain, and may only employ the oral proof in determining the meaning of ambiguous terms or terms employed in a local or colloquial sense. It appears, from this evidence, that the contract was made in the county of Hamilton, at a place far remote from the office or residence of a lawyer or of one skilled in legal matters. It was prepared by the general factotum of the neighborhood, a man who acted for his neighbors in the capacity of priest, magistrate, and merchant. He was, however, a man of intelligence and probity, absolutely uninterested, and his testimony may be accepted with the utmost confidence.

Reading the contract in the light of these facts, we should not expect to find all its terms employed in their strict legal sense as established by English precedents. On the contrary, we should expect to find it couched in the local vernacular, made up, as we all know, by a fusion of idioms from different languages. We must therefore give to its words the sense in which they are commonly employed by the people by whom and for whom it was written. Permitted to read the contract thus illuminated, that which otherwise may be meaningless becomes reasonably clear and certain. The important part of the agreement which we are called upon to construe, reads as follows:

"In consideration whereof, the said James M. Ordway and Mary, his wife, does hereby covenant and agree to and with the said George B. Stanton, party of the first part, to adopt the said Sarah as their own child, to feed, clothe, educate, and provide proper care and nourishing when sick as their ability shall allow, provided, always, the said Sarah is to remain with the said James Ordway and Mary, his wife, and submit to their government, until she shall arrive at the age of eighteen years, when she shall be entitled to her dower right to the property of the said James and Mary Ordway, the same as though she were their own legitimate offspring; and the said George B. Stanton, for himself, hereby relinquishes all further claim or control to or in the said Sarah Ordway either in law or equity."

I do not think it difficult to perceive from these provisions that it was the intention of the parties, in case the plaintiff remained with

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the Ordways until she arrived at the age of 18 years and submitted to their government, that thereafter she should be regarded as their legitimate offspring and be entitled to the same interest in her foster father's property that a legitimate child would be entitled to in cases of intestacy. If this be a fair construction of the agreement, no serious difficulty stands in the way of its enforcement. Gates v. Gates, 34 App. Div. 608, 54 N. Y. Supp. 454. The case cited was in many respects similar to the one at bar and furnishes a reliable guide for the decision of this court.

It is said that the employment of the word "dower," as descriptive of the interest conferred, is meaningless, as not having reference to any interest which a child may have in the estate of its father, and that therefore no right was conferred. I am of the opinion that such is not the case. The word was not employed in the sense as understood by lawyers, but in its local and colloquial sense, and may have reference to the portion which a daughter receives from her father upon her marriage or upon his death.

The further objection is made that any right which the plaintiff might take under the contract is limited to the time when she arrived at the age of 18 years, and, as no right then accrued, she takes nothing by virtue of the provision. But this does not strike me as having any force. The time was fixed, not with respect to the enforcement of her rights, but as the time when her legal status as the offspring of her foster parents should begin. From thence her status as their child was to continue, and her right in their property was to be determined by the status so established.

But it is said that this contract is unilateral, and therefore void. The defendant cites Gall v. Gall, 64 Hun, 600, 19 N. Y. Supp. 332, Mahaney v. Carr, 175 N. Y. 454, 67 N. E. 903, and Ide v. Brown, 178 N. Y. 26, 70 N. E. 101; but none of these cases has application. In Gall v. Gall, supra, specific performance was not denied because the contract was simply unilateral, but so uncertain that it was not practicable to carry it into effect. In Mahaney v. Carr, supra, specific performance was denied, not because the contract was unilateral, but because the deceased left no property which would in any manner satisfy the terms of the contract. In Ide v. Brown, supra, the contract was also unilateral, but performance was not denied on that ground alone, but because it was made by a guardian for a period which might extend beyond the minority of his ward; and, inasmuch as he had no power to make such a contract, its performance was denied. A careful reading of these cases, together with numerous others of similar character, leaves the impression upon the mind that the courts were constrained in their decisions by the fact that the contracts under consideration were considered inequitable and not supported by satisfactory proof. The harshness of the rule as enforced in Ide v. Brown, supra, does not characterize the general temper and disposition of the courts toward contracts of adoption; and I do not believe that it was intended by that court to in any manner impair the ancient and well-established rule founded in equity that a contract, although unilateral, if in fact performed by the person not bound by its terms, should be enforced against the other party, provided there be no ob-

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jection rendering it inequitable. Parsell v. Stryker, 41 N. Y. 480, 486.

Both parties contend that the agreement gives to the plaintiff the same right in her foster father's personal estate as if she were his legitimate offspring, and that the defendant widow must take, under the statute of distribution, subject to the plaintiff's rights. This question is not without its difficulties. It must be conceded that the husband, during his life, might have disposed of his personal property by will or gift, and that the widow would take subject thereto, and therefore the argument comes with great force that his contract with the plaintiff is no more or less than the exercise of the power so residing in him. It was held in Gates v. Gates, supra, that a child, adopted under the provisions of an agreement similar to this, shared with the other children, thus lessening the part which they otherwise would have received; and, unless the rights of a widow under the statute of distribution may be differentiated from those of a child, the same result must follow. I am inclined to the view that such a discrimination exists. The relation of father and child is not in any sense a contractual one, and the child has no interest in its father's estate growing out of such relation. The father may therefore multiply by agreement the number of persons who shall stand in the relation of children to him, without regard to the wishes of the children who may be the fruit of his loins. Such, however, is not the case between husband and wife. It is not in derogation of that relation to say that it rests upon contract, and that, in most, if not all, instances, is affected by property qualifications. In some states the wife, immediately upon the marriage, becomes ipso facto the owner of certain specific interests in her husband's estate, both real and personal; and in this state her inchoate right of dower is created by that relation alone. It is too much to say that the marriage contract is entered into in view of the law which regulates the property rights of the parties and that one party to the contract may not violate the law so as to defeat the rights of the other. It may be true that the wife assumes the relation subject to the right of her husband to squander his property or to bestow it by gift or will; but that does not include the right on his part to constitute to himself heirs and next of kin in a manner not contemplated by the marriage contract. In order to recover, the plaintiff must be deemed the child of her foster father. She takes in the same manner as a child born to him in lawful wedlock. She takes under the contract of adoption, not by sale, will, or gift, but, to use the language of the contract, "the same as though she were their own legitimate offspring." The husband may not as to his wife so constitute to himself next of kin and thus deprive the wife of her rights to share in his estate under the statute of distribution. It is in violation of the marriage contract.

But a further reason exists. A married man, not lawfully separated from his wife, may not adopt a child without her consent. Laws 1873, p. 1244, c. 830, § 3; Laws 1896, p. 225, c. 272, § 60. This provision, no doubt, has reference to an adoption as provided in and by the domestic relation law, of which it forms a part, and therefore may not be regarded as rendering this contract strictly malum prohibitum; it not being an adoption under that statute. But I am in-

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clined to the view that it has that effect as to the defendant widow. Her husband may not accomplish indirectly what he is not permitted to do directly. I therefore regard the contract valid as between the parties thereto, but malum prohibitum as to her, and without effect upon her interest in her husband's estate under the statute of distribution. James M. Ordway left no will, and therefore the enforcement of this contract is in no way brought into conflict with any other disposition of his property made by him.

These views lead to the conclusion that judgment must be entered in behalf of the plaintiff for the specific performance of the contract set up in the complaint, such judgment not to affect the interest of the defendant widow in her husband's estate.

Judgment accordingly.

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affirmed 184 N.Y. 301; 106 N.Y. 938

## ROBERTSON et al. v. DE BRULATOUR et al.

(Supreme Court, Appellate Division, First Department. March 23, 1906.)

1. TRUSTS—CAPITAL AND INCOME—DIVIDENDS ON STOCK.
   Where testator's will gave railroad stock to trustees, to pay the income and profits to testator's wife for life, with remainder to his heirs, and real estate of the corporation which was not needed in its business was sold and the proceeds distributed as a dividend, the widow was entitled to the same.

2. SAME—DEPRECIATION IN SECURITIES—RIGHT TO ESTABLISH SINKING FUND.
   Where testator's will gave certain securities to trustees, to pay the income and profits to the widow, with remainder to testator's heirs, the trustees had no authority to establish a sinking fund from income and profits to provide for depreciation in the value of the securities.

3. SAME—COMMISSIONS OF TRUSTEES.
   Code Civ. Proc. § 2802, provides that a testamentary trustee shall be allowed the same compensation as executors and administrators on the basis of receiving and paying out "sums of money." Section 3320, as amended in 1904, provides that a trustee shall receive commissions on all sums of "principal" received and paid out. *Held* that, the amendment having been made after judicial construction of the other sections so as to award commissions only when the property had been received and turned into money, a trustee receiving securities to pay the income and profits to a life beneficiary was entitled to commissions immediately upon the receipt of the property out of the corpus of the estate.

4. SAME.
   Where a will gave personal property to trustees, to pay the income and profits to a life beneficiary and to preserve it for certain remaindermen, the life beneficiary was entitled to receive a commission as trustee on personal property received by the trustees.

Appeal from Judgment on Report of Referee.

Action by Alexander F. Robertson and another, as testamentary trustees under the will of John T. Farish, deceased, against Martha S. De Brulatour and others, to have their accounts settled. From the judgment entered upon the report of the referee, all parties appeal. Modified and affirmed.

Argued before O'BRIEN, P. J., and PATTERSON, INGRAHAM, LAUGHLIN, and CLARKE, JJ.

Henry De Forest Baldwin, for appellant, De Brulatour.

George F. Canfield, for remaindermen.

Edward T. McLaughlin, guardian ad litem for infant remaindermen.

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INGRAHAM, J. This action was brought by the trustees under the last will and testament of John T. Farish to have their accounts settled. The controverted questions upon this accounting related to dividends upon stocks bequeathed to the trustees in trust for the testator's widow and as to the commissions to which the trustees were entitled. The trust was created by the sixth clause of the will of John F. Farish, and is as follows:

"Sixth. I give and bequeath to Charles M. Fry, Alexander F. Robertson, and my wife, Martha G. Farish, and the survivors and survivor of them, and to the successor or successors of such survivor, twenty-five hundred (2,500) shares of the capital stock of the New York & Harlem Railroad Company, one thousand (1,000) shares of the capital stock of the New York Central & Hudson River Railroad Company (consolidated), and one thousand (1,000) shares of the capital stock of the Chicago, Rock Island & Pacific Railway Company, also twenty thousand dollars ($20,000) at the par value of the consolidated bonds of the Erie & Pittsburgh Railroad Company, fifty thousand dollars ($50,000) at the par value of the consolidated bonds of the Chicago & Northwestern Railway Company, and thirty thousand dollars ($30,000) at the par value of the first mortgage bonds of the Louisiana & Missouri River Railroad Company, together with all interest accrued on said above-described bonds at the time of my death and all interest accruing thereon thereafter, and also every and all dividends which may be declared on the above-described stocks subsequent to my death, in trust, nevertheless, to receive the income and profits thereof and apply the same to the use of my said wife, Martha G. Farish, during the term of her natural life; and I hereby authorize and empower my said trustees, if it shall seem advisable to them so to do, to sell and dispose of any or all of the aforesaid shares of stock and bonds, and to invest and reinvest the proceeds in such securities as to them may seem advisable and to apply the income arising therefrom as above provided. Upon the death of my said wife I give and bequeath all of the above-mentioned shares of stock and bonds, or the proceeds of such as shall have been previously sold, to such persons as would have inherited the same under the laws of the state of New York, if the same were real estate and I had died, intestate and unmarried, at the same time as my said wife, and in such proportions as they would have inherited the same, respectively."

The testator died, a resident of the city of New York, on the 13th day of May, 1891. He left, him surviving, his widow, but no children; his next of kin being certain brothers and sisters, all of whom are now dead. Those who are his present next of kin are the descendants of two sisters, who are parties to this action. The first questions to be considered relate to a dividend declared on September 19, 1899, by the New York & Harlem Railroad, which amounts to $31,250; to a dividend of 100 shares of stock declared as a stock dividend upon the stock of the Chicago, Rock Island & Pacific Railroad Company held by the trustees, and to the amount realized by the trustees for the sale of rights to subscribe for certain additional stock of the Chicago, Rock Island & Pacific Railroad Company and the New York Central Railroad Company, and the allowance of commissions.

Before discussing the question relating to these dividends, we will consider the intention of the testator relating to this trust as disclosed by the will. The testator, leaving a large estate, made provision for his wife. He gave her $100,000 in cash, a stable, and his horses, carriages, furniture, and household articles, and created for her benefit this trust, consisting of securities of the par value of $425,000. This trust consisted of $325,000 of stock of three railroad companies and

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$100,000 of railroad bonds. These specific securities having been bequeathed to his trustees for the benefit of his wife, he also bequeathed to them "all interest accrued on said above-described bonds at the time of my death and all interest accruing thereon thereafter, and also every and all dividends which may be declared on the above-described stock subsequent to my death." The bequest was in trust "to receive the income and profits thereof and apply the same to the use of my said wife, Martha G. Farish, during the term of her natural life," with a power to the trustees to sell any or all of these securities, "and to invest and reinvest the proceeds in such securities as to them may seem advisable and to apply the income arising therefrom as above provided," viz., to the use of his wife during the term of her natural life. Having thus disposed of what should accrue upon these securities by way of income and profits during the life of his wife, upon the death of his wife he bequeathed "all of the above-mentioned shares of stock and bonds, or the proceeds of such as shall have been previously sold, to such persons as would have inherited the same under the laws of the state of New York, if the same were real estate and I had died, intestate and unmarried, at the same time as my said wife, and in such proportions as they would have inherited the same, respectively."

It would seem that the testator intended by this bequest to dispose of all these securities, including any income that was received during the continuance of the trust and what would be left of the trust upon the death of his wife. He disposed of the "income and profits" of the securities received during the life of his wife by directing that they should be applied to her use. What he directed should pass upon the death of his wife was "the above-mentioned shares of stock and bonds, or the proceeds of such as shall have been previously sold"—an indication, it seems to me, that what the testator understood would remain undisposed of at the death of his wife were these specific shares of stock as they then stood, or the proceeds in the hands of the trustees in the event that such shares had been sold by the trustees under the power given to them. There was no expressed intention that any dividend or interest that had been received by the trustees upon the shares of stock or bonds should be held by the trustees and turned over to those entitled to the remainder. This provision for the wife was to be in lieu and bar of all dower and right of dower and of any other claim or interest whatsoever that she might have in his estate, real or personal, or any part thereof. There is certainly in this will no indication that it was the intent of the testator that there should be anything deducted from the sums received by the trustees in the way of dividends, income, or profits to be accumulated by them to prevent any deterioration or depreciation in the value of the stock and bonds during the continuance of the trust. The primary object was to make provision for his wife during her life, and, subject to that provision, what was left at her death was to be disposed of as indicated.

There was bequeathed by the testator to these trustees, as a part of the trust property, 2,500 shares of the capital stock of the New York & Harlem Railroad Company. On September 19, 1899, the di-



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rectors of the New York & Harlem Railroad Company passed the following resolutions:

"Whereas, it appears from the treasurer's report that the company's cash surplus now amounts to upwards of $2,500,000 over and above all claims and obligations, existing and contingent, and that the same is now available for distribution among the stockholders: It is further resolved, that the sum of $2,500,000 of the said surplus distributed at the rate of $12.50 per share to all stockholders of record at the close of business on the 23d day of September, 1899, and that the treasurer be and he is hereby authorized and directed to make such payment on the 2d day of October, next."

The amount of this dividend was $31,350, which was received by the trustees and retained by them; and the first question presented is whether this amount is to be retained by the trustees as capital of the trust, or whether it belongs to the widow as beneficiary for life.

The New York & Harlem Railroad Company was the owner of a steam railroad and was also the owner of a street railroad in the city of New York. Long prior to the death of the testator, the steam railroad had been leased to the New York Central & Hudson River Railroad Company, which agreed to pay the New York & Harlem Railroad Company as rent 8 per cent. per annum upon its stock. At the death of the testator, the New York & Harlem Railroad Company operated its line of street railroad, and the profits of that line were divided among its stockholders. The company also owned several parcels of real estate in the city of New York. After the death of the testator the New York & Harlem Railroad Company leased its city line of railroad to the Metropolitan Street Railway Company. There was evidence that after this lease certain real estate that belonged to the Harlem Railroad Company and which was not needed in its business was sold, and it would appear that the particular money used in paying this dividend was partly the proceeds of the sale of this real estate. The amount distributed as a dividend, however, was surplus which represented the accumulations of profits of the company in the past, either from its operation, or from the increase in the value of its real estate; and this distribution was simply a distribution of surplus profits of the company realized from its operations and which were not needed in the conduct of the company's business. The profits as such were realized when the company's real estate was sold. It then became money in its possession as surplus profits, and was distributed by the company among its stockholders as such. The trustees, therefore, received from the New York & Harlem Railroad Company a dividend of $12.50 a share as a distribution by the company of its surplus. The testator had directed the trustees to receive the income and profits of these securities and to apply the same to the use of his wife during her life.

There is nothing in the evidence to indicate that this dividend was a distribution of the capital of the railroad company, as the witnesses all testify, and the referee finds, that the capital of the company was intact after the payment of the dividends, and the property of the company was largely in excess of its indebtedness and capital stock. Of late years this question has been much discussed, and there is now a settled distinction between a case where specific securities consisting of stock and bonds are bequeathed to a trustee, with a direc-

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tion to pay the income and profits of these specific securities to a life beneficiary, and where a sum of money is bequeathed to trustees, with directions to invest that sum of money and to pay the income of the amount so bequeathed and invested to a beneficiary. In the latter case, the trustees are bound, whatever the form of the investment may be, to preserve intact the capital of the trust bequeathed to them; and while, if in case of unexpected decline in the value of the securities, or for any other reason, the capital becomes impaired, where the trustees have acted in good faith and observed the rules of law in carrying out the trust, they are not required to make up such deficiency from the income, still, when they purchase securities at a high premium, they are justified in applying a part of the income or dividends to prevent a depreciation in the value of the securities, where such interest or dividends represent in part a premium which they have paid; but a different situation is presented where a person bequeaths to trustees specific securities and directs that the income and profits of such securities be paid to a beneficiary for life, with a bequest over of such securities at the termination of the life estate. In the latter case it is the income or profits that the trustees received from the securities to which the life beneficiary is entitled, not the income of a specific fund which represents the value of the securities at the time of the testator's death; and I think it is now established that when the profits or surplus of a corporation, which it has earned or realized in the management of its business, are paid to its stockholders by way of dividends, whether such profits or surplus has been earned before or after the creation of the trust, so long as the amount that is actually distributed is actual surplus earned, or income or profits made, by the corporation in its business, and distributed as such, it is income or profits which go to the life tenant.

The first case to which I will call attention is Matter of Kernochan, 104 N. Y. 618, 11 N. E. 149. In that case the trustees were authorized to receive the "rents, interests, and income" of property given to them in trust and to apply the net amount of such rents, interest, and income to the use of the widow during her life, and after her death to divide his estate among his surviving daughters and the issue, if any, of such as may have died. Among the personal property left to the trustees was 5,000 shares of the capital stock of the Panama Railroad Company. It seems that this stock was, subsequent to the death of the testator, sold to the Panama Canal Company at something over $265 per share. As a part of the agreement of sale it was provided that:

"All earnings of the railroad company to and including June, 1881, and all moneys and other effects not by that agreement to be left with the railroad company, should be transferred by the railroad company to a trustee for the benefit of all the existing shareholders who are such at the time of the declaration of such dividend or transfer of the railroad company."

It appeared that these assets were subsequently sold to a syndicate for an amount which equaled $24.26 on each share of the capital stock of the company; and on June 30, 1881, a dividend of $24.26 on each share of the capital stock of the company was declared. It appeared that the assets which formed the consideration of the pay-

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ment by the syndicate were accumulated net earnings, represented by cash or securities calling for cash. The remaindermen objected that this sum should not be credited to the income, but should have been held as capital. The referee found that the amount after the death of the testator was income, but that earned before the death of the testator was principal. Judge Danforth, delivering the opinion of the court, said:

"I find nothing in the will which indicates that the testator intended any such investigation or division, or that any other than the ordinary rule which gives cash dividends declared from accumulated earnings or profits to the life tenant should be applied. * * * From the shares in question no income could accrue, no profits arise, to the holder until ascertained and declared by the company and allotted to the shareholder, and that act should be deemed to have been in the mind of the testator, and not the earnings or profits as ascertained by a third person, or a court upon an investigation of the business and affairs of the company, either upon an inspection of their books or otherwise."

Then after examining the authorities, the learned judge continued:

"In this case no portion of the earnings which entered into the dividend had been capitalized by the company, and therefore the inquiry when the profits were earned, out of which it was to be paid, was immaterial. It is not claimed that the declaration of the dividend, as dividend from profits, was ultra vires, and whenever earned they were not profits until the directors so declared."

And quoting with approval from Sproule v. Bouch, L. R. 29 Ch. Div. 635, as follows:

"The general principle applicable to these inquiries may, in our opinion, be thus stated: When a testator or settlor directs or permits the subject of his disposition to remain as shares or stock in a company, which has the power either of distributing its profits as dividend, or of converting them into capital, and the company validly exercises this power, such exercise of its power is binding on all persons interested under him (the testator or settlor) in the shares, and consequently what is paid by the company as dividend goes to the tenant for life, and what is paid by the company to the shareholder as capital, or appropriated as an increase of the capital stock in the concern, inures to the benefit of all who are interested in the capital. In a word, what the company says is income shall be income, and what it says is capital shall be capital."

The next case to which I wish to call attention is McLouth v. Hunt, 154 N. Y. 179, 48 N. E. 548, 39 L. R. A. 230. In that case the estate of the testator was bequeathed to the trustees with a provision that his directors pay over to the use and benefit of each of his grandsons, respectively, from and after the arrival at age of his said grandsons, respectively, the full income of one of the said parts. The portion of the estate which the executors received in trust was 254 shares of the capital stock of the Western Union Telegraph Company upon which the trustees received a stock dividend of 10 per cent., represented by certificates issued to them for 25.4 additional shares. This dividend was declared from the surplus earnings of the corporation, and it was claimed by the trustees that these stock dividends upon the Western Union stock was not income payable to the life tenants, but an accession to the capital which went to the remaindermen. The court held that what the corporation really did was to issue to the shareholders its own obligations in the form of stock certificates against the accumulated earnings which it had on hand, and these certificates,

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having a market value, could readily be converted into money by the shareholders, so that the transaction was in substance a distribution of profits, and that in that case the stock dividend represented income and properly belonged to the life tenant.

The next case is Matter of Rogers, 161 N. Y. 108, 55 N. E. 393. In that case the testator created three separate trusts for the benefit of his children during their lives, with remainders to their issue. A part of the principal devised to the trustees was shares of the capital stock of the Rogers Locomotive & Machine Works. The testator died in 1868. The capital stock of the corporation was then $300,000, and this stock was appraised at $125 per share. The corporation continued business until 1893, paying dividends each year. In 1893 it sold its plant for the sum of $2,750,000, to be paid in stock of a new corporation known as the Rogers Locomotive Company, whose capital stock was $3,000,000. The stock of the new company, obtained from the sale of the plant of the old company, was divided among the stockholders of the old company in proportion of ten shares of new stock to one share of old stock. After this sale the old company remained in possession of other property which it had accumulated consisting of capital on hand, bills receivable, real estate, government bonds, and stock of other companies, amounting in round numbers to $3,000,000. This property the officers of the old corporation converted into money and distributed it among its stockholders. The question arose as to whom this belonged, whether to the life tenants or to the remaindermen. The court said:

"As we have seen, the surrogate held that all that was received upon the sale of the plant should be retained by the trustees as capital, and this included that which had been paid out for raw material. He also held that the first cash dividend made on the liquidation of $100 per share should also be retained by them as capital"

—and that the balance of the $3,000,000 that was divided among the stockholders of the old company was income to go to the life tenant. This determination was affirmed upon the ground that this $100 per share represented what was reserved for working capital by the new company, and was therefore capital, and that the balance was profits, which, being properly distributed as such, went to the life tenants. Here was property representing accumulated surplus which was distributed upon the winding up of a corporation; yet where it was distributed as surplus profits, and not as a part of the plant or working capital of the company, it was held to go to the life tenants, although apparently it was realized from real estate, government bonds, and stock in railroad corporations, cash on hand, and bills receivable.

The next case is Lowry v. Farmers' Loan & Trust Company, 172 N. Y. 137, 64 N. E. 796. In that case the testator died in 1895. He gave one-fourth of his residuary estate to trustees, to apply the rents, incomes, and profits thereof to the use of the testator's wife until her death or remarriage, in either of which events the trust property should go to increase the portion of the estate held in trust for the benefit of his children. As a part of this trust there was stock of the Pullman Palace Car Company, eight shares of which formed a part of the trust estate held for the plaintiff. That company declared a dividend

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N. Y. 285, 27 N. E. 475, which was also of the Code, the will gave to the trustees hold the same in trust, with a power to convert the same, and collect, invest, reof as they should deem best for the in- this income there was to be paid an an- named during her life, and the balance into six parts, one part to be paid to a her life. In considering this question the

over the allowance to the executors of half funds of the estate. The law allows a specific out all sums of money.' The statute indicates which should apportion one-half to the re- paying out, though the courts have allowed lowance here was premature. The bulk of the already invested and in the form of securities into money. No law justifies the allowance their estimated value in advance of their con- uivalent. It was proper enough to allow one- ums of money received; but until the securities by conversion into cash, or by their acceptance the allowance is premature. The computation ier period pays for services before they are ren- ates of value which may be very different from received and paid out. A time will come when entirely just and proper. That will be when the se- turned into money for the purpose of payment, or have he legatee as cash without being converted. The allow- rities was premature, and without a statutory basis and

as followed by the General Term in the First Depart- the report of a referee upon his opinion. The opinion y v. Bogart (Sup.) 33 N. Y. Supp. 975.

as again presented in Matter of Johnson, 57 App. Supp. 1004. In that case the testator gave to his sum of money, the income to be paid to his daugh- and the court said:

Surrogate's Court awarded to the trustees commis- corpus of the trust estate. In this we find no error. awarded on the settlement of the accounts of exec- the latter are managing an estate which must con- expected that before they can receive any compensa- they must wait the termination of the trust. In this the functions of trustees for years. They had man- with thrift and good judgment. It was well invest- an accounting by the surrogate, and it was their right his property. The commissions to be awarded upon of the fund must be deferred until the moneys are receiving is a distinctive one and has the trustees are not entitled to commis- the testator and which they have not d, as they were first-class securities.

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of 50 per cent., payable in certificates of stock at par value. This dividend was declared and obtained from the accumulations of net surplus as the same appeared in the accounts of the company; and it was held that such a transaction, although in the form of an issue of stock certificates, was a distribution of the profits and what the stockholders got represented income and was income. The rule is that "where a corporation has declared a dividend upon its capital stock, payable in new stock certificates, if it is based upon an accumulation of earnings or profits, by their distribution in that manner the stockholders receive the representative of income and not of capital"; that "while the corporate action may not be necessarily conclusive upon the court with respect to the question, if it is based upon facts and is not purely arbitrary, it will and should be controlling." The court then goes on to say:

"It is true enough, as the appellant argues, that the testator, at the time of his death, owned the right to share in the assets of the corporation, proportionately to the amount of stock which he held; but it does not therefore follow that dividends thereafter made from the accumulations of earnings must be regarded and treated as additions to the capital of the trust estate. All stockholders are interested in the operation of the property of a corporation and their shares of stock represent individual interest in the corporate enterprise, in its capital, as in its net earnings; but the corporation itself has the legal title to all the properties and holds them for their benefit. They have a right to dividends, only as the corporate agents, in the exercise of their discretion, may declare them. * * * The declaration of a dividend by a corporation in active operation is the appropriation of a portion of the assets, which represented the net earnings of the corporation, for the use of the stockholders, and pro tanto the assets are diminished. The stock no longer represents them. The capital is unchanged; but the value in the market of the shares may be affected by the diminution in the amount of the corporate assets. That the value of the shares of stock has been lessened by a dividend is a fact of no relevancy in determining the question of whether the dividend is to be regarded as income to the life tenant or as capital for the remainderman. That question will be determined by the origin of the dividend. In this case a fund had been created by an accumulation of the net earnings of the corporation and it remained a part of the general assets, until, in the judgment of the directors, the time came when it was proper and prudent to distribute it among the stockholders. That which the directors of the corporation distribute among its stockholders, without intrenching upon capital, must be comprehended within the term 'profits,' and we should assume that the testator intended that what might be paid in that way should belong to the beneficiary. There is no question of diminishing the capital, nor of increasing the capital for any corporate purpose or need. It was simply a mode of distributing the profits earned by the employment of the capital."

The case of Chester v. Buffalo Car Mfg. Co., 70 App. Div. 443, 75 N. Y. Supp. 428, is entirely in line with these decisions, for there the court said:

"While it is subject to modification and variation, the natural and fundamental idea of life income payable under a will is of that current income which accrues and becomes payable from time to time during the life tenancy upon a principal fixed as of the time when the trust took effect and remaining substantially unchanged."

The fact that the particular money that was used in the payment of this dividend was from the sale of real estate seems to me entirely unimportant. The company had been in operation for many years. It had from time to time moved its depot, as its business required.

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It had invested money in the real estate necessary for its new depot, and when the old real estate became unnecessary it was sold, and the proceeds of such sale became money of the company, to be distributed if it was not needed for the business of the company. It represented surplus profits, just as much as if the money invested in the new real estate had been kept in its possession and this real estate exchanged for the new real estate required for the new depot. In this case, as in Lowry v. Farmers' Loan & Trust Company, supra, "a fund had been created by an accumulation of the net earnings of the corporation and it remained a part of the general assets, until in the judgment of the directors, the time came when it was proper and prudent to distribute it among the stockholders," and "that which the directors of the corporation distribute among its stockholders, without intrenching upon capital, must be comprehended within the term 'profit,' and we should assume that the testator intended that what might be paid in that way should belong to the beneficiary." It follows that the learned referee was wrong in holding that this dividend was a part of the capital, and that the judgment should be modified by directing it to be paid to the life tenant.

The second question presented is as to the 100 shares of the capital stock of the Chicago, Rock Island & Pacific Railroad Company, and as to certain cash dividends paid upon the stock held by the trustees. The same principal that we have before discussed in regard to the dividend of the Harlem Railroad Company determines this question, and the referee was clearly right in holding that these dividends belonged to the life tenant.

The next question is as to the proceeds of the sale of rights to subscribe in the Chicago, Rock Island & Pacific Railroad Company and the New York Central Railroad Company. We think the referee was right in respect to this question, and that the amount realized was a part of the capital of the estate. When the corporation gave to the existing stockholders a right to subscribe to its capital stock at a price fixed, there was nothing in this right of the nature of a dividend or distribution of profits. It was a right which accrued to the owners of the stock as an incident to its ownership. If the owner of the stock had accepted the option and had subscribed to the stock, the stock so subscribed and paid for out of the capital of the trust would be clearly a part of the trust property, and any increase in the value of that stock after its subscription would accrue to the capital of the trust. The trustees, not being in a position to make these subscriptions, sold the right to subscribe, and the proceeds realized from a sale of this right were a part of the capital of the trust. This question is presented in Matter of Kernochan, 104 N. Y. 618, 11 N. E. 149, and that case is controlling upon this point.

The next question is as to the necessity of establishing a sinking fund to provide for any depreciation in the value of the securities which form a part of the trust estate. This question is also settled by the authorities that we have before considered. It is now settled that where specific securities are devised, with a direction to pay the income and interest of those securities, the beneficiary is entitled to all the interest, even though the payment of all the interest would tend

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to reduce the selling value of the securities. McLouth v. Hunt, supra; Matter of Rogers, 22 App. Div. 428, 48 N. Y. Supp. 175.

The only remaining question is as to the right of the trustees to one-half commissions for receiving the entire trust property. I think we must treat this question without reference to the fact that the executors and trustees were the same persons. Whether or not the executors were entitled to commissions is not before us. The will bequeathed certain property to the trustees in trust, and it has been received by them, and is now held by them under the provisions of the will; and these trustees are entitled to such a commission as the law allows to trustees who have received bequests of personal property in trust, to hold it during the life of the beneficiaries and to pay the income and proceeds thereof during her life to the beneficiary and upon her death to deliver the securities over to the remaindermen. Upon this appeal we are not concerned with the right to commissions upon the income which was received by the trustees and paid to the life tenant, as by an express stipulation that question has been arranged by private agreement between the life tenants and the trustees.

Section 2802 of the Code of Civil Procedure provides for a voluntary accounting by trustee created by a last will and testament before a surrogate. It provides that a surrogate before whom such an accounting may be had "shall allow to the trustee or trustees the same compensation for his of their services, by way of commission, as are allowed by law to executors or administrators, besides their just and reasonable expenses therein." By section 2730 of the Code, the commissions of an executor or administrator are fixed as a percentage "for receiving and paying out all sums of money." While these sections of the Code were the only provisions allowing or regulating commissions to trustees, the right to such commissions was presented to the Court of Appeals in Phœnix v. Livingston, 101 N. Y. 451, 5 N. E. 70, where the main portion of the trust property consisted of real estate. In discussing whether or not the trustees were entitled to commissions upon the real estate held by them, and considering sections 2730 and 2802 of the Code, it is said:

"Sums received and paid out are made the basis of computation. It has, nevertheless, been held that securities received by an executor, and by him turned over to the parties entitled, might be treated as money received and paid out for the purpose of computing commissions. This was itself an extension of the authority of the statute, justified by the consideration that what was accepted as money by the parties interested might well be treated as such for purposes of compensation. But we are asked now to take a step further, and give a new extension to the act, which does violence to its language, and makes land, in no just sense received or transferred, constructively money. * * * They were authorized to sell and to rent the real estate. Upon all sums of money thus realized and passing through their hands they were entitled to commissions; but the unsold lands, at the close of the trust, passed to the possession of the remaindermen, not through any title derived from the trustees, but by force of the original devise. The trustees transferred no land, but simply refrained from exercising their power of converting it into money. And so they not only never paid it out, even constructively, by any grant or conveyance, but never even received the absolute fee, which all the time was a vested interest in remainder. Their estate was simply commensurate with their trust, bounded as to duration by the terms

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of the trust, and as to the unsold lands never equaling in value that of the fee. We must, therefore, adhere to the statutory basis of computation and decline to advance further in a construction which steadily departs from a plain and unambiguous enactment having a definite purpose and meaning."

In McAlphine v. Potter, 126 N. Y. 285, 27 N. E. 475, which was also under section 2730 and 2802 of the Code, the will gave to the trustees the remainder of property to hold the same in trust, with a power to lease, sell, assign, transfer, and convert the same, and collect, invest, and reinvest the proceeds thereof as they should deem best for the interests of the estate. From this income there was to be paid an annuity of $200 to a beneficiary named during her life, and the balance of the income was divided into six parts, one part to be paid to a beneficiary named during her life. In considering this question the court say:

"A further question is raised over the allowance to the executors of half commissions for receiving the funds of the estate. The law allows a specific rate for 'receiving and paying out all sums of money.' The statute indicates no division of the commissions which should apportion one-half to the receiving and the balance to the paying out, though the courts have allowed it in proper cases. But the allowance here was premature. The bulk of the estate came to the executors already invested and in the form of securities which have not been turned into money. No law justifies the allowance of one-half commissions upon their estimated value in advance of their conversion into money or its equivalent. It was proper enough to allow one-half commissions upon all sums of money received; but until the securities become sums of money, either by conversion into cash, or by their acceptance as cash by those entitled, the allowance is premature. The computation of the commission at an earlier period pays for services before they are rendered, and rests upon estimates of value which may be very different from the sums of money actually received and paid out. A time will come when the allowance may be entirely just and proper. That will be when the securities have been turned into money for the purpose of payment, or have been accepted by the legatee as cash without being converted. The allowance upon the securities was premature, and without a statutory basis and must be reversed."

That case was followed by the General Term in the First Department, affirming the report of a referee upon his opinion. The opinion is reported in Linsly v. Bogart (Sup.) 33 N. Y. Supp. 975.

This question was again presented in Matter of Johnson, 57 App. Div. 494, 67 N. Y. Supp. 1004. In that case the testator gave to his executors a certain sum of money, the income to be paid to his daughter during her life, and the court said:

"The decree of the Surrogate's Court awarded to the trustees commissions for receiving the corpus of the trust estate. In this we find no error. Commissions are usually awarded on the settlement of the accounts of executors or trustees. When the latter are managing an estate which must continue for years, it is not expected that before they can receive any compensation for their services they must wait the termination of the trust. In this case they had performed the functions of trustees for years. They had managed the trust property with thrift and good judgment. It was well invested, and was approved on an accounting by the surrogate, and it was their right to be paid for receiving this property. The commissions to be awarded upon distributing the principal of the fund must be deferred until the moneys are paid over, but the compensation for receiving is a distinctive one and has been earned. Again, it is urged that the trustees are not entitled to commissions on the securities which came from the testator and which they have not converted into cash, but have retained, as they were first-class securities.

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The whole scope of the trusteeship is to keep the money invested in securities of this kind in order to bear an income, and the executors might properly be condemned if they had parted with safe mortgage investments which the testator had carefully made."

And as a result, the court held that each trustee was entitled to "one-half commissions allowed by said section for 'receiving and paying out,' and which is to be computed on the entire principal which came into their custody as trustees, keeping in view, however, the separate trust funds." There was an appeal in this case to the Court of Appeals (170 N. Y. 139, 63 N. E. 63); and in considering this question it was said:

"While in this case the same trustees were appointed for each of the trusts, that does not affect the meaning of the statute, which would be the same if different trustees had been selected for each trust."

And it was held that each of the respondents as trustee was not entitled to full commissions, but only to one-third thereof, but the judgment was affirmed allowing the trustees commissions upon the securities which had come into their hands, but which had not been sold by them, although the point was taken by the appellant in his brief that awarding to the trustees commissions in the proceeding was error, citing McLouth v. Hunt, supra.

In Matter of Notman, 103 App. Div. 520, 93 N. Y. Supp. 82, we held that a committee of an incompetent was entitled to one-half commissions for receiving the securities of which the estate of which he was a committee consisted, although he had not sold or disposed of those securities, but retained them in the condition in which they were at the time he received them. After considering the authorities the court said:

"We are of the opinion, therefore, that the committee of the property of an incompetent person is to be compensated for receiving and holding property which it does not become his duty to convert into cash, and that such compensation is not to be made upon the theory that these are extra services in addition to those which would be required to be performed by an executor or administrator and for which the court may make a special allowance, but upon the theory that they correspond, within the fair intent and meaning of section 2338 of the Code of Civil Procedure; with the services of an executor or administrator in converting property into cash. It follows that the committee should have been allowed one-half commissions."

After the rule had thus been settled the Legislature, in 1904, amended section 3320 of the Code by adding the following provision:

"A trustee of an express trust is entitled * * * as compensation for services as such, over and above expenses, to commissions as follows: For receiving and paying out any additional sums of principal not exceeding ten thousand dollars at the rate of two and one-half per centum. For receiving and paying out all sums of principal above eleven thousand dollars at the rate of one per centum."

Also a provision that:

"If the principal of the trust estate or fund equals or exceeds one hundred thousand dollars, each trustee is entitled to the full commission on principal and on income for each year to which a sole trustee is entitled."

And in considering this provision of the Code we should give weight to the change in phraseology between this provision and the section

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of the Code awarding commissions. In section 2730 of the Code, commissions are fixed as a percentage for receiving and paying out "sums of money"; and in Phœnix v. Livingston, and McAlphine v. Potter, supra, it was finally settled that, where specific property was received by a trustee, an allowance for commissions is premature until the property has been in some way turned into money or accepted by the remaindermen as money. Thus, it is said:

"A time will come when the allowance may be entirely just and proper. That will be when the securities have been turned into money for the purpose of payment, or have been accepted by the legatee as cash without being converted."

With this construction of section 2730 of the Code, the Legislature passed an act which in express terms awarded to trustees commissions, and instead of using the language which had before been used in relation to executors' commissions, and which the Court of Appeals have construed so as to award commissions only when the property had been received and turned into money, or accepted by the residuary legatee as money, it provided that an executor or trustee is entitled, as compensation for services as such, over and above expenses, to commissions as follows: "For receiving and paying out all sums of principal," etc. "All sums of principal" would apply as well to securities in bulk as it would to money received. The principal of the trust consists of the securities in which the trust is invested; and, whether they are turned over to the trustees in specie or money, it seems to me that in either case the trustees have received principal of the estate, and, as the section gives to a trustee commissions based upon the sum of principal, it would seem that he is entitled to one-half commissions for receiving the securities in which the estate is to remain invested immediately upon their receipt.

Considering the services that trustees render for which they are entitled to this commission, I think this provision a reasonable one. When the securities are turned over to the trustees, they must see that they are properly transferred, so as to protect the estate, and that arrangements are definitely made for the continuance of the trust. The trust then continues without further action by the trustees so far as these securities are concerned; the trustees merely receiving in the meantime the interest and turning it over to those entitled to it until the termination of the trust, when the securities have to be transferred to those entitled to them. The mere fact that a reinvestment may be necessary during the continuance of the trust, the securities being paid off, or of its being necessary to sell them and reinvest the proceeds, would not, of course, entitle the trustees to any additional compensation; that being incident to the proper performance of the duties of the trust. I think, therefore, that in view of what has been said in the cases before cited, under section 3320 of the Code, where specific personal property has been given to a trustee, in trust to receive the rents and profits for the benefit of a life beneficiary, and such securities are received and held by the trustees, the trustees are entitled to one-half commissions for receiving it, immediately upon the receipt of the property, out of the corpus of the estate.

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The remaining question presented is whether the life beneficiary can act as trustee of this trust, so as to be entitled to commissions. The general rule is undisputed that a beneficiary of a trust cannot be at the same time a trustee; but it is also recognized that where other trust duties are devolved upon trustees than those which merely relate to the performance of trusts for the benefit of a beneficiary, the beneficiary can act as trustee for the others interested in the estate. This trust is personal property. The trustees are bound to hold it and preserve it for the benefit of those to whom it goes at the termination of the trust. There is thus an active duty imposed upon the trustees for the benefit of the remaindermen, and for their benefit the life beneficiary can act as trustee. Nor do I think that the question of the right of the life beneficiary to act as trustee is before us on this appeal. It appears that by the decree of the surrogate she was recognized as a trustee, and the trust property was turned over to her with her co-trustees, and she has performed the duties required of her as trustee. She would clearly be responsible to the remaindermen for any neglect in the performance of her duties as trustee, and is entitled to the compensation allowed for the performance of such duties. I think, therefore, that the life beneficiary is entitled to act as trustee for the benefit of the remaindermen, and as such is charged with an active duty of receiving and preserving the trust property and is entitled to commission as trustee.

The views before expressed will require a modification of this judgment, and the judgment is so modified, and, as modified, affirmed, with costs to all parties payable out of the principal of the trust. All concur.

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## In re STEVENS et al.

(Supreme Court, Appellate Division, Fourth Department. March 7, 1906.)

1. TRUSTS—EXECUTION—CAPITAL AND INCOME.

Testatrix bequeathed certain corporate stock to her executors in trust to collect the "dividends, issues, and profits" thereof, and apply to the use of the beneficiary as often as they should be declared paid or released, until the beneficiary arrived at the age of 30 years, and then to transfer the stock to the beneficiary absolutely, and, if she died before arriving at such age, then remainder to certain grandchildren. *Held* that, on a dissolution of the corporation and sale of all of its assets, the value of the plant, equipment, and materials, betterments, good will, patents, patent rights, licenses, trade-marks, rights, privileges and franchises, and working capital constituted principal, and the invested surplus, surplus cash capital and accumulated surplus earnings constituted dividends, issues, and profits, as between the beneficiary of the trust and the remainderman.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trusts, §§ 383–385.]

2. SAME—SINKING FUND—RIGHT OF REMAINDERMAN.

Where a trust estate consisted in part of certain bonds which had been purchased at a premium, and the remainderman, by investment of the capital of the trust, had derived a material benefit, consisting of a very large increase in the estate, he was not entitled to call on the life tenant to create a sinking fund from the income to make good the premium on the bonds which wore away as the bonds matured.

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Appeal from Surrogate's Court, Chautauqua County.

Judicial settlement of the accounts of Frederick H. Stevens and another, as surviving trustees for Jesse Brooks Nichols and others under the will of Julia A. Brooks, deceased. From a surrogate's decree (95 N. Y. Supp. 297) settling the accounts, certain of the remaindermen appeal. Affirmed.

Argued before McLENNAN, P. J., and SPRING, WILLIAMS, NASH, and KRUSE, JJ.

John Ewen, Clare A. Pickard, and Fred Greiner, for appellants.

Lewis & Montgomery, for respondents.

WILLIAMS, J. The decree should be affirmed, with costs to the trustees, the special guardian, and Jesse Brooks Tyler, payable out of the fund.

The testatrix made the will October 5, 1896, and died November 5, 1896. The will was admitted to probate November 16, 1896, and Stevens and Solano qualified as executors and trustees thereunder, and served as such. The former was a son-in-law, and the latter a daughter, of the testatrix. By the will (articles 8, 9, 10, 11, and 12) five trusts were created, each of 247 shares of the stock of the Brooks Locomotive Works, for the benefit of five grandchildren. The language of the five articles was precisely the same, except as to the name of the beneficiary. The stock was given to the executors in trust, to hold the same, collect the dividends, issues, and profits thereof, and apply to the use of the beneficiary, in semiannual payments, or as often as the same shall be declared, paid, or realized, until the beneficiary arrived at the age of 30 years, and then the stock with any accumulations or earnings thereon to be transferred to the beneficiary absolutely. If the beneficiary died before he became 30 years old, leaving issue surviving, the same to go to such issue; if there were no such issue, the same to go to the then surviving children and grandchildren of testatrix, they taking per capita and not per stirpes. These articles were subject to article 13 of the will, which provided that the executors should not be held liable for any depreciation in the value of the stock, and, while the testatrix wished the stock to be held so long as it seemed to the executors prudent to hold it, yet she authorized them to sell it and reinvest the proceeds whenever they deemed it prudent to do so, and they should not be held liable for any loss or depreciation in such investments, resulting from mistakes in judgment in making the same.

The Brooks Locomotive Works was organized by the husband of the testatrix in 1869. The capital stock was $250,000, in shares of $100 each, and has always remained the same. Mr. Brooks was, during his lifetime, the president and dominating spirit of the company. He died in 1887. At the time of his death the company was a prosperous business concern. A majority of the stock went to the testatrix when her husband died, and she assumed the control of the affairs of the company, which continued in a prosperous condition until her death, in 1896. The period of the company's greatest prosperity was, however, between 1896, when the will was made and the testatrix died, and 1901, when the company sold out and discontinued busi-

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ness. At the death of the testatrix the value of the total assets of the company was $1,791,708.59; the value of plant and equipment being $748,152.43; and value of materials being $345,193.35; cash, bills receivable, etc.:

| | |
|---|---|
| Invested surplus | $418,492 50 |
| Working cash capital | 279,870 31 |
| | $698,362 81 |

These figures make no account of the value of the good will, franchise rights, or dividend-earning capacity of the company as a going business concern. This was the property as it existed when the will was made and took effect at testatrix's death.

One of the questions involved in the case was how much of this amount constituted principal and how much "dividends, issues and profits," under the provisions of the will creating the trusts in question. What were the rights in the fund between the holders of the intermediate estates and the remaindermen? The surrogate held that the principal was the value of the plant, equipment, and materials, and its good will, patents, patent rights, licenses, trade-marks, rights, privileges, and franchises, called above plant, equipment, and materials, $1,093,345.78, and necessary working capital, $70,000, making a total of $1,163,345.78, and the balance being invested surplus, $418,492.50, and working cash capital, $279,870.31, less above, $70,000—$209,870.-31, making a total of $628,362.81, was "dividends, issues and profits," and this result is not seriously objected to here. It was, at all events, substantially correct.

From 1896 to 1901 the business increased largely. Three hundred and five per cent. in dividends were paid to the stockholders, and profits were made besides those dividends amounting to $1,424,034.82, which were undivided at the time of the sale hereinafter referred to, and a part of which had been invested in betterments and materials. June 20, 1901, the company sold its entire plant, equipment, and materials for $6,626,837, of which materials, supplies, product, finished or in process, patterns, drawings, and templates, were valued at $1,126,837; value of plant and equipment at death of testatrix, $748,152.43; expended for betterments since her death, $553,410.57; and the balance was $4,198,437, which covered all patents, patent rights, licenses, trade-marks, rights, good will, privileges, and franchises, and an agreement that the company should be wound up and dissolved and all capital stock turned over to the purchaser, and that the company and its officers should not for 10 years thereafter carry on the business of manufacturing locomotive engines. There was expressly excepted from the sale, cash on hand or in bank, bills and accounts receivable, stocks, bonds, leases, agreements, warrants, or other forms of invested surplus earnings. The sale was fully consummated, the company received the purchase price, and was itself finally dissolved October 30, 1903. After the sale there was paid and distributed to the stockholders, including the trustees under the will, as accumulated surplus earnings, $900,000, being those as found at testatrix's death, $628,362.-81, and those accumulated thereafter, $271,637.19.

There seems to be no controversy but that these payments were

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properly made, and, so far as the trusts in question were concerned, were properly distributed to the holders of the intermediate estates. The main contention arises over the increase of the assets, or the value thereof, at the time of the sale in 1901. The principal at testatrix's death was $1,163,345.78. The sale was for $6,626,837. The increase was $5,463,491.22. This was made up of materials, $781,643.65; betterments, $553,410.57; and balance of $4,128,437. The question is whether this increase is to be regarded as principal or as "dividends, issues and profits." The surrogate decided it was to be regarded as principal and "accretions" thereto. It will be noted that there is no controversy now as to what the principal was at the time the trusts were created. Between that time and the discontinuing of business, however, the income of the company had increased, and large dividends had been paid, from time to time, which went to the holders of the intermediate estates, so far as the trust shares were concerned. Other earnings of the company were used to purchase additional materials and to make additional betterments. And there was, moreover, a large general increase in the value of the property itself, including among other things the good will of the business, which had not been considered in making up the "principal," as of the date of the creation of the trusts in question; and including also patents, patent rights, privileges, and franchises, the agreement to go out of business and dissolve the company, and not itself or its officers to carry on the same business for 10 years thereafter.

The words "dividends, issues and profits," used in the creation of the trusts, should be construed as meaning practically "income or earnings." The large balance of $4,128,437, covering good will, franchises, etc., can hardly be regarded as earnings or income. It was an increase in the value of the property itself, and such increase was in no proper sense a profit arising from or growing out of the stock which was the subject of the trusts. This principle was clearly enunciated and illustrated in Stewart v. Phelps, 71 App. Div. 91, 75 N. Y. Supp. 526, affirmed on opinion below, 173 N. Y. 621, 66 N. E. 1117. The terms of that trust were "rents, income, issues and profits," and they were held to give the intermediate beneficiary only the annual income, and not any increase in the value of the securities in which the fund was invested.

There is some reason to question the correctness of the surrogate's conclusion as to the other two items of materials and betterments. Those were the product of the surplus of yearly "income or earnings." The betterments had become a part of the property itself, the plant, and equipment. The materials were on hand and were simply materials, or in process of manufacture into locomotives. These amounts were to be distributed to the stockholders, not of a going concern, but of a company that had ceased doing business and had been closed up. Were they a part of the "principal" of the trust fund, or were they "income and earnings"?

In Matter of Rogers, 22 App. Div. 428, 48 N. Y. Supp. 175, and 161 N. Y. 108, 55 N. E. 393, there were some conditions very like those here involved. The company started in 1838 with a capital of $300,000. Rogers died in 1868. The words used in creating the trust were "income or interest." During the continuance of the trust the

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company paid 10 per cent. dividends semiannually. The business was very successful, large improvements were made in the plant, and large investments were made outside in bonds, stock, and real estate. In 1893 the whole plant, materials, and good will were sold for $2,750,000, in the stock of a new company organized for the purpose of acquiring the property, and the old company went out of business. The old company had other property besides that sold, of the value of $3,000,000, and both these amounts, in all $5,750,000, were divided between the stockholders. The large increase in the property of the company resulted from accumulated and undivided profits and earnings of the company since its organization in 1838. The $3,000,000, at the time of the closing up of the business, was not being used in any way as active capital. It was invested in securities outside. In making a division of the fund, so far as the trusts were concerned, the $2,750,000 stock in the new company, issued to the stockholders in the old company, was regarded by the surrogate as capital, while the $3,000,000 of outside investments was regarded as profits or accumulated income. The Appellate Division and the Court of Appeals affirmed the surrogate. Clearly the moneys invested outside the business could not be regarded as capital. The amount received on the sale, however, was all held to be capital, including that for material, whether in process of manufacture or not, and the courts held this to be, in the absence of proof to the contrary, a part of the working capital, necessary to use in the business, and therefore capital, and not merely "income or interest." It was the product of accumulated, undivided profits, that had been made a part of the property itself, as necessary to the carrying on of the business, enlarged and extended as it had been. This decision is authority for holding the betterments and materials in this case a part of the capital or principal, rather than "earnings or income," so far as these trusts are concerned.

We have carefully examined the surrogate's opinion, and the briefs of counsel, and the various cases referred to by them, and must refrain from making any argument ourselves, or attempting to harmonize the apparent conflict in the decisions of the Court of Appeals. We conclude, upon the authority of the Rogers Case above, and upon a reasonable construction of the terms of these trusts, that the surrogate was correct in his decision in reference to this part of his decree. If we are wrong, the Court of Appeals can readily correct us.

The question as to a sinking fund, so-called, arises out of the consideration that there has been a decrease in the value of some bonds, in which investments have been made, by the wearing away of premiums thereon, to the amount of $9,158, and it is claimed this amount should have been provided for by reserving interest received thereon to meet this deficiency. This question has been held to be largely one of the intention of the testatrix, to be determined in each case upon the language of the will and the surrounding facts and circumstances. McLouth v. Hunt, 154 N. Y. 179, 48 N. E. 548, 39 L. R. A. 230; Matter of Hoyt, 160 N. Y. 607, 55 N. E. 282, 48 L. R. A. 126; N. Y. Ins. & Tr. Co. v. Baker, 165 N. Y. 484, 59 N. E. 257, 53 L. R. A. 544. The surrogate considered the question under this rule, and concluded that no sinking fund was required as to these bonds in question. We

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have examined and considered his opinion and the briefs of counsel and the cases referred to therein, and see no reason to disagree with the surrogate's conclusion. There has been a very large increase in the estate by reason of the holding of the common stock of the new locomotive company, $2,750,000, and some preferred stock of the company, 13,000 shares, in which investments have been made. Perhaps this consideration has no real bearing upon the question of a sinking fund as to other securities, but it hardly seems in accordance with equity and equality to permit the remaindermen to retain the large increase realized upon some securities, and at the same time require the holders of the intermediate estates to contribute from their income amounts to keep the other securities good for their original purchase price, and the courts will lean towards an equitable and just disposition of these questions.

The decree should be affirmed, with costs, as hereinbefore suggested, payable from the fund. All concur.

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## In re HUDSON WATERWORKS.

(Supreme Court, Appellate Division, Third Department. March 13, 1906.)

1. APPEAL—APPEALABLE ORDER.

An appeal lies from an order denying, because a proper bond was not presented, an application to file an undertaking for the purpose of discharging a lien against the amount due a contractor from a municipal corporation for the construction of a public improvement, although such order gives the privilege to renew the motion on additional papers; such permission giving the applicant no further right than he would otherwise have.

2. MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—DISCHARGE OF LIEN—UNDERTAKING—BY WHOM SIGNED.

Laws 1897, p. 517, c. 418, § 20, as amended by Laws 1898, p. 318, c. 169, provides in subdivision 5 that a lien against the amount due a contractor from a municipal corporation may be discharged by a contractor executing an undertaking, with two or more sufficient sureties, in such sums as the court may direct, conditioned for the payment of any judgment which may be recovered in an action to enforce the lien. Laws 1897, p. 515, c. 418, § 2, defines the term "contractor" as "a person who enters into a contract with the owner of real property for the improvement thereof," and section 22 of said act provides that the article "is to be construed liberally to secure the beneficial interests and purposes thereof." *Held*, that the assignee of a contractor stands in the latter's place, and may procure a discharge of the lien by filing an undertaking as principal.

Appeal from Special Term, Columbia County.

In re Hudson Waterworks. From an order denying the application of the National Commercial Bank of Albany for the discharge of a lien on moneys due for the construction of waterworks in the city of Hudson, it appeals. Reversed.

Hurd, Sherman & Co., a corporation, had contracted with the city of Hudson for constructing a part of the system of waterworks, which was authorized by chapter 187, p. 332, Laws 1904. One John Stackpole filed with the city treasurer of Hudson a notice of lien on the said public improvement to the amount of $822. The National Commercial Bank of Albany presented to a justice of the Supreme Court an undertaking which was signed by itself as principal and with the American Surety Company of New York as surety, and



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asked for a discharge of the lien of said Stackpole. By affidavit upon the application it was shown that this contract of Hurd, Sherman & Co., and all moneys due and to grow due thereon, had been assigned by the said corporation to the said bank. The justice hearing the application made the following order: "The National Commercial Bank of Albany having executed an undertaking with the American Surety Company of New York as surety, and having served a copy of the same, together with a notice that the said undertaking would be presented to me at my chambers, in the city of Hudson, N. Y., on the 4th day of November, 1905, at 9 a. m., and that the surety thereunder would justify at such time and place, and said special proceeding having been duly adjourned from time to time to this date: Now, on reading and filing the said undertaking and notice, and due proof of service filed therewith, and the affidavit of J. Murray Downs, verified November 16, 1905, and it appearing to me that the said undertaking is not such an undertaking as is contemplated by Laws 1897, p. 517, c. 418, § 20, subd. 5, as amended by Laws 1898, p. 318, c. 169, and for that reason I have decided to decline to pass upon the sufficiency of the said undertaking, or its form, or the sufficiency of the surety; and after hearing Rosendale & Hessberg, attorneys for the National Commercial Bank of Albany, and Brownell & Tilden, attorneys for the above-named lienor. It is ordered that the said application to file the said undertaking for the purpose of discharging the said lien be, and the same hereby is, denied, on the ground that the said undertaking is not such an undertaking as is contemplated by Laws 1897, p. 517, c. 418, § 20, subd. 5, as amended by Laws 1898, p. 318, c. 169, and without prejudice, however, to a renewal on additional papers." From this order the National Commercial Bank of Albany has appealed to this court.

Argued before PARKER, P. J., and SMITH, CHESTER, and KELLOGG, JJ.

Rosendale & Hessberg (J. Murray Downs, of counsel), for appellant.
Brownell & Tilden (John L. Crandell, of counsel), for respondent.

SMITH, J. The right of the appellant to appeal from this order is challenged because of the privilege given therein to renew the motion upon additional papers. The application was denied because a proper bond was not presented. If the right to renew upon another and proper bond were dependent upon this permission, the order would probably not be such a final order as to authorize an appeal. See Robbins v. Ferris, 5 Hun, 286; Wells, Fargo & Co. v. W. C. & P. C. R. R. Co., 12 App. Div. 49, 42 N. Y. Supp. 225. The bank, however, might without such permission have presented another bond and might have asked the judge to approve of the same. The permission therefore to apply upon additional papers would seem to give no further right to the appellant than it would otherwise have. Notwithstanding such privilege, therefore, it may consistently appeal if the approval of its bond was improperly refused. Section 20, c. 418, p. 517, Laws 1897, as amended by chapter 169, p. 318, Laws 1898, provides for the discharge of a lien for a public improvement. It is therein provided that a lien against the amount due or to become due a contractor from a municipal corporation for the construction of a public improvement may be discharged as follows:

"* * * (5) Either before or after the beginning of an action by a contractor executing an undertaking with two or more sufficient sureties, who shall be freeholders, to the state or the municipal corporation with which the notice of lien is filed, in such sums as the court or a judge or justice thereof may direct, not less than the amount claimed in the notice of lien, conditioned for the payment of any judgment which may be recovered in an action to enforce the lien."

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The holding of the learned judge seems to have been that the bond was insufficient because it was signed not by the contractor, but by the National Commercial Bank, the assignee of the contractor, and that, in order to procure a discharge of the lien under this provision of the law, the bond must be signed by the original contractor with the municipality. No other criticism is made of the bond presented. In section 2, c. 418, p. 515, Laws 1897, the term "contractor" is defined as "a person who enters into a contract with the owner of real property for the improvement thereof." By strict interpretation this would seem to exclude either the personal representatives of a deceased contractor or his assigns. Under the strictest interpretation of the statute an assignee of the contractor might procure a discharge of the lien if only the contractor himself be upon the bond. No reason is suggested, however, why the bond of the contractor should be required and the bond of the assignee prohibited, nor can any reason be assigned why the representatives of a deceased contractor should not be allowed to procure this money upon the giving of a bond with a sufficient surety. The surety must be approved by the judge, which is ample protection to the municipality. It can hardly be conceived that the legislative intent was to bar the representatives of a deceased contractor from this right to procure a discharge of the lien or to bar an assignee of the contract from recovering the moneys which are his by assignment duly made, providing the contractor refused to join in the undertaking. We are of opinion, therefore, that this provision should not receive the strict construction contended for by the respondent, but that within the permission of the statute an assignee of the contract and of the moneys due thereupon may procure a discharge of the lien by filing an undertaking in which the assignee shall appear as principal and with such surety as is provided by the act of which the justice may approve.

We are not unmindful of the change in the phraseology of the lien law from former lien laws, as found in chapter 315, p. 403, of the Laws of 1878, and chapter 629, p. 1180, of the Laws of 1892. In those acts the term "contractor" was defined as the person with whom the contract with the city is made, his assigns, or legal representatives. In the present act the words "assigns or legal representatives" are omitted from the definition of the term "contractor." Prima facie this would seem to indicate an intent on the part of the Legislature to deprive either the assignee or the legal representatives of a contractor of the benefits of this provision of the act of 1897 as amended by Laws of 1898.

The contention that such an amendment is not conclusive evidence of such intent finds some support in our holding in the Matter of Cullinan (Maher Certificate), 109 App. Div. 816, 96 N. Y. Supp. 751. The inconvenience that would arise from the strict construction of the statute which has been given by the learned judge before whom the application was made, and the inability of respondent's attorney to suggest any conceivable ground for withholding either from the representatives of a deceased contractor or from his assignee the right to make this application, lead us to give to the statute a liberal interpretation, and to hold that the assignee stands in the place of the contractor, and is

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entitled to the privilege given to the contractor by the provisions of the statute quoted. It is provided in the act itself, by section 22, that the article "is to be construed liberally to secure the beneficial interests and purposes thereof." Laws 1897, p. 525, c. 418. By section 32, c. 677, p. 1492, Laws 1892 (the statutory construction law), it is provided:

"The provisions of the law repealing a prior law which are substantially re-enactments of provisions of a prior law shall be construed as a continuation of such prior law and not as new enactments."

The order of the justice refusing to approve the undertaking as sufficient should be reversed.

Order reversed, with $10 costs and disbursements, with leave to renew application upon the same or additional papers to any justice of the Supreme Court. All concur.

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## BUELLESBACH et al. v. HENDERSON.

(Supreme Court, Appellate Division, First Department. March 23, 1906.)

CONTRACTS—PARTIAL PERFORMANCE—RECOVERY.

Where a contract for the construction of the iron work on certain buildings required plaintiffs to perform the work according to the plans and specifications, which required that the fire escapes be connected by a slanting ladder, and that the upper escapes on each house be connected on the roofs by an iron ladder and two iron bridges, and the escapes as constructed did not comply with such specifications, the necessary expense to complete the same being $350, plaintiffs were not entitled to recover the full contract price, in the absence of proof of defendant's waiver of the provisions of the contract.

Appeal from Judgment on Report of Referee.

Action by Joseph Buellesbach and others against William Henderson. From a judgment entered on a referee's report in favor of plaintiffs, defendant appeals. Reversed.

Argued before O'BRIEN, P. J., and PATTERSON, INGRAHAM, LAUGHLIN, and CLARKE, JJ.

Henry C. Henderson, for appellant.

C. V. Pallister, for respondents.

INGRAHAM, J. The complaint alleges that the plaintiffs entered into a contract with the defendant, William Henderson, a copy of which was annexed to the complaint, by which they were to furnish certain iron work for four houses on the west side of Eagle avenue for the sum of $796.90; that they proceeded with the said work and completed the same according to the terms of the said contract; and that no part of the contract price has been paid except the sum of $100; and asks judgment for the sum of $696.90. The defendant answered, denying that the plaintiffs completed and performed the work mentioned in the complaint according to the terms of the contract under which the same was to have been performed, and alleged that the plaintiffs have refused, neglected, and failed to perform said work in the manner required by the terms of the contract. The referee's report found that the plaintiffs had entered into a contract with the

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defendant, as alleged in the complaint; that they completed the same in accordance with the terms of the said contract; that no part of the contract price has been paid except $100; and, as a conclusion of law, that the plaintiffs are entitled to a judgment for $696.90. The referee then found, at the request of the defendant, that one Diederick filed with the bureau of buildings, plans and specifications for erecting the buildings in question, which plans and specifications were approved by the said bureau, including the iron work in question herein; that the iron work mentioned in the said contract was understood between the plaintiffs and defendant to refer to the completion of iron work upon the buildings in question; that, prior to the time of making the agreement between the parties hereto, the plaintiffs had entered into an agreement with one Henry S. Diederick to construct the iron work upon the same buildings; that, by the agreement between the plaintiffs and the said Diederick, the plaintiffs were required to complete the iron work upon the buildings in question in accordance with the plans and specifications therefor so approved by, and on file in, the bureau of buildings in the city of New York; that the said Diederick was unable to perform the contract upon his part; that the iron work mentioned in the agreement between the plaintiffs and the defendant, annexed to and made a part of the complaint herein, is the same iron work referred to in the agreement between the plaintiffs and the said Diederick, and the same iron work shown upon the plans and referred to in the specifications approved by, and filed in, the bureau of buildings by the said Diederick, as aforesaid; that, by the said plans and said specifications, the fire escapes to be constructed upon each of the buildings aforesaid were to be connected by a slanting ladder, the upper fire escape upon each house was to connect with the roof of the house by an iron ladder, and two iron bridges were to be constructed connecting two of the buildings; that the fire escapes constructed on each of the buildings in question are connected by verticle ladders; that the upper fire escape on each building has not been connected with the roof of the building by an iron ladder, nor by any other method; that the buildings have not been connected by bridges nor by any other means; that the expense necessary to make the iron work constructed by the plaintiffs, upon the houses in question, conform to that shown upon the plans and described in the specifications approved and filed as aforesaid, and to the agreement between the parties, in $350.

It appears that these findings are entirely inconsistent with the referee's report. By the contract made between the plaintiffs and Diederick, he was to perform the work according to the plans and specifications, which required that the fire escapes were to be connected by a slanting ladder, and the upper fire escapes upon each house were to be connected on the roofs of the houses by an iron ladder and two iron bridges. The fire escapes as constructed did not comply with this contract, and the necessary expense to make the iron work constructed by the plaintiffs conform to that shown upon the plans and described in the specifications is $350. Certainly the plaintiff was not entitled to recover the full amount of the contract, when he had not performed the work upon the performance of which depended his right to recover in this action. There is no finding of any waiver by the defendant

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of the provisions of the contract. The form of the contract sustains the finding made by the referee on the requests of the defendant. It is apparent that the fire escapes as constructed were not such as required by the plans and specifications as filed in the building department. Certainly the plaintiff cannot recover for the completion of the contract, when the referee has found expressly that the contract as made by him was not completed and the work done was not in accordance with the contract. The cause of action is based upon the completion of the contract in accordance with the plans and specifications. The referee has found that the plaintiffs did not complete the contract in accordance with the plans and specifications, and they were not therefore entitled to judgment in this action.

The judgment appealed from must therefore be reversed, and a new trial ordered before another referee, with costs to the appellant to abide the event. All concur.

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## WABNICH v. DRY DOCK, E. B. & B. R. CO.

(Supreme Court, Appellate Division, First Department. March 23, 1906.)

STREET RAILROADS—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—CHILDREN IN STREET—INJURY BY CAR.

A bright child five years old allowed by its parents to play in the streets, is not as a matter of law, absolutely relieved from the obligation of exercising care in relation to vehicles properly in the street, and having been struck while attempting to cross a street railway track in front of an approaching car, the question whether such act of the child or the act of the parents in allowing the child to be unattended in the street, was negligence, should be submitted to the jury.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, §§ 124, 348; vol. 44, Cent. Dig. Street Railroads, § 257.]

Appeal from Trial Term, New York County.

Action by Lewis Wabnich, administrator of Rosa Wabnich, deceased, against the Dry Dock, East Broadway & Battery Railroad Company. From a judgment on a verdict for plaintiff, and from an order denying a motion for new trial, defendant appeals. Reversed.

Argued before O'BRIEN, P. J., and PATTERSON, INGRAHAM, LAUGHLIN, and CLARKE, JJ.

Bayard H. Ames, for appellant.
H. B. Davis, for respondent.

INGRAHAM, J. The plaintiff's intestate was a child five years and two months old, large and bright for her age. She was run over by one of the cars on the defendant's road and received the injuries which resulted in her death, for which her father as her administrator brings this action. The jury found a verdict for the plaintiff, from which the defendant appeals. The trial judge charged the jury:

"If you find that the accident occurred through the negligent act of the driver, that the little girl lost her life as the result of the accident, then you will take up the question of the compensation which the plaintiff shall receive."

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There was nothing said about contributory negligence either of the child, or her parents, if the child was non sui juris. The liability of the defendant was made to depend solely upon the question of the negligence of the defendant.

The counsel for the defendant submitted to the court several requests to charge which were denied, and to which the defendant excepted. He asked the court to charge:

"Second. If you find the plaintiff is non sui juris, were her parents or custodians free from all contributory negligence in permitting the child to be in the street unattended at the time and place in question.

"Third. If you find that the infant plaintiff was sui juris, did it exercise the ordinary care of a reasonable prudent child of similar age in the same situation.

"Fourth. Was the defendant company guilty of any negligence contributing to the accident.

"Fifth. If you answer either the second, third or fourth questions in the negative, your verdict must be in favor of the defendant.

"Sixth. If you answer all three questions in the negative, your verdict must be in favor of the defendant."

After exceptions to these refusals to charge had been taken, counsel for the defendant said:

"Does your honor submit this case to the jury on the theory that the child was sui juris?"

To which the court replied:

"I have submitted the case to the jury upon what I have said in my charge. I have stated to the jury that if this child was in the street and on this track far enough from the horses, so that the driver had ample time to have stopped the horses if he had been observing what was going on before him, that is evidence from which the jury may find that the defendant is liable, no matter how the child got there."

Counsel for the defendant then said:

"I except to that portion of the charge."

Subsequently, in answer to counsel for the defendant, the court again stated:

"I have not submitted the question whether the child was or was not sui juris, because I do not think it has any bearing upon the case at all."

The court thus took entirely from the jury any consideration of the contributory negligence of the child or of her parents in allowing her to go unattended on the street. This was error which requires reversal of the judgment. A bright child of five years allowed by its parents to play in the public street is not as a matter of law absolutely relieved from the obligation of exercising while in the street any care in relation to the vehicles properly there. Costello v. Third Ave. R. Co., 161 N. Y. 317, 55 N. E. 897; Adams v. Nassau R. R. Co., 41 App. Div. 334, 58 N. Y. Supp. 543; West v. Met. St. R. R. Co., 105 App. Div. 373, 94 N. Y. Supp. 250; Buscher v. N. Y. Transportation Co., 106 App. Div. 493, 94 N. Y. Supp. 798; Zwach v. N. Y. L. E. & W. R. R. Co., 160 N. Y. 362, 54 N. E. 785. Assuming that upon the evidence there was a question for the jury as to the negligence of the defendant, the defendant was entitled to have the jury instructed that the plaintiff's intestate while in the street was bound to exercise

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the care that they found that a child of her age and condition could be expected to exercise under the circumstances. All of the witnesses testified that the child was struck while attempting to cross the track in front of an approaching car. In such a case the trial judge cannot take from the consideration of the jury the question as to whether the act of the child in running in front of the car or the act of the parents in allowing the child to be unattended in the street was or was not negligence.

For this error the judgment and order must be reversed, and a new trial ordered, with costs to the appellant to abide the event.

O'BRIEN, P. J., PATTERSON and CLARKE, JJ., concur. LAUGHLIN, J., concurs in result.

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**PEOPLE ex rel. MOYNIHAN v. McADOO, Police Com'r.**

**(Supreme Court, Appellate Division, First Department. March 23, 1906.)**

CERTIORARI—FURTHER RETURN.

**A further return to a writ of certiorari to review the action of respondent, the police commissioner, in dismissing relator, a police officer, from the force, so as to include the original charges served on the relator and the finding of the trial commissioner, the deputy police commissioner, will not be required; the return containing the five charges on which relator was tried, and his petition for a further return showing that the original charges consisted of the second, fourth, and fifth of those on which he was tried, and it being shown by the return what the trial commissioner orally found, while it is stated in an affidavit in opposition to the motion for a further return that such trial commissioner made no written finding.**

Appeal from Special Term, New York County.

Certiorari, on the relation of Daniel C. Moynihan, against William McAdoo, police commissioner. From an order granting relator's motion for a further return to the writ, respondent appeals. Reversed.

Argued before O'BRIEN, P. J., and PATTERSON, INGRAHAM, LAUGHLIN, and CLARKE, JJ.

Terence Farley, for appellant.

William C. Dewitt, for respondent.

PATTERSON, J. The order from which this appeal is taken requires the appellant, as police commissioner of the city of New York, to make a further return to a writ of certiorari issued to review his action in dismissing the relator, a police captain, from the police force of the city. The writ directs the respondent to make return of "all and singular the act, acts, proceeding, and proceedings by you had in the premises, and all affidavits, exhibits, documents, testimony, and other proceedings and things before you, together with your action, decision, and proceedings in the removal or dismissal of the said Daniel C. Moynihan, heretofore a member of the police department of the city of New York, to wit, captain of police, had or in any way or manner relating thereto, with this writ." The commissioner made a return to the writ, and therein stated that it and the schedules annexed thereto contained,

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as commanded by said writ and directed by statute, "all and singular the proceedings had herein by the police department of the city of New York." It appears by the petition presented on the application for a further return that the relator was tried on or about the 15th of September, 1902, upon charges and specifications before John N. Partridge, then police commissioner of the city of New York, and at the close of the trial an order was made and entered dismissing the petitioner from the police force. A writ of certiorari to review the action of Commissioner Partridge was procured, and, after a hearing, was dismissed by this court; but on appeal to the Court of Appeals that decision was reversed, the writ was sustained, and a new trial of the charges considered by Commissioner Partridge was ordered. On the 19th of December, 1904, the relator was served with a writing purporting to be specifications and charges, duplicates of the charges and specifications upon which Commissioner Partridge acted; but on the 14th of April, 1905, he was served with another paper, purporting to be amended charges and specifications, and he states that "the said charges were embraced in five specifications, the first and third of which were wholly new and not contained in the original charges and specifications served on or about September 10, 1902." The relator then sets forth in his petition in extenso the five specifications containing the detail of the respective charges upon which he was to be, and was, tried before the appellant.

The trial of the relator sought to be reviewed under the present writ was had before the deputy commissioner of police, and thereafter the commissioner found the relator guilty, and he was again dismissed from the police force. The return to the present writ does not contain as a separate document the three specifications upon which the relator was tried before Commissioner Partridge, nor does it contain a record of the finding or recommendation of the deputy commissioner before whom the second trial was conducted. It does contain, however, a copy of the five charges and the five specifications upon which the relator was arraigned at the second trial. By the order appealed from the appellant is required "and directed to make a further return herein, consisting of the original charges and specifications served on the relator by him on or about the 19th day of December, 1904, and also a further return, consisting of the finding made by the trial commissioner (Deputy Commissioner McAvoy) or, if he made no finding, of such fact." The right of a relator in a proceeding of this character to a further return is regulated by statute, and such further return is only allowed where the one already made does not comply with the writ. People ex rel. Meehan v. Greene, 103 App. Div. 393, 92 N. Y. Supp. 1112. What was directed to be returned by the writ now before us has already been stated. All that it requires concerning affidavits, writings, exhibits, and documents is the production of such as were used upon the trial or investigation. The appellant in his affidavit swears that the original charges were not produced on such trial, nor were they offered in evidence, and that they are not part of the record in this proceeding.

There is nothing in the writ which required the appellant to produce papers not used on this second trial. The office of the writ was per-

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formed when the appellant obeyed its requirements. But it may be said that the original charges were used on this second trial or investigation, and that the appellant has found the relator guilty upon these charges. In the affidavit of the appellant it is declared that what are called the "original charges" were not considered in the final determination made by him. But, if they were, they are in the record; it is true, not as a separate document but they are identified by the relator in his petition. As before stated, he says that the charges upon which he was tried were embraced in five specifications, of which the first and third were new and not contained in the original charges. It is clear, therefore, that the original charges consisted of the three numbered in Schedule A of the return as the second, fourth, and fifth. If the fact that there were former charges, and their nature and the decision of the commissioner thereon, should become material to the decision of the proceeding, those matters appear without a further return. The return as made to the present writ was sufficient as a compliance with its requirements. Nor do we think the court below was justified in requiring the appellant to make a further return consisting of the finding made by the trial commissioner, or, if he made no finding, of such fact. The trial commissioner did make a finding or determination, and that appears from the return, in which it is stated that, after the termination of the trial, hearing, or investigation, the charges and specifications, testimony taken, and proceedings had were duly considered by the first deputy police commissioner, and it was determined by him, in the exercise of his best judgment and discretion, that the relator was guilty of said charges. Thereafter a finding was made. The commissioner cannot be compelled to make a return of a written finding, if there were no finding in writing, as the appellant states in his affidavit, read in opposition to the motion. He says: "No written finding was made in the present instance." The deputy commissioner before whom the investigation or trial was had was not required to make a finding in writing. People ex rel. Garvey v. Partridge, 180 N. Y. 237, 73 N. E. 4. As no finding in writing was made by the deputy commissioner, none can be returned as part of the record; and what he found orally is stated in the return.

The order appealed from should be reversed, with $10 costs and disbursements, and motion denied, with $10 costs. All concur.

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## In re WALTON.

(Supreme Court, Appellate Division, First Department. March 23, 1906.)

1. EXECUTORS AND ADMINISTRATORS—DECEASED EXECUTORS—ACCOUNTING.

The estate of an executor should not be charged with the amounts of uncollected judgments, book accounts, and notes of testator; the executor as such or otherwise never having received them, and such judgments, accounts, and notes having vested in the administrator with the will annexed of testator on the death of the executor.

2. SAME—REQUIRING PROPERTY TO BE TURNED OVER.

Code Civ. Proc. § 2606, provides that, where an executor dies, the Surrogate's Court has the same jurisdiction, on petition of persons interested, to compel the executor or administrator of the decedent to ac-

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count which it would have had his letters been revoked by a surrogate's decree, and has also jurisdiction to compel the executor or administrator or successor of any decedent at any time to deliver over any of the trust property which has come into his possession or is under his control. *Held* that, while in such proceeding a valid adjudication of the account between a decedent and the estate of his deceased executor may be had, the executor of the deceased executor may be required to pay over only money or property which has come into his possession or is under his control.

3. SAME—COSTS.

The executrix of a deceased executor may not be personally charged with the costs of a proceeding to compel her to account as to the estate of which her testator was executor; she having received no property as executrix, and having been guilty of no misappropriation of funds and of no wrongdoing.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, §§ 2260–2264.]

Appeal from Surrogate's Court, New York County.

In the matter of the judicial settlement of the account of Anna T. Walton, as executrix of Patrick Walton, deceased, who was executor and trustee under the will of James Hernon, deceased. From the decree settling the accounts, Anna T. Walton, individually and as executrix, appeals. Modified.

Argued before O'BRIEN, P. J., and PATTERSON, INGRAHAM, LAUGHLIN, and CLARKE, JJ.

C. Bertram Plante and George Hahn, for appellant.

Charles C. Sanders, for respondents.

INGRAHAM, J. It appeared than one James Hernon died, leaving a last will and testament which was admitted to probate February 19, 1895, appointing one Patrick Walton executor, and letters testamentary were issued to him, he taking possession of the estate, and that Patrick Walton died on August 11, 1897, leaving a last will and testament admitted to probate on September 8, 1897, by which Anna T. Walton, his wife, was appointed his executrix. By the will of James Hernon he left his residuary estate to his two sisters, Mary Conley and Anna T. Walton. Mary Conley died in July, 1891. Letters of administration were issued upon her estate to Anna Conley, one of the respondents. As such administratrix, she became entitled to the legacy given and bequeathed by the will of James Hernon to Mary Conley. On September 17, 1901, this proceeding was instituted to compel Anna T. Walton, executrix of Patrick Walton, to account for the property of James Hernon which came into his hands. There is no allegation in the petition that any assets belonging to the estate of James Hernon had come into the possession of Anna T. Walton, as executrix of Partick Walton. Upon this petition the surrogate granted a decree requiring Anna T. Walton, as executrix of James Hernon, deceased, to render and judicially settle the accounts of Patrick Walton as executor of James Hernon, and also to settle her own account, as executrix of the will of Patrick Walton, deceased, in relation to the estate of James Hernon, deceased. In pursuance of this decree Anna T. Walton filed an account from which it appears that personal property aggregating $13,607.29 came into the posses-

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sion of Patrick Walton as executor of James Hernon, and that of that amount there were judgments recovered by James Hernon, but which were unpaid and uncollectible, aggregating $4,423.36, that the said Patrick Walton paid funeral expenses and debts of the decedent aggregating $6,440.59, and that there had been paid to legatees of the deceased the sum of $1,541.65. It was further stated that Patrick Walton, the deceased executor, left no estate, either real or personal, and that Anna T. Walton, as his executrix, had never received any property from him. That at the time of the death of said Patrick Walton there was in banks to the credit of said James Hernon the sum of $665.97, and that this amount had been received by Anna T. Walton as administratrix with the will annexed, and was the only amount that the executrix of Patrick Walton received of the estate of James Hernon.

Objections were filed to this account, whereupon the surrogate appointed a referee to hear and determine all the questions arising upon the settlement of the said account. The referee found that Patrick Walton, as executor and trustee under the will of James Hernon, opened three bank accounts, in which there was deposited an aggregate of $13,595.35, and that at the death of Patrick Walton there was on deposit in these three banks to the credit of the estate of James Hernon $669.13, which was subsequent to the death of Patrick Walton received by Anna T. Walton, as the administratrix with the will annexed of James Hernon, deceased. The referee further found that, in addition to the amounts thus deposited in these banks to the credit of the estate of James Hernon, his executor, Patrick Walton, had received various sums of money which, with the amount so deposited, aggregated $15,244.62, and that, in addition to that amount, Anna T. Walton, as executrix of Patrick Walton, deceased, had received of the estate of James Hernon the sum of $181.09, making an aggregate sum for which the estate of Patrick Walton is chargeable of $15,425.71. The referee further reported that Mary Conley and Anna T. Walton were each entitled to one-half of the residuary estate, that payments made out of the residuary estate to Anna T. Walton exceeded payments made thereout to Mary Conley by at least the sum of $2,785.60, and that to equalize the payments shown to have been made to Anna T. Walton the said sum of $2,785.60 must be paid to the estate of Mary Conley, deceased, before any further payment is made to Anna T. Walton and before division and distribution of the estate is made, and, as a conclusion of law, that the estate of Patrick Walton, as executor and trustee of James Hernon, deceased, and the estate of said Walton, is chargeable with the sum of $30,034.62. In this amount is included the uncollected judgments, uncollected book accounts, and unpaid notes, amounting to $12,748.29, which were never received by Patrick Walton as executor of James Hernon, and never received by Anna T. Walton as executrix of Patrick Walton.

It would seem that there was no justification for charging these amounts of uncollected debts and judgments against the estate of Patrick Walton, deceased. He never received them, either as executor or otherwise, and on the appointment of the administratrix with the will annexed of James Hernon, deceased, these uncollected judgments

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and book accounts and notes vested in such administratrix with the will annexed; and this amount should therefore be deducted from the amount for which the estate of Patrick Walton, as executor, is chargeable, leaving a balance chargeable against the estate of Patrick Walton of $17,286.33. The referee then found that Patrick Walton was entitled to credits aggregating $9,791.09, which would leave a balance chargeable against the estate of Patrick Walton in favor of the estate of James Hernon of $7,495.24. Exceptions were filed to this report, and it was modified by the surrogate by deducting $181.09 from the amount, which would leave the amount for which the estate of Patrick Walton is chargeable at $7,314.13. The surrogate in his opinion states that "it does not appear that any of the assets of James Hernon have come into possession of Anna T. Walton as executrix of the will of Patrick Walton, the deceased executor of James Hernon"; that "the legal representative of the estate of James Hernon is Anna T. Walton, as administratrix of his estate with the will annexed"; that "the decree must therefore here require her, as executrix of the will of Patrick Walton, to pay the amount adjudged to herself as such administratrix, etc., of James Hernon"; and that no distribution can be had of any amount thus recovered until Mrs. Walton shall account as administratrix, etc., of James Hernon. The surrogate further directed that the costs of the proceeding, other than the disbursements for the stenographer, are to be charged against Anna T. Walton personally; and a decree was entered in accordance with this conclusion, and from that decree Anna T. Walton, as executrix and individually, appeals.

The jurisdiction of the surrogate in this proceeding is based upon section 2606 of the Code of Civil Procedure. That section provides:

"Where an executor * * * dies, the Surrogate's Court has the same jurisdiction, upon the petition of his successor, or of a surviving executor, administrator or guardian, or of a creditor, or person interested in the estate, * * * to compel the executor or administrator of the decedent to account, which it would have against the decedent if his letters have been revoked by a surrogate's decree. * * * On a petition filed either by or against an executor or administrator of a deceased executor, administrator, guardian or testamentary trustee. * * * The Surrogate's Court has also jurisdiction to compel the executor or administrator, or successor of any decedent, at any time to deliver over any of the trust property which has come to his possession or is under his control, and if the same is delivered over after a decree, the court must allow such credit upon the decree as justice requires."

By this section the surrogate is given power to require the executor of a deceased executor to account for the acts and doings of the decedent and for the trust property which has come into the possession of the decedent, and may at the same time compel the executor or administrator of a deceased executor to deliver over any of the trust property which has come into his possession or under his control. It seems to me that an accounting under this section can determine the condition of the account as between the decedent and the estate of his deceased executor, and if this adjudication thus settling the accounts is valid, the decree of the surrogate should be modified by fixing the amount of $7,314.13 as before indicated.

The surrogate has also jurisdiction to compel the executor of the de-

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ceased executor to deliver over any of the trust property which has come to his possession or is under his control; but he can only require the executor of the deceased executor to pay over to his successors money or property which has come into his possession or under his control. As there was no allegation in the petition that any money had come into the possession of Anna T. Walton, as executrix of Patrick Walton, that belonged to the estate of James Hernon, and as there was no finding that there was any such property, there could be no decree directing the appellant, as executrix of the estate of Patrick Walton, to pay to herself as administratrix with the will annexed of Patrick Walton any money or to deliver any property. This portion of the decree, therefore, which directs Anna T. Walton, as executrix of Patrick Walton, to pay over or deliver any property to herself as administratrix of the estate of James Hernon, should be stricken out.

The decree also requires that the costs of this proceeding be paid by Anna T. Walton personally. I do not find that there was any jurisdiction for this provision of the decree. Anna T. Walton has been guilty of no misappropriation of funds and of no wrongdoing, so far as is disclosed by this record. She has received no property as executrix of Patrick Walton of any kind. She is chargeable with no neglect or violation of duty in relation to the estate of James Hernon, or in relation to the estate of Patrick Walton, so far as is disclosed by this record. The fact that her husband was a defaulter, or that he misappropriated the property of this estate, is certainly no reason for charging her personally with the costs of this proceeding. I think, therefore, the judgment should be modified by striking out the provision making these costs payable by Anna T. Walton personally, and by providing that they should be payable by the estate of Patrick Walton.

As this disposed of all the questions presented on this appeal that requires discussion, the decree is modified as before indicated, and, as modified, affirmed, without costs of this appeal. All concur.

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## MLADINICH v. LIVINGSTON.

(Supreme Court, Appellate Division, First Department. March 23, 1906.)

1. DISMISSAL AND NONSUIT—FAILURE TO PROSECUTE—SUFFICIENCY OF SHOWING.

On a motion to dismiss for failure to prosecute, it appeared that the action was at issue in September 1900, that no steps were taken to place it on the calendar until November, 1905, when a notice of trial for December term was served, and that younger issues had been tried in their regular order on the calendar. *Held* to show a prima facie case of failure to prosecute under Code Civ. Proc. § 822, and General Rule of Practice 36, providing that when plaintiff neglects to proceed in the action, the court may, on the application of defendant, dismiss the complaint.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Dismissal and Nonsuit, §§ 140–152.]

2. SAME—EXCUSE FOR DELAY IN PROSECUTION—SUFFICIENCY.

Defendant established a prima facie case of neglect to prosecute an action. Plaintiff showed that the action could not be properly noticed for trial until a prior action set up in the answer as a defense was dis-

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posed of, but did not disclose any reason why the prior action could not have been discontinued. *Held*, that plaintiff failed to show that his neglect to prosecute was reasonable, necessary under General Rules of Practice 36, to prevent a dismissal of the action, on that ground.

3. SAME.

Plaintiff also stated that owing to his impoverished condition he was unable to pay to his attorney the necessary disbursements required to place the case on the calendar. *Held* not to show that the neglect to bring the action to trial was reasonable.

4. SAME.

That defendant waited before moving for the dismissal of the case because of neglect to prosecute it, until after plaintiff had noticed the action and put it on the calendar might be considered by the court in determining whether the motion should be granted.

Appeal from Special Term, New York County.

Action by Joseph Mladinich against Johnston Livingston, as president of the National Express Company. From an order denying a motion to dismiss the complaint on the ground of failure to prosecute, defendant appeals. Modified.

Argued before O'BRIEN, P. J., and PATTERSON, INGRAHAM, LAUGHLIN, and CLARKE, JJ.

Joseph W. Welsh, for appellant.

Herman Gottlieb, for respondent.

INGRAHAM, J. Upon an affidavit of one of the attorneys for the defendant that this action was commenced on June 5, 1900, that it was finally at issue on September 15, 1900, and no steps were taken by the plaintiff to place the case upon the calendar until November 17, 1905, when a notice of trial for the December term in 1905, was served, and that younger issues have been tried in their regular order upon the calendar, the defendant made a motion to dismiss this action. Section 822 of the Code of Civil Procedure provides that where the plaintiff unreasonably neglects to proceed in the action against the defendant, the court may, in its discretion, upon the application of the defendant, dismiss the complaint as against the moving party and render judgment accordingly; and rule 36 of the general rules of practice provides that whenever an issue of fact in any motion pending in any court has been joined, and the plaintiff therein shall fail to bring the same to trial according to the course and practice of the court, the defendant, at any time after younger issues shall have been tried in their regular order, may move at Special Term for the dismissal of the complaint, with costs. These facts establish a prima facie case of neglect on the part of the plaintiff to proceed with the action, and the plaintiff was thereupon called to explain his neglect, or submit to a dismissal. Zafarano v. Baird, 80 App. Div. 144, 80 N. Y. Supp. 510; McMann v. Brown, 92 App. Div. 251, 87 N. Y. Supp. 38. Notwithstanding the fact that the defendants brought themselves within this section of the Code and the rule, the court denied the motion, with $10 costs to the plaintiff.

The defendant having a prima facie case for the dismissal of the complaint, the question was whether or not the plaintiff made it appear to the court that his neglect to bring the action to trial had not been unreasonable, for where that is made to appear the court may permit the

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plaintiff on such terms as may be just to bring the action to trial. Rule 36, General Rules of Practice. The plaintiff as an excuse stated that as the defendants had alleged in their answer that another action was pending on behalf of the plaintiff to recover for such injury, the plaintiff's attorney could not properly notice the case for trial until the other action was disposed of. This does not follow. No reason is disclosed why the former action could not have been discontinued or disposed of at any time. Certainly the fact that the defendant has a good defense to the action is no reason why the plaintiff should delay for five years in noticing his case for trial and place it on the calendar. Nor does it appear that this other action has now been disposed of, or that the plaintiff is in any different situation from that which he was in at the time the case was at issue.

The plaintiff also stated that, owing to his impoverished condition, he was unable to pay to his attorney the necessary disbursements. The amount required to place the case upon the calendar is so insignificant that this would not seem to be an excuse. Under rule 36 it is only when it is made to appear to the court that the neglect of the plaintiff to bring the action to trial has not been unreasonable that the court is justified in denying the defendant's motion and in allowing the plaintiff to try the case. It does not appear that the neglect of the plaintiff to bring the action to trial has not been unreasonable. If this motion had been made by the defendant before the plaintiff had noticed the case and placed it upon the calendar, I should think that upon these papers the defendant was entitled to the order. See Seymour v. Lake Shore & M. S. R. R. Co., 12 App. Div. 300, 42 N. Y. Supp. 92. The defendant, however, has waited until after the plaintiff has noticed the case and put it on the calendar, and this fact can be considered by the court in determining whether the motion should or should not have been granted. It seems that the plaintiff has been guilty of neglect in prosecuting the action. We think, however, that under all the circumstances the plaintiff should have an opportunity of trying his case. It should, however, only be upon condition that the plaintiff pay to the defendant $10 costs of opposing the motion and stipulating to try the case when reached without further delay.

The order appealed from should therefore be modified accordingly, with $10 costs and disbursements to the defendant to abide the result of the action. All concur.

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## HUNTINGTON v. HERRMAN et al.

(Supreme Court, Appellate Division, First Department. March 16, 1906.)

1. TROVER AND CONVERSION—PROOF AND VARIANCE.

Under a complaint for conversion, no recovery can be had on any cause of action ex contractu.

2. SAME—ELEMENTS OF ACTION—EXERCISE OF DOMINION.

Where plaintiff left property in defendants' building under an agreement that it should be removed on notice if the building was leased, and defendant leased the building to a tenant who removed the property, defendant was not liable for conversion thereof.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trover and Conversion, §§ 25–37.]

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Appeal from Trial Term, New York County.

Action by Byron O. Huntington against Morris S. Herrman and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Argued before O'BRIEN, P. J., and McLAUGHLIN, INGRAHAM, LAUGHLIN, and HOUGHTON, JJ.

James F. O'Neill, for appellant.

Benjamin N. Cardozo, for respondents.

LAUGHLIN, J. The action is for the conversion of five sewing machines, certain office fixtures and furniture, and other personal property, of the alleged value of $8,500. During a period of about two years prior to the 1st day of February, 1898, plaintiff conducted the business of manufacturing ladies' underwear in the third loft of premises Nos. 68 and 70 Grand street, New York, under a lease from the Merchants' Central Club. The defendant Herrman then became owner, or succeeded to the right to possession, of the premises, and he leased the loft to the plaintiff for the month of February for a rental of $50. Plaintiff was closing out his business, but had not finished doing so by the 1st of March, and desired to continue in possession for two months longer, and to leave the property, to recover for which the action is brought, until the premises should be again rented by his new landlord. On or prior to the 1st day of March, he informed Herrman's brother that he desired the privilege of keeping the property there until the loft was rented and was willing to pay for the privilege $25 per month for the months of March and April, and was informed that there would be no objection to his leaving the property there, provided he agreed to remove it within two days after being notified that the building had been rented. The rental was subsequently changed to $50 for March and $25 for April. The respondent's brother then suggested that appellant, when ready to move his other things out, send word so that a memorandum could be made of the property he desired to leave. Plaintiff paid the rent for the two months, and some time after the last payment, which was on April 11th, he moved out, leaving the property of which a memorandum was taken—but no receipt was given—together with his address at which he might be reached "if the goods were to be removed." The plaintiff subsequently —it does not appear just when—received notice from the respondent that the loft had been rented and requesting that he remove his signs and put them on the first floor, so that the new tenant could put out signs. This request was complied with, and while doing so plaintiff was informed by the elevator boy that it would be necessary also to move the other property, and that it might be placed in the first loft. After some negotiations, it was agreed that appellant and respondent should together bear the expense of cleaning the first loft to put in suitable condition to leave the property there, and this was done, and the property was transferred accordingly. The plaintiff thereafter, from time to time, visited the premises for the purpose of seeing his property, to which he was given access. In December, 1899, plaintiff learned that his property was being removed, and on visiting the premises he found it on the sidewalk, where it had been placed by the elevator boy on orders from the defendant Stein, to whom Herrman had in July or



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August, 1898, leased the entire building and surrendered possession. Herrman did not assume to lease plaintiff's property to Stein or to confer any right concerning it, and had a distinct understanding with Stein that the right was reserved to enter at any time and remove any property left by tenants, and he had no knowledge that Stein contemplated removing the property. The defendant Stein was not served and did not appear. The verdict in favor of the defendant Herrman was directed upon motion of his counsel, made upon the grounds: (1) That the plaintiff had failed to establish a cause of action of any kind; (2) that the plaintiff's cause of action, if any, was not for conversion, but for breach of a contract of bailment, and that the sole cause of action pleaded in the complaint was one for conversion; (3) that the defendant's possession being originally rightful, a demand was necessary to make it unlawful, that such demand was a condition precedent to the maintenance of an action for conversion, and that none had been proved.

It appears that Herrman did not notify plaintiff that he had leased the premises to Stein, or request him to remove the property. We are not in accord on the question as to whether the notice to remove in the event that the premises should be leased was for the benefit of the defendant Herrman alone, or whether he owed a duty to the plaintiff to give such notice; but that is not material, because, if such duty existed, a breach thereof might give rise to a cause of action for damages for breach of the contract, but it would not constitute a conversion of the property. It is unnecessary to decide whether the facts give rise to any cause of action ex contractu, for, the complaint being in conversion, no recovery could be had without proof thereof. Wamsley v. Steamship Co., 168 N. Y. 533–540, 61 N. E. 896, 85 Am. St. Rep. 699. The defendant Herrman exercised no dominion over the property. In the exercise of his legal right to sell or lease the premises, he leased the entire building, but not its contents. The defendant Stein thus came into possession of the building, subject to the rights of the plaintiff. Clearly, the mere execution of a deed or lease of the premises, and surrender of possession thereof to another, does not render the owner liable in conversion for all the property of the tenants of the building, either as to tenants in possession and occupation, or as to those who have left some of their property temporarily. Peck v. Knox, 1 Sweeny, 311; Salt Springs Nat. Bank v. Wheeler, 48 N. Y. 492, 8 Am. Rep. 564; Wamsley v. Atlas Steamship Co., supra, and cases cited.

The contract by which the goods were left does not differentiate the case, considered as an action for conversion, from one in which the goods were left by consent, as in Peck v. Knox, supra. Plaintiff saw fit to leave his property in the building, not for a month or two or three, but for a year and eight months, inspecting it himself at intervals. It was not reasonable to expect that defendant had surrendered his right to sell or lease his property indefinitely. In fact, the execution of a lease by him was contemplated, and, if plaintiff was entitled to any notice at all, it was, according to the contract, only to be given after the premises had been leased. He did not lease it until after three or four months, and the property was not disturbed until nearly a year and a half thereafter. It is sufficient to sustain the judgment that it

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has not been shown that defendant Herrman exercised any dominion over the property. The execution of the lease and transfer of possession was lawful and invaded no right of the plaintiff with respect to the ownership or possession of the property. The possession of the property was not disturbed. The plaintiff, under the arrangement with Herrman, in effect, had a lease of the space occupied by the property, terminable on notice, or a license to leave the goods there until notified to remove them. It did not constitute conversion of the property for Herrman to lease the building subject to plaintiff's right, which is, in effect, what he did. If this action for conversion could be sustained, then it would be for failure to notify plaintiff of the lease to Stein, and even though the property were still in the building uninjured.

It follows that the judgment and order should be affirmed, with costs. All concur.

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## HELLMAN v. CITY TRUST, SAFE DEPOSIT & SURETY CO. OF PHILADELPHIA.

(Supreme Court, Appellate Division, First Department. March 16, 1906.)

PRINCIPAL AND SURETY—DISCHARGE OF SURETY—ESTOPPEL TO CLAIM.

Where a surety on a building contractor's bond consented by parol to modifications of the contract by which a provision authorizing the owner to retain 15 per cent. of the contract price until the work was completed, was waived by him and the time for performance was extended, the surety was estopped from contending that these modifications discharged it from liability.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Surety, §§ 366-369.]

Appeal from Trial Term, New York County.

Action by Myer Hellman against the City Trust, Safe Deposit & Surety Company of Philadelphia. From a judgment dismissing the complaint, plaintiff appeals. Reversed and remanded.

Argued before O'BRIEN, P. J., and McLAUGHLIN, INGRAHAM, LAUGHLIN, and CLARKE, JJ.

John A. Straley, for appellant.

William R. Conklin, for respondent.

LAUGHLIN, J. The complaint shows that on the 7th day of December, 1898, the plaintiff entered into a contract in writing with one Blake, by which the latter agreed to do certain work, consisting of blasting rock and excavating for sewer connections on premises at the northwest corner of Madison avenue and 117th street, on or before the 15th day of July, 1899, and other work consisting of blasting and removing rock from the same premises on or before the 15th of May, 1899; that Blake, as principal, and the defendant, as surety, duly executed a bond to the plaintiff in the penalty of $10,000, conditioned for the faithful performance of the contract by Blake; that the contract provided that partial payments should be made on account of the contract work every 15 days on certificates of a designated surveyor as to the amount earned, but that 15 per cent. should be reserved until the completion of the work; that the plaintiff kept and performed all of the terms and pro-

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visions of the contract, except that "with the full knowledge, approval, and consent of the defendant" the provision with respect to reserving the 15 per cent. until final payment was waived, and that with like knowledge, approval, and consent of the defendant there was a substitution of surveyors and an extension of the time of performance from time to time, and that the provisions as to strict performance thereof on the part of Blake and the plaintiff were waived by the defendant; that Blake failed to perform and abandoned the contract and refused to proceed therewith as therein required, and the plaintiff was obliged to proceed with the work and to expend in the performance thereof, including the amount paid to Blake, more than the penalty of the bond above the contract price.

Counsel for plaintiff, in opening the case, did not waive any right of his client to prove the material allegations of his complaint or make any admission inconsistent therewith. He stated that plaintiff would prove that, during the progress of the work, Blake was falling behind in paying for the labor, and that Blake, plaintiff, and plaintiff's counsel called on defendant, and Blake requested the defendant to consent to the payment of the full amount earned from time to time without deduction, in order that he might be able to perform the contract, and that with full knowledge and consent of all the parties the provision with respect to withholding the 15 per cent. was waived, and thereafter payments in full were made; that the time of performance was first extended 45 days, with the consent in writing of the defendant, and that thereafter, when Blake was again in default with respect to the time of completion, a conference was had between him, plaintiff, and defendant, and with the full knowledge and consent of the defendant the time of performance was further extended from time to time, and strict performance as to time was "wholly waived by the defendant"; that subsequently, at a like conference between all the parties, a substitution of surveyors was agreed upon, and that thereafter, with full knowledge and approval of defendant, Blake continued the work, receiving payments in full from time to time on the certificate of the substituted surveyors, until the middle of May, 1900, when he abandoned the contract, having a large part of the work uncompleted; that after giving the notices required by the contract, and continued default on the part of Blake, and notice to defendant of his default, and an opportunity to it to take charge of and complete the work, plaintiff completed it at an expense, including the payments made to Blake over the contract price, of more than the penalty of the bond. The judgment was granted and is sought to be sustained, upon the theory that parol evidence is not admissible to show the facts alleged and offered to be proved.

The defendant's contract being one of suretyship, it is claimed that it could not be waived in any of the three particulars specified, except by an agreement in writing. Of course, a valid new contract could not be made by parol, nor could the liability of the surety be enlarged or extended by parol. Here, however, was an existing contract in the performance of which the surety was interested, because it was liable therefor. In the circumstances disclosed, it evidently appeared to be to the interest of the surety to have the provision with respect to reserving part of the amount earned waived, and likewise with respect to

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the time of performance. Having consented to these modifications at the instance of its principal, and the plaintiff having acted thereon manifestly to his prejudice if the consent and waiver were now to be repudiated, the defendant is estopped from contending that these modifications with respect to performance discharge it from all liability. Thomson v. Poor, 147 N. Y. 408, 42 N. E. 13; Gallagher v. Nichols, 60 N. Y. 438; Smith v. Wetmore, 167 N. Y. 234, 60 N. E. 419; Blanchard v. Trim, 38 N. Y. 225; Roberge v. Winne, 144 N. Y. 709, 39 N. E. 631; Dodge v. Wellman, 1 Abb. Dec. 512; Klein v. Lang, 27 App. Div. 158, 50 N. Y. Supp. 419; N. Y. Life Ins. Co. v. Casey, 81 App. Div. 92, 81 N. Y. Supp. 1; Wood on Frauds, § 403; Brant on Suretyship, § 439; Prairie St. Nat. Bank v. U. S., 164 U. S. 227, 17 Sup. Ct. 142, 41 L. Ed. 412.

It follows that the judgment should be reversed, and new trial granted, with costs to appellant to abide the event. All concur.

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## HOROWITZ v. GOODMAN.

**(Supreme Court, Appellate Division, First Department. March 16, 1906.)**

**PLEADING—AMENDMENT.**

**Code Civ. Proc. §§ 542, 543, allow an amendment to a pleading of course. By section 546, the court may require indefinite and uncertain allegations to be made definite and certain, and sections 539 and 540 provide for an amendment where there is a variance between an allegation in a pleading and proof. Section 723 authorizes the court upon the trial, or at any other stage of an action, to amend any pleading by inserting an allegation material to the case. Section 544 declares that upon application of either party the court may permit the filing of a supplemental complaint or answer alleging material facts which occurred after the former pleading or of which the party was ignorant when it was made. *Held*, that where the original complaint alleged that plaintiff was the lessee of premises, and that defendant the lessor had caused a portion of the premises to be cut away, and threatened to further cut away the ceiling and floors, and an injunction was prayed, it was error to permit plaintiff to subsequently file what he termed "an amended and supplemental complaint" which charged that after the action was commenced defendant wrongfully entered on the premises and constructed certain shafts, and during the commission of such act personal property of plaintiff was damaged.**

**Patterson, J., dissenting.**

Appeal from Special Term, New York County.

Action by Rebecca Horowitz against Bernard Goodman. From an order allowing plaintiff to serve an "amended and supplemental complaint" defendant appeals. Reversed.

Argued before O'BRIEN, P. J., and PATTERSON, INGRAHAM, LAUGHLIN, and CLARKE, JJ.

Henry A. Forster, for appellant.

Alfred Steckler, for respondent.

INGRAHAM, J. This action was commenced in June, 1905. By the original complaint, the plaintiff alleges that she is the lessee of certain premises belonging to the defendant, and that the defendant had caused a portion of the leased premises to be cut away for the purpose

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of constructing water-closets and shafts, and threatens to further cut away the ceiling and floors of the leased premises, and to construct such water-closets and shafts without the authority and consent of the plaintiff; and the complaint asks judgment that the defendant be restrained from constructing and maintaining said water-closets and shafts and from breaking the ceiling and floor of the plaintiff's store, and from in any way trespassing upon or interfering with the said store of the plaintiff. The lease was annexed to the original complaint.

The plaintiff made a motion for a temporary injunction, which was denied. The answer was served, and the case was put upon the calendar for trial. Subsequently the plaintiff moved for leave to serve an amended and supplemental complaint upon an affidavit alleging that after the action was commenced the defendant had wrongfully entered upon the plaintiff's premises and wrongfully constructed said shaft and water-closet in said premises; that during the commission of such act certain personal property of the defendant in the store was damaged; that the defendant had thus completed subsequent to the commencement of the action the wrongful acts threatened prior to the commencement of the action and alleged in the complaint herein, and has so damaged the personal property of the plaintiff in the course of his wrongful acts in trespass; that in order to prove said acts so committed by the defendant subsequent to the commencement of the action it is necessary that a supplemental and amended complaint be served herein, the commission of said acts subsequent to the commencement of the action necessitating an amendment of the complaint herein, as deponent is advised by her counsel and verily believes. Annexed to this was the proposed pleading which was intended to take the place of the original complaint. The Code of Civil Procedure recognizes no such pleading as an "amended and supplemental complaint." Section 478 of the Code provides that "the first pleading, on the part of the plaintiff, is the complaint"; and section 481 provides that the complaint must contain (subdivision 1):

"The title of the action, specifying the name of the court in which it is brought; if it is brought in the Supreme Court, the name of the county, which the plaintiff designates as the place of trial, and the names of all the parties to the action, plaintiff and defendant. 2. A plain and concise statement of the facts, constituting each cause of action without unnecessary repetition. 3. A demand of the judgment to which the plaintiff supposes himself entitled."

Sections 542 and 543 of the Code allow an amendment to a pleading of course. By section 546 the court may require indefinite or uncertain allegations to be made definite and certain by amendment; and section 539 and 540, provide for an amendment where there is a variance between an allegation in a pleading and proof. Section 723 of the Code authorizes the court, upon the trial, or at any other stage of action, to amend any process, pleading, or other proceeding by inserting an allegation material to the case, or where the amendment does not change the pleading or other proceedings to the facts proved; and further power on relation to amendments is given by section 724 of the Code. This power in relation to an amendment to the original complaint relates to the insertion of an allegation of fact existing at the time of the commencement of the action, and thus, amendments to a complaint

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are simply authorized to allow the insertion of allegations of fact existing when the action was commenced and upon which the action is to be maintained. Provision is then made by section 544 of the Code for what is called "supplemental pleadings." That section provides that:

"Upon the application of either party, the court may, and, in a proper case, must, upon such terms as are just, permit him to make a supplemental complaint, answer, or reply alleging material facts which occurred after his former pleading, or of which he was ignorant when it was made. The party may apply for leave to make a supplemental pleading, either in addition to or in place of, the former pleading."

The facts which may be alleged by way of a supplemental pleading are "material facts which occurred after his former pleading, or of which he was ignorant when it was made." Just what is meant by the provision that this supplemental pleading may take the place of the former pleading is not clear, but it has been uniformly held that:

"The plaintiff could not, by a supplemental complaint, change the action in its entire scope and purpose by bringing in and substituting a new controversy, and a new and independent cause of action springing out of a transaction occurring since the commencement of the action between the defendants, with which the plaintiff had no connection." Prouty v. Lake Shore & Mich. So. R. R. Co., 85 N. Y. 275, and cases there cited.

It would seem that under these provisions of the Code the complaint in the action must consist of facts in existence at the time of the commencement of the action and upon which the plaintiff bases his right to relief. It may be amended by the court so as to include facts then existing and which are material to the plaintiff's cause of action. As to material facts which occurred after the service of the complaint, or of which the plaintiff was ignorant when his complaint was made, the plaintiff may allege such facts by way of supplemental complaint, and such a supplemental complaint may be served in place of the original complaint, in which case it would entirely supersede it. The plaintiff in this case has attempted to unite in one complaint, called "an amended and supplemental complaint," facts alleged in the original complaint, and which occurred prior to the service of his original complaint, and the facts which have occurred after the service of the original complaint and which she seeks to set up by way of supplemental pleading. I think this practice improper and that it should not be allowed. It is in substance commencing a new action to recover upon facts alleged after the commencement of this action and would introduce an element of uncertainty and confusion. The original complaint in this action was one in equity and demanded a judgment enjoining the defendant from proceeding to make such changes in the premises which had been leased to the defendant under orders of the tenement house commission. The new pleading proposed by the plaintiff as "an amended and supplemental complaint," alleges all the facts set up in the original complaint, and also other facts, not in the original complaint, which happened before the commencement of the action, and further alleges that subsequent to the commencement of the action the defendant entered upon the leased premises, constructed the appliances required by the tenement house commission, ejected the plaintiff from certain portions of the leased premises and caused the plaintiff substantial damage; and the relief that

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the plaintiff now demands is that the defendant be compelled to remove such appliances so placed upon the leased premises and that the plaintiff have judgment against the defendant for the sum of $15,000.

I think the plaintiff should have been granted leave to serve a supplemental complaint, setting up the acts of the defendant after the service of the former pleading in carrying out the acts which, when the former pleadings were served, were threatened, and stating the damages occasioned thereby, and asking to recover in this action such damage. Upon the trial the facts would then have been presented to the court under the original complaint upon which the right of the plaintiff to maintain the action would depend, and the relief to which the plaintiff would be entitled would depend upon the facts alleged in the original and supplemental complaints; but if the plaintiff had no right to maintain the action as one in equity, the cause of action could not be bolstered up by the facts alleged after the commencement of the action. If upon the trial it appeared that the plaintiff at the time it was commenced was authorized to maintain it as an action in equity, the court would have power to retain the action, and to grant the plaintiff such relief as she was entitled to, although in consequence of the wrongful acts of the defendant after the commencement of the action, equitable relief would not give the plaintiff full relief; but it was irregular to attempt to set up by way in one complaint facts which occurred before and after the commencement of the action, and attempt thereby to sustain a new cause of action against the defendant.

For this reason I think this "amended and supplemental complaint" should not have been allowed, and that the order appealed from should be reversed, with $10 costs and disbursements, and the motion for leave to serve this pleading denied, with $10 costs, without prejudice to a motion to be made by the plaintiff for leave to serve a proper supplemental complaint.

O'BRIEN. P. J., and LAUGHLIN and CLARKE, JJ., concur. PATTERSON, J., dissents.

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## FLYNN v. SMITH.

(Supreme Court, Appellate Division, First Department. March 16, 1906.)

1. TROVER AND CONVERSION—ACTION—EVIDENCE.

Certain stock was pledged with stockbrokers as collateral to a customer's margin account, but did not so appear on the stockbrokers' books. After their failure their assignee scheduled the brokers' claim against the customer as worthless, and later, not knowing that it was secured by the stock, sold the claim for a nominal sum to plaintiff's assignor. In a suit against the stockbroker's assignee for alleged conversion of the stock, he claimed that plaintiff's assignor, in purchasing the claim, was merely acting for the customer. *Held*, that it was error for the court to exclude evidence that defendant, when he assigned the the claim, had no knowledge that it was secured by the stock, and to refuse to permit plaintiff's assignor to answer how he came to purchase the account.

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2. ASSIGNMENTS—SECURED CLAIMS—MEETING OF MINDS.
Where, at the time a claim, thought to be worthless, was assigned for $10, it was in fact secured by certain stock worth $1,120, and it appeared that neither party to the assignment had knowledge of such security, there was no meeting of minds, and the assignment was subject to rescission.

3. PLEADING—MOTION FOR JUDGMENT—EXCEPTIONS—WAIVER.
Where, after the denial of a motion for judgment on a counterclaim for want of a reply, defendant did not rest on his exception, but offered proof of the facts, he was not entitled to rely on such exception on appeal.

Appeal from Trial Term, New York County.

Action by John J. Flynn against Frank S. Smith. From a judgment in favor of plaintiff, and from an order denying defendant's motion for a new trial, he appeals. Reversed.

Argued before O'BRIEN, P. J., and McLAUGHLIN, INGRAHAM, LAUGHLIN, and HOUGHTON, JJ.

George Coggill, for appellant.

Charles De Hart Brower, for respondent.

LAUGHLIN, J. This is an action for the conversion of 10 shares of the capital stock of the Crocker Wheeler Electric Company. One Alfred W. Law owned the stock and had pledged the same to Henry Marquand & Co., stockbrokers, as collateral security to his account as their customer speculating in stocks on margins. The brokers made a general assignment for the benefit of creditors to the defendant. Their books showed that Law was indebted to them in the sum of $4,120.23. The defendant as such assignee duly advertised and sold the claim at public auction. It was purchased for $10 by one Hunter, a lawyer, and the next day the defendant executed and delivered to him an assignment thereof, with a statement of the account annexed, assigning all defendant's "right, title, and interest in and to any and all sum or sums of money now due, or to grow due, upon the annexed account, which said account was duly assigned to me by the firm of Henry Marquand & Company." The stock came into the possession of defendant as assignee, but the books did not show, and he was not aware, that it was held as collateral to Law's account until seven days after the sale, when Hunter demanded it upon the ground that it passed to him as incidental to the account. The defendant declined to deliver it and offered to return the $10 purchase price of the account, which was refused. Neither the account itself nor the advertisement or assignment thereof contained any reference to this stock or indication that any security had been put up or held as margin. Within two months after the sale of the account the defendant sold the stock for $1,120, which apparently was its fair market value then and also at the time of the sale of the account. Hunter subsequently assigned to plaintiff the claim against Law on the account, all his right to the stock, and his claim against defendant for refusing to deliver it.

The defendant set up as a separate defense, and as a counterclaim, that he did not know that this or any stock was held as margin to Law's account; that he did not intend to sell the stock with the account or to execute any assignment thereof to him; that the sale and assignment

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were made under the misapprehension that there was no margin to secure Law's claim; that Hunter was acting for Law in purchasing the account, and he demanded the rescission of the sale and cancellation of the assignment upon his restoring the consideration. The defendant testified to these facts, and they are not expressly contradicted. He further showed that in the inventory and schedule filed by him as assignee he described this claim against Law as an account receivable, $4,120.42, of "no value," and "uncollectible," and he included this stock in a schedule of securities found in the safe deposit vault, which, on information derived from clerks of his assignor, he inventoried as "believed to be lodged by clients for safekeeping, and to which the assignors had no claim by way of title or lien, and consequently unappraised." There was no reference to this stock on the ledger containing Law's account. The only reference in the books of the assignors to the stock was in the register of securities in the cashier's safe, which indicated that they belonged to Law; and this was referred to in a note to the schedule in which they were inventoried without having been appraised. According to the testimony of Law, Hunter did not know until after the sale that the account was secured by this stock; and on objection interposed by counsel for plaintiff the court excluded Hunter's testimony on this point, upon the ground that it was immaterial whether or not Hunter knew what he was purchasing.

The court also sustained an objection to a question put to Hunter by counsel for defendant inquiring how he came to buy the account, and defendant took an exception. Those rulings were manifestly erroneous. It clearly appeared that the defendant did not intend to sell any right or interest in the stock; and, if this evidence had been received, it might have conclusively appeared that Hunter did not intend to buy any right or interest therein. Brown v. Lanphear, 35 Vt. 252. This evidence, with that already in, might have shown a mutual mistake concerning a material fact, which would have required a rescission at the instance of the party prejudiced. It is true that the collateral goes with the debt, and the owner of the debt holds it as trustee for the debtor, and therefore it passes as incidental to a sale of the debt, and yet it is usually, and especially in this case, a very important incident, many times more important than the debt itself. Knowledge of it, therefore, cannot be immaterial. If, on the other hand, Hunter knew that the stock was pledged as collateral to the account, he must have learned it from Law, with whom he occupied offices and for whom he was acting in part without a definite arrangement as to their respective interests. Law knew all the facts, including the value of the stock, and undoubtedly knew that the defendant had scheduled the account as worthless and the stock as merely held on deposit; and, if Hunter knew these facts, as is quite likely, he was under a duty to disclose them to the defendant, who was acting in a trust capacity, and was not, owing to the condition of the books, chargeable with negligence.

However, the action is not defended on that theory, and there are other grounds upon which this unjust judgment may be reversed. The defendant knew that he was selling the account which he had inventoried as valueless and which brought $10; but he had no knowledge as to the existence of the stock as collateral, and he did not intend to sell

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for $10 a secured debt worth more than 100 times that sum. Nothing was done to lead the plaintiff's assignor to believe that he was to receive the collateral, and he could only have known of the existence thereof through Law. The defendant could not have intended to part with any interest in the securities, since he did not know that he held them as collateral. If, as already observed, plaintiff's assignor was equally unaware of the fact that the stock was held as security, he could not have intended to purchase the right to the security. In these circumstances, even if the form of the sale would in law carry the securities to the plaintiff, it is clearly a case for rescission on the ground that the minds of the parties never met as to the property and property rights.

Moreover, the defendant merely asks a rescission of the contract, not a reformation. He does not ask to retain the purchase price and have the contract so amended as to except the stock. He offers to return the consideration and to restore the plaintiff's assignor to his former position and asks like restoration for himself. In such case relief may be had, not only on the ground of fraud or mutual mistake, but also upon the ground that, owing to lack of knowledge of a material fact by the party seeking the relief, without negligence on his part, the minds of the parties never met with respect to the property or property interests transferred or even the consideration therefor. Smith v. Mackin, 4 Lans. 41; Bedell v. Bedell, 37 Hun, 419; Crowe v. Lewin, 95 N. Y. 423; Duncan v. N. Y. Mutual Ins. Co., 138 N. Y. 88, 33 N. E. 730, 20 L. R. A. 386; Moffett Co. v. City of Rochester (C. C.) 82 Fed. 255; Id., 178 U. S. 373, 20 Sup. Ct. 957, 44 L. Ed. 1108; Harris v. Pepperell, L. R. 5 Eq. 1; Werner v. Rawson, 89 Ga. 619, 15 S. E. 813; Diman v. Providence, W. & B. R. Co., 5 R. I. 130; Am. & Eng. Enc. of Law, vol. 24, p. 618. The facts of the case at bar fairly bring it within this rule of law.

No reply was served to defendant's counterclaim for rescission. The counterclaim was good. The facts pleaded constituted not only a defense to the action for conversion, but ground for affirmative relief to have the sale of the account rescinded. At the commencement of the trial the defendant moved for judgment on the counterclaim, which was denied, and he excepted. We think this was error also; but since defendant did not rest on his exception, but offered proof of the facts, we think that we should not direct final judgment on the counterclaim.

It follows that the judgment and order should be reversed and a new trial granted, with costs to appellant to abide the event.

O'BRIEN, P. J., and INGRAHAM, J., concur. McLAUGHLIN and HOUGHTON, JJ., concur in result.

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## CUNNINGHAM v. PEIRCE.

(Supreme Court, Appellate Division, Second Department. March 22, 1906.)

1. MASTER AND SERVANT—NEGLIGENCE OF MASTER—DEFECTIVE SCAFFOLDING.
Under the labor law, an employer has performed his duty as to scaffolding, when he has constructed one sufficiently strong in its materials and construction to remain in position while in use, though, when one working thereon sets his wheelbarrow down and throws his weight on one of the outside planks, it sags an inch.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 207.]

2. SAME—DEFECTIVE IMPLEMENTS.
Though a wheelbarrow furnished by a master to an employé engaged in wheeling cement onto a scaffolding, and unloading it by shoveling it to a platform above, is so constructed as to be top-heavy when loaded, the master is not liable as for not furnishing a safe appliance, where, the employé having set the wheelbarrow down and thrown his weight on one of the outside planks of the scaffolding, it sagged about an inch, and the wheelbarrow, a leg of which was on the plank, tipped, and threw the employé, who was standing between the handles.

Hirschberg, P. J., and Rich, J., dissenting.

Appeal from Trial Term, Kings County.

Action by Bernard Cunningham against John Peirce. From a judgment for plaintiff, and from an order denying a motion for a new trial on the minutes, defendant appeals. Reversed.

Argued before HIRSCHBERG, P. J., and WOODWARD, JENKS, RICH, and MILLER, JJ.

Richard B. Aldcroftt, Jr., and James B. Henney, for appellant.
Charles F. Brandt, for respondent.

WOODWARD, J. The plaintiff was employed as a common laborer, engaged in taking loaded wheelbarrows from an elevator, rolling them along an elevated platform or scaffolding upon the seventh floor of a building in course of construction, and then unloading the same with a shovel, throwing the load, consisting of cement on the occasion of this accident, upon a platform some six or seven feet above that on which the wheelbarrow was standing. The accident, according to the plaintiff's testimony, which has been accepted by the jury, occurred while the plaintiff was shoveling the cement out of his wheelbarrow. It appears from the evidence that the platform was made of spruce scaffolding planks about 23 feet long, 12 inches wide, and 3 inches thick, supported at intervals of 10 or 12 feet by "horses." There were three of these planks placed side by side, and the evidence is undisputed that this scaffolding was a suitable scaffolding, strong enough, and built so that it did not fall. The only defect alleged in reference to this scaffolding is that, when the plaintiff set his wheelbarrow down and threw his weight upon one of the outside planks, it sagged about an inch, and, the wheelbarrow leg or support being upon this plank, it tipped over. The plaintiff was between the handles of the wheelbarrow, and was in the act of throwing a shovelful of the cement on the platform above, and the turning of the wheelbarrow threw him off from the scaffolding, precipitating him through a hole in the floor to the floor below, where he sustained injuries for which the jury has awarded him

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a verdict of $500. The defendant appeals from the judgment entered upon such verdict.

It seems entirely clear that the labor law never contemplated a fanciful degree of safety in a scaffolding erected for temporary purposes, and that the requirements of the statute are fully met when the master has created a scaffolding which is sufficiently strong in its materials and construction to remain in position, while it is in use for the purpose for which it is designed. The plaintiff seems to practically concede that this is the fair construction of the law, for little is predicated upon this feature of the case; stress being laid upon the alleged defects in the wheelbarrow, which permitted it to overturn, to the plaintiff's injury. The wheelbarrow described in the evidence is what is commonly known as a "Paddy's Gig," and consists of two handles, spreading 22 inches to 2 feet, and then running down to 8 or 10 inches to the point where the wheel is inserted; the same being surmounted by a sort of scoop-shaped body. There was considerable testimony in reference to alleged defects in this wheelbarrow, but the witnesses do not agree as to the defects, nor do any of them, so far as we are able to discover, show that the accident was due to any one of the alleged defects. The evidence does not attempt to show that any other style of wheelbarrow would have been safer, or would not have overturned under the same circumstances, though the plaintiff does suggest in his evidence that he had been used to a different style of wheelbarrow; but what this style was, or in what respect it would have prevented the accident, if the defendant had supplied the style which the plaintiff had previously used, does not appear. There is a suggestion that the scoop or body of this particular wheelbarrow was too high; that it was, when loaded, top-heavy. But in this respect it does not appear to have differed from the general run of this simple implement, and the top-heaviness, if it existed, was due, no doubt, to the method of loading, rather than to any inherent defect in the construction, of the wheelbarrow, which it was the duty of the master to take notice of in fulfilling his duty of supplying reasonably safe tools and appliances for the work to be done.

After giving full weight to the discussion of counsel, in an effort to distinguish the facts in this case from the principle enunciated in Marsh v. Chickering, 101 N. Y. 396, 5 N. E. 56, we are unable to discover any proper line of demarcation. In the case cited, which has been followed in many instances, and has the weight of authority, it was said that:

> "Where persons are employed in the performance of ordinary labor, in which no machinery is used, and no materials furnished, the use of which requires the exercise of great skill and care, it can scarcely be claimed that a defective instrument or tool furnished by the master, of which the employé has full knowledge and comprehension, can be regarded as making out a case of liability within the rule laid down. A common laborer, who uses agricultural implements while at work upon a farm or in a garden, or one who is employed in any service not requiring great skill and judgment, and who uses the ordinary tools employed in such work, to which he is accustomed and in regard to which he has perfect knowledge, can hardly be said to have a claim against his employer for negligence, if, in using a utensil which he knows to be defective, he is accidentally injured."

If the plaintiff had been engaged in working on a farm and had used a wheelbarrow to carry a fertilizer upon a scaffolding that he might

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throw it over a wall, and this same accident had happened to him, would the master be liable? Hardly. Why then should the master be liable here? All of the defects in the wheelbarrow, if they existed, were equally obvious to the plaintiff as to the defendant, and, beyond this, the accident was not one which the defendant was bound to anticipate would result from any defect which is alleged against this particular wheelbarrow. The truth is that the wheelbarrows of the class in use are designed for easy dumping, they are intended for a crude form of work, and their efficiency would be very largely reduced if the legs or rests under the body were as wide as the wheelbarrow. Indeed, they would be too cumbrous to be used. This accident happened, no doubt, because the load upon the wheelbarrow was so placed that, when the plaintiff set it down upon the planks, the greater part of the weight was upon the outside plank. When the plaintiff, in the act of throwing the shovelful of cement to the platform above, threw his whole weight upon the outside plank, there was a slight spring downward, and the wheelbarrow dropped over in that direction. If the wheelbarrow had been placed a little differently, so that the excess of weight had been on the second or third plank, the accident would not have happened, and it was not the duty of the master to anticipate the accident which has happened, for that was one of the details of the work, and the danger was one which was always as obvious to the plaintiff as it could have been to the master.

The judgment and order appealed from should be reversed, and a new trial granted, costs to abide the event.

JENKS and MILLER, JJ., concur. HIRSCHBERG, P. J., and RICH, J., vote for a modification of the judgment by striking out the provision for an extra allowance, for want of power in the trial court to grant the same, and, as modified, for the affirmance of the judgment and order, without costs.

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## HYDE v. ANDERSON et al.

(Supreme Court, Appellate Division, Second Department. March 22, 1906.)

1. COSTS—MOTIONS—JUDGMENT.

   Under Code Civ. Proc. § 779, providing that, where costs of a motion directed by an order to be paid are not paid within the time fixed, an execution may issue in the form as nearly as may be as an execution on a judgment, judgment may not be entered for costs allowed on a motion.

2. DISMISSAL AND NONSUIT — LEAVE OF COURT — CONDITIONS — PAYMENT OF COSTS—ORDER—DISCONTINUANCE.

   On plaintiff's motion for leave to discontinue, the entry of an order discontinuing the action and requiring plaintiff to pay full costs was error, as the order should only have imposed the costs as a condition of granting leave to discontinue.

Appeal from Special Term, Kings County.

Action by Benjamin Hyde against Charles W. Anderson and others. From an order denying a motion to vacate a judgment in favor of defendants for costs, plaintiff appeals. Reversed.

The plaintiff made a motion to the Special Term for leave to discontinue. Instead of making a conditional order that the plaintiff might discontinue

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on payment of costs, the court's order was a discontinuance of the action and that the plaintiff should pay full costs. On this the defendant had the clerk enter judgment for the costs. The plaintiff made a motion to the Special Term to set aside this judgment as unauthorized, and it was denied; and this appeal is from that order.

Argued before HIRSCHBERG, P. J., and WOODWARD, GAYNOR, RICH, and MILLER, JJ.

Sanders Shanks, for appellant.
Frederick W. Sparks, for respondent.

GAYNOR, J. The order should be reversed and the motion granted. The judgment was unauthorized; judgment may not be entered for costs allowed on a motion. Code Civ. Proc. § 779. Moreover, the order of discontinuance should not have been absolute, as it was. It could only impose the costs as a condition of discontinuance, and then the plaintiff would have been free to pay the costs and discontinue, or go on with the action.

Order reversed with costs and disbursements, and motion granted with costs. All concur.

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## In re WHITE PLAINS PRESBYTERIAN CHURCH.

(Supreme Court, Appellate Division, Second Department. March 22, 1906.)

MUNICIPAL CORPORATIONS—LOCAL IMPROVEMENTS—ASSESSMENTS.

Under Laws 1879, p. 397, c. 310, providing that no land actually used for cemetery purposes shall be sold for any tax or assessment, nor shall any tax or assessment be levied, collected or imposed so long as it shall continue to be used for cemetery purposes, no assessment for an improvement can be levied, though the improvement is authorized by a special act. Laws 1900, p. 1178, c. 497.

[Ed. Note.—For cases in point, see vol. 86, Cent. Dig. Municipal Corporations, § 1048.]

Application by the White Plains Presbyterian Church for a writ of certiorari to the board of trustees of the village of White Plains to review an assessment for macadamizing and improving a street in the village of White Plains made by the trustees of the village. Assessment corrected.

Argued before HIRSCHBERG, P. J., and WOODWARD, JENKS, and HOOKER, JJ.

William A. Woodworth, for relator.
H. T. Dykman, for respondent.

JENKS, J. This is a writ of certiorari to review an assessment for macadamizing and improving a street, laid in part upon the realty of the applicant located thereupon. The said lands have a frontage of 350 feet, of which 50 feet are occupied by a church edifice, and the remainder by a burial ground. The applicant concedes that the said 50 feet are subject to an assessment (but not in the amount apportioned), but contends that the remainder is wholly exempt under chapter 310, p. 397, of the Laws of 1879. That act reads:

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"Section 1. No land actually used and occupied for cemetery purposes shall be sold under execution or for any tax or assessment, nor shall such tax or assessment be levied, collected, or imposed, nor shall it be lawful to mortgage such land, or to apply it in payment of debts, so long as it shall continue to be used for such cemetery purposes.

"Sec. 2. Whenever any such land shall cease to be used for cemetery purposes, any judgment, tax, or assessment which, but for the provisions of this act, would have been levied, collected or imposed, shall thereupon forthwith, together with interest thereon, become and be a lien and charge upon such land, and collectible out of the same.

"Sec. 3. The provisions of this act shall not apply to any lands held by the city of Rochester."

I think that the lands of the relator are within the purview of the act. Our decision in Oakland Cemetery v. City of Yonkers, 63 App. Div. 448, 71 N. Y. Supp. 783, determines that said act is applicable notwithstanding the special act for this improvement. Section 1 of the act not only declares that such land shall not be sold under execution for any tax or assessment, but expressly prohibits the levy, collection or impost of any tax or assessment. It is contended that section 2 of the act necessarily implies that during the time that the lands are used for cemetery purposes there may be procedure in the levy or imposition of an assessment up to the collection thereof, and that, therefore, the assessment in this case may remain as laid but with the prohibition against collection, during such period. Personally, I am inclined to think that there is some force in that contention, for the reason that the scheme of the statute is not for exemption absolute, but exemption during the period that the land is used for such cemetery purposes. The expression of the said section that whenever the land shall cease to be used for cemetery purposes that any assessment, which would have been levied, collected or imposed "shall thereupon forthwith become and be a lien" is only fully satisfied by the condition that there is in existence some assessment perfected for collection, but suspended from collection by the act. This view is strengthened by the provision for "interest thereon." My associates, however, are of opinion that such construction cannot obtain for the reason that it is entirely antagonistic to the general declarative part of the act, the first section which in express terms prohibits the levy, collection, or impost, whereas it must be read as subordinate to it and in harmony with it. The court, then, is of opinion that the second section, so far as tax or assessment is concerned, refers to the period when the lands cease to be used for cemetery purposes. I admit that there is much that makes for this view, for it is said that othewise there is no exemption, but only deference of payment, and that practically there would be accumulated an enormous burden of taxes and assessments which might eat up the land. On the other hand, the absolute exemption and not deference of collection might well tempt speculators or property holders, by the devotion of lands to cemetery purposes for the time being, to obtain the benefits of taxation and assessment and avoid the burdens of them.

It is contended that there should be a discrimination made in the amount of the assessment for the reason that the lands of the applicant are used for a limited purpose, and that equality of assessment with other property of general use, is inequality in the eye of the law. The

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special act (chapter 497, p. 1178, of the Laws of 1900) for this improvement provides that the board of trustees shall fix the district of assessment of the property in the judgment of said board benefited. The trustees adopted the foot frontage plan. I think that this was within the statutory powers conferred upon them. See City of Ithaca v. Babcock, 72 App. Div. 260, 265, 76 N. Y. Supp. 49. I think that in a work of this character, namely, the macadamizing and improving of a street, it cannot be urged that the benefit to the cemetery lands of the relator is so much less than to other lands upon the street, as to make the uniform application of the foot frontage rule erroneous. See the discussion in People ex rel. Scott v. Pitt, 169 N. Y. 521, 62 N. E. 662, 58 L. R. A. 372. We also discussed the question of inequality in our decision in Matter of Phelps (decided by this court December 29, 1905). 96 N. Y. Supp. 862.

It follows that the assessment should be corrected by exemption of all of the property of the applicant from the impost, and hence the collection of this assessment, save in the case of the 50 feet thereof occupied by the church edifice, without costs. All concur.

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## KOSOWER v. SANDLER.

(Supreme Court, Appellate Term. March 15, 1906.)

1. APPEAL—HARMLESS ERROR.

Where a defense involved no controverted facts and the legal effect of the evidence concluded the case against plaintiff, errors on other issues did not affect the result.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 4083.]

2. JUDGMENT—RES JUDICATA—PERSONS CONCLUDED—PRIVITY.

In a proceeding by a landlord to dispossess a tenant, the latter asserted a new lease from a lessee of the landlord, and the issue was whether the lease covered the premises occupied by the tenant. The tenant had successfully resisted a prior proceeding by a third person under a lease of the landlord on the same issue. The prior proceeding was instituted with notice to the landlord, who was liable over to the third person if possession could not be acquired as against the tenant. *Held*, that the order in favor of the tenant in the prior proceeding was res judicata in the proceeding by the landlord.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, § 1207.]

On reargument. Former opinion reversed, and order of trial court affirmed.

For former opinion, see 96 N. Y. Supp. 734.

Argued before SCOTT, P. J., and BISCHOFF and MacLEAN, JJ

Feltenstein & Rosenstein, for appellant.

Steuer & Hoffman, for respondent.

PER CURIAM. While errors were committed at the trial, as pointed out in the opinion rendered upon the appeal, these errors would appear, upon further examination, to offend no substantial right of the appellant, since the final order was necessarily rendered in favor of the tenant respondent, in view of the defense of an estoppel by former



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adjudication. This defense involved no controverted facts, and the legal effect of the evidence was to conclude the case against the landlord; hence errors in the course of the litigation of other issues could not well have affected the result.

The landlord sought to dispossess the tenant as a hold-over, the tenant asserted a new lease from one Deutschman, a lessee of the same landlord, and the issue was whether this lease covered the premises occupied by the tenant. An earlier proceeding, instituted by one Rothman, another lessee of this landlord, against this tenant, was successfully resited by the tenant upon the same issue, to wit, the existence of a lease from the superior landlord, through Deutschman, covering, as matter of actual understanding between the parties, these same premises. Rothman could properly maintain that proceeding if Sandler's term had, as then alleged, expired (Gardner v. Keteltas, 3 Hill, 330, 38 Am. Dec. 637; Goerl v. Damrauer, 27 Misc. Rep. 555–557, 58 N. Y. Supp. 297), and the issue whether he had or had not a new lease was necessarily the direct question in the case. The earlier proceeding was instituted by Rothman, with notice to Kosower, the principal landlord, who was liable over to Rothman if possession could not be acquired as against that tenant (Sandler), and the issue was litigated with the substantial participation of Kosower, who was ultimately concerned.

Under these circumstances, the law finds privity between the immediate claimant and the person, not a party, who is liable over upon the same facts and who has had notice of the litigation which thus intimately concerns him, the rule being founded upon public policy, which does not favor a second litigation of facts once determined, substantially, as to all parties in interest, although not formally parties of record. Prescott v. LeConte, 83 App. Div. 482, 82 N. Y. Supp. 411; 178 N. Y. 585; Carleton v. L. A. & Co., 149 N .Y. 137, 43 N. E. 422. Within this rule the final order in favor of the tenant in Rothman's proceeding was an adjudication operative as against this landlord (Tyree v. Magness, 1 Sneed [Tenn.] 276), and the final order appealed from has thus apparent ground of support.

Final order affirmed, with costs.

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(49 Misc. Rep. 72.)

**PEOPLE ex rel. JEROME, Dist. Atty., v. GOFF et al.***

**(Supreme Court, Special Term, New York County. December, 1905.)**

PROHIBITION, WRIT OF—WHEN ISSUES.

Code Cr. Proc. § 466, provides that, except when made on newly discovered evidence, a motion for new trial must be made before judgment. *Held*, that a writ of prohibition will not issue to the Court of General Sessions, commanding it to desist from any proceedings on a motion for new trial made after conviction of a misdemeanor, as the Court of General Sessions will be presumed to construe the section correctly.

Application by the people, on the relation of William Travers Jerome, district attorney of New York county, for writ of prohibition to John W. Goff, recorder, and John Blake. Writ denied.

*For opinion in Appellate Division, see 98 N. Y. Supp. 557.

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William Travers Jerome, Dist. Atty., for the relator.

Osborne, Hess & Churchill (James W. Osborne, of counsel), for respondents.

FITZGERALD, J. Relator (the district attorney of the county of New York) applies for an absolute writ of prohibition commanding respondents (the Court of General Sessions and the recorder of the county of New York) "to desist and refrain from any further proceedings upon or under the motion made for a new trial by defendant John Blake." It appears that defendant (Blake) was convicted of a misdemeanor upon a trial in Part I of the Court of General Sessions during the November term, and it is conceded that the indictment upon its face establishes the fact that the prosecution of the act charged was barred by the statute of limitations. Code Cr. Proc. § 142. The attention of the trial court had not been called to this fact until after sentence had been pronounced and the part had adjourned sine die. A motion for a new trial was made in the Court of General Sessions, the same judge presiding, upon notice to the district attorney, and its consideration was objected to upon the ground that that court had lost all jurisdiction over its judgment, except to the extent of the power reserved by the statute for the granting of new trials upon the ground of newly discovered evidence. Notwithstanding this objection, the learned recorder proceeded to hear argument and adjourned the matter to a future time, with leave to counsel to submit further papers. Prior to the adjourned day an alternative writ of prohibition was issued out of this court, upon the application of relator, who now seeks a writ absolute.

Section 465 of the Code of Criminal Procedure confers upon the court in which a trial has been had power to grant a new trial upon various grounds, but the following section (466) provides that, except when made upon the ground of newly discovered evidence, the application must be made before judgment. Not always is the word "must" to be construed as mandatory. It has been construed as directory only. Matter of Hennessy, 164 N. Y. 393, 58 N. E. 466. The case of People, etc., v. Wooten, Criminal Term, Supreme Court, First Department (not reported), to which my attention has been called, appears to be an authority for the converse of the proposition for which the relator now contends. True in that case the term had been continued; but, if the strict construction now urged should be upheld, jurisdiction became exhausted upon the recording of the judgment, and an order made thereafter continuing the term could not revive a power already extinct. It was said in Appo v. People, 20 N. Y. 531, that the court does not become functus officio as to a particular case whenever sentence has been pronounced. Uniformity of practice is essential to the due administration of justice, and deviations therefrom are not only confusing and misleading, but it is obvious that these are among the slightest and least harmful of possibly resultant evils. The allowance of the remedy is largely discretionary, and, as in all other matters concerning prerogative writs, the power should be used with great caution and forbearance. "The writ of prohibition is an extraordinary remedy, and should be issued only in cases of extreme necessity." People ex rel. Burbank v. Wood, 21 App. Div. 245, 47 N. Y. Supp. 676. The construction of

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section 466 of the Criminal Code is properly before the Court of General Sessions, which court, it must be presumed, will construe it correctly. In State v. Price, 8 N. J. Law, 358, the writ was refused to restrain the Quarter Sessions from granting a new trial to defendant after the entry of final judgment of conviction. Applying the common-law rule that the issuance of the writ is not a matter of right, but rests in the sound discretion of the court to the facts presented upon this application, I have reached the conclusion that absolute prohibition cannot be granted, and that the alternative writ heretofore allowed must be vacated.

Settle order on notice.

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## KEENE v. NEWARK WATCH CASE MATERIAL CO.

(Supreme Court, Appellate Division, First Department. March 16, 1906.)

1. BONDS—ACTIONS—EVIDENCE.

Plaintiff contracted to furnish gold to the C. Watch Case Company; it agreeing to manufacture cases therefrom for plaintiff, to render an account, on demand, of the gold it had received, and to be answerable in damages for loss of gold furnished. *Held*, in an action on defendant's bond, that the C. Company should discharge its obligations under the contract, and that a statement as to the amount of gold furnished made on an accounting between plaintiff and the C. Company, an officer of defendant being present and participating, and all the parties then concurring in the statement, was competent evidence.

2. TRIAL—SUBMITTING CASE TO JURY.

Defendant, in an action on a bond to secure performance of the contract of the C. Company with plaintiff to account for gold furnished it by plaintiff to be manufactured into watch cases, and to be liable for loss of any gold furnished, cannot complain of refusal of its request to go to the jury; the only question that could have been presented being the amount of the C. Company's shortage, there being no dispute but that the parties to the original contract had an accounting, in which a representative of defendant took part, on which the amount of shortage was ascertained, and the statement then made being in evidence, and defendant having introduced no evidence.

3. PRINCIPAL AND SURETY—DISCHARGE OF SURETY.

Where plaintiff contracted to furnish gold to the C. Company for a certain time, in accordance with the needs of the company, to be manufactured into watch cases for plaintiff, and the company agreed to account at any time for gold received and to be liable for any lost, the obligation of defendant, under its bond that the C. Company should discharge at the termination of the contract its obligations, was not discharged by plaintiff refusing during the term of the contract to furnish more gold, and taking away the gold then in the possession of the C. Company; an accounting having been had showing loss of gold, and the C. Company having refused to make good the loss.

Appeal from Trial Term, New York County.

Action by Charles A. Keene against the Newark Watch Case Material Company. From a judgment on a verdict directed for plaintiff, defendant appeals. Affirmed.

Argued before O'BRIEN, P. J., and McLAUGHLIN, INGRAHAM, LAUGHLIN, and HOUGHTON, JJ.

Isaac L. Miller, for appellant.

George C. Harrison, for respondent.

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INGRAHAM, J. At the end of the testimony counsel for the defendant moved for the direction of a verdict for the defendant, and asked, if that motion was denied, that the defendant be permitted to go to the jury. That motion was denied, and counsel for the plaintiff moved for the direction of a verdict for the plaintiff, which was granted. The defendant made no request to submit any specific question to the jury.

The action was based upon a contract, a copy of which was annexed to the answer of the defendant, and a bond given by the defendant to secure the performance of that contract, a copy of which was annexed to the complaint. The contract was between the plaintiff, of the first part, and the Camm Watch Case Company, of the second part. By it the plaintiff agreed to "place into the possession of the party of the second part, for the purpose hereinafter mentioned, bars or quantities of gold of customary weight and fineness, to the value of four thousand ($4,000) dollars, currency of the United States of America"; that the defendant would use said gold so to be furnished in the construction and manufacture of watch cases of the character thereinafter mentioned; that the party of the first part (plaintiff) would continue to supply bars or quantities of gold in accordance with the needs and demands of the defendant, such needs and demands to arise solely by reason of and to be limited to the provisions and terms of the contract set forth, and in accordance with the needs of the business engaged in by the parties to the agreement; that the defendant would furnish the labor, machinery, alloy, and all other constitutent features incident to the production and making of the perfect complete watch case pursuant to and in accordance with the terms of this contract, the defendant to construct and have ready for the market a sufficient number of watch cases to satisfy the demands and needs of the business of, and in accordance with the orders given by the party of the first part (plaintiff), and to deliver reasonably promptly to the plaintiff all the watch cases manufactured by the defendant pursuant to the agreement, the title to all the gold supplied by the plaintiff to remain in the plaintiff from the delivery of the same to the defendant, throughout the manufacture of the watch cases constructed in accordance with the terms of the agreement and the return thereof to the party of the first part in watch case form; that the defendant would render an account to the plaintiff at the termination of the contract of all the gold it will have received during the existence of the agreement, and render an account at any and all reasonable times of the gold it had received upon the request of the party of the first part during the existence of the contract; that the account so made should be a basis for determining the status of the parties as to the value and amount of gold furnished by the party of the first part to the party of the second part, and delivered, actually or constructively, by said party of the second part to the party of the first part in watch case form, the party of the second to be answerable in damages to the party of the first part for any loss in gold furnished under the provisions of the contract, the party of the second part to deliver at the office or place of business of the party of the first part, in the city of New York, borough of Manhattan, all the gold in gross remaining in the factory of the party of the second part, at the

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termination of the contract, for the purpose of finally settling accounts between the parties.

To secure the performance of this contract by the Camm Watch Case Company, the bond was given by which the Camm Watch Case Company, as principal, and the defendant, as surety, were held and firmly bound unto the plaintiff in the sum of $10,000; the condition being that if the principal (the Camm Watch Case Company) "shall well and truly discharge, at the termination of the said contract referred to herein, the obligations arising as hereinbefore set forth, that then these presents shall be and become null and void." It was further understood, covenanted, and agreed "that the New York Watch Case Material Company shall only be liable to the said Charles A. Keene, the obligee herein, for any loss of gold in an amount in excess of one-half of one percentum of all the gold furnished under the contract referred to herein."

The complaint alleges that, in accordance with the agreement between the plaintiff and the Camm Watch Case Company, the plaintiff furnished to the Camm Watch Case Company gold bars and materials of the value of $49,000 from the 8th day of May, 1901, until the 1st day of September, 1901, and received from the said company gold watch cases in return; that on the last-mentioned day the plaintiff demanded an accounting of the gold received by the Camm Watch Case Company, and, upon an inventory being made of the plaintiff's gold in the factory of the said company, a shortage was disclosed in the gold furnished by the plaintiff of the value of about $5,600.15; that the plaintiff thereupon demanded that the said Camm Watch Case Company make good the loss of gold by delivering to him gold sufficient to balance the gold account, or give a cash equivalent therefor, with which demands the said company had not complied, and therefore there was a loss of $5,600.15, the value of the said gold.

The defendants demurred to this complaint. The demurrer was overruled at the Special Term (39 Misc. Rep. 8, 78 N. Y. Supp. 753), and that judgment was affirmed by this court (81 App. Div. 48, 80 N. Y. Supp. 859). Upon the trial the only question to be determined was as to the damage that the plaintiff sustained by reason of the loss of gold which had been furnished by the plaintiff to the Camm Watch Case Company, and whether the said company had satisfied all claims and obligations arising because of any loss in said gold so furnished. At the time the contract was executed there was gold in the Camm Watch Case factory of the value of $4,000, for which the plaintiff paid to the Camm Company that amount. The plaintiff then continued to furnish gold as called for by the Camm Watch Case Company until September, 1901. Some time between the 9th and the 23d of September, 1901, the plaintiff demanded an accounting from the Camm Company under the ninth clause of the contract. A detailed statement of the amount of gold furnished by the plaintiff was made up, containing the dates and amounts of the delivery of gold, which aggregated $48,012.74. There was a meeting at the office of the Camm Company between the plaintiff and one of his employés, Mr. E. W. Camm, the president of the Camm Company, and a Mr. Arthur, the secretary of the defendant. These parties appear to have all taken part in this accounting.

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Each had a statement of the amount of gold furnished, and they all tallied, and the amounts were checked up and balanced. At the foot of this agreement the president of the Camm Watch Case Company marked, "O K, E W Camm." This statement was received in evidence over the objection and exception of the defendant, and this exception is relied upon by the defendant on this appeal.

We think this evidence was properly admitted. The accounting was one under the contract which was recited in the bond upon which the action was brought. An officer of the defendant was present at this accounting and took part in it. It certainly was competent evidence against the defendant of an accounting between the defendant and the plaintiff as to the amount of gold furnished by the plaintiff under the contract. At the same time there was an accounting as to the amount of gold that had been delivered by the Camm Watch Case Company to the plaintiff. The gold on hand was produced by the Camm Company, and it was ascertained that there was a shortage of about $5,600. The plaintiff then insisted on removing the gold that was on hand, which he claimed belonged to him. This the officer of the Camm Company objected to, but the plaintiff finally took away the gold and refused to furnish any more until the Camm Company had supplied this deficiency. This the Camm Company refused to do. No further effort was made on behalf of the Camm Company to perform its agreement, and after the termination of the contract this action was brought.

The plaintiff having rested, no evidence was offered by the defendant to disprove these facts, and the evidence sustained a verdict for the amount of this deficiency. The plaintiff having rested, the defendant's counsel said:

"I move for a direction of a verdict for the defendant, and, if your honor denies my application for a direction, then I ask that it be permitted to go to the jury."

This motion was denied. The plaintiff then moved for the direction of a verdict, and counsel for the defendant then said:

"In order to get it on the record I except to the court declining to direct a verdict for the defendant, and I also except to the refusal of the court to allow the defendant to go to the jury."

The defendant made no request to submit any particular question to the jury, and I think upon this record it was not error for the court to refuse to entertain the defendant's request. The only question that could have been presented was as to the amount of this shortage, but there was no dispute but that the parties to the original contract had an accounting under the contract in which a representative of the defendant, the surety, took part and the amount of the shortage had then been ascertained. If the defendant had wished to submit this specific question to the jury, it should have called the attention of the court to the question, and a general request to go to the jury, or to submit the case to the jury generally, was not calling the attention of the court to a specific question, and as the plaintiff was clearly entitled to a verdict an exception to such a refusal presents no question for review.

There is no merit in the claim of the defendant that, by the plain-

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tiff's refusing to allow the gold that it had furnished to remain with the Camm Watch Case Company after that company had violated the contract in disposing of gold furnished by the plaintiff under the contract, the obligation of the surety was discharged or that plaintiff was bound to continue to furnish gold to the Camm Company. It was proved that the Camm Company had over $5,000 of gold of the defendant which it had failed to account for. The obligation of the plaintiff was to furnish gold as required by the contract; and, while this gold was in the possession of the Camm Company, no further gold was required for the purposes on the contract. Plaintiff was not required to continue to furnish gold to the Camm Company or to its officers when it was conceded that they had an amount of gold exceeding $5,000 belonging to the plaintiff, which they could use in carrying out the contract. It was not, therefore, a breach of the contract for the plaintiff to refuse to furnish further gold, or to allow the gold that he had delivered to the Camm Company to remain in its possession. At the termination of the contract, the Camm Company having failed to comply with its contract and to account for the gold plaintiff had delivered, there was a breach of the condition of the bond which entitled the plaintiff to recover.

I think the judgment was right, and should be affirmed, with costs. All concur.

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## LAYTON v. KRAFT et al.

(Supreme Court, Appellate Division, First Department. March 16, 1906.)

1. EVIDENCE—MATTERS OF PEDIGREE—RECORDS—AUTHENTICATION.

The records of births and marriages made by a clerk of a church corporation from information furnished by the pastors of the congregations belonging to the corporation are admissible on the issue of pedigree, without proof as to the handwriting of the entries, or as to who was clerk of the corporation at the time they were made, and without showing a rule requiring the keeping of such records.

2. SAME—ANCIENT DOCUMENTS.

Records of births and marriages in existence for a century, coming from a proper custody, are ancient documents, and prove themselves.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 1614–1618.]

3. SAME—MATTERS OF PEDIGREE—DECLARATION OF DECEASED MEMBERS OF FAMILY—PRELIMINARY PROOF.

Where the records of births and marriages made by the clerk of a church corporation show that a third person was a member of the family of plaintiff's grandmother and great grandmother, who are dead, their declarations as to the relationship of the third person and her mother to plaintiff's grandmother, and their declarations as to the death of other members of the family without issue, are admissible on the question of pedigree.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 1152.]

4. SAME—ERRORS IN RECORDS—EFFECT.

The records of births made by a clerk of a church corporation contained a mistake as to the maiden name of the mother, it being spelled Bokee, Bookee, Bohea, Bockee. The name of the father was given as Heyer or Hyer. *Held*, that the mistakes did not render the records inadmissible on the issue of pedigree.

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Appeal from Trial Term, New York County.

Action by Edward A. Layton against Elizabeth A. Kraft and others. From a judgment for defendants, and from an order denying a motion for a new trial, plaintiff appeals. Reversed.

Argued before O'BRIEN, P. J., and McLAUGHLIN, PATTERSON, LAUGHLIN, and HOUGHTON, JJ.

Rastus S. Ransom, for appellant.

Morris A. Tyng, for respondents.

HOUGHTON, J. Although Anna E. St. John left a will, it is conceded that she died intestate as to the real property described in the complaint. The action is in partition, the plaintiff alleging that he and his sister, the defendant Kraft, are the only heirs at law of the deceased. The relationship claimed is that the plaintiff's grandmother was a sister of the mother of the deceased. The grandmother's name was Maria Hyer, and she married Alexander Tullock, and plaintiff asserts that the mother of the deceased was Hannah Eliza Hyer, who married Francis Bos, and that both were children of Daniel Hyer, who married Catherine Bokee.

The plaintiff was sworn as a witness in his own behalf, and testified that he was born in 1845, and that his mother, Jane B., who had married his father, Edward C. Layton, died when he was 15 years of age; that his grandmother, Maria Tullock, died when he was 17 years of age; that his great grandmother, Catherine Hyer, died when he was 24 years of age; and that during his boyhood they all constituted one family. Both the grandmother and the great grandmother were then widows; the grandfather, Alexander Tullock, and the great grandfather, Daniel Hyer, having died before plaintiff was born. As a boy plaintiff knew Anna E. St. John when her former husband, Charles E. Burton, was living, and he testified that she visited his grandmother and great grandmother, and was known as their niece. These facts were practically all the personal knowledge that the plaintiff had with respect to the identity of his ancestors. That his grandmother was married to Alexander Tullock, and that her maiden name was Maria Hyer, and that his great grandmother was married to Daniel Hyer, and that her maiden name was Catherine Bokee, and that the name of one of his great grandmother's children was Hannah Eliza, and that she married Francis Bos, and that their only child was the deceased, and that the other descendants of Daniel Hyer and his wife, Catherine, died in infancy, or without issue, he learned only by the various declarations of his ancestors, which were, of course, hearsay. All of the family lived in Brooklyn, and the plaintiff was born there.

In order to meet the rule requiring it to appear that the persons making the declarations were members of the family whose relationship was sought to be proved, and to show that the deceased, Anna E. St. John, was a member of that family, plaintiff produced the witness Emma L. J. Schoonmaker, who testified that she knew Mrs. St. John, and lived in her father's family; that her father's name was Francis Bos; that she had heard Mrs. St. John speak of her mother's mother, "Grandmother Hyer," who was dead, and of her uncles and aunts on her

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mother's side, the Tullocks, and their children, the Laytons, or Claytons as the witness understood the name, and had heard her say that her mother died in her own infancy.

To further meet the rule as to the declarations, the plaintiff offered in evidence certain letters and receipts addressed to and held by the Tulloch and Layton families and inscriptions on tombstones; and also the record of baptisms of the Collegiate Reformed Church of the city of New York, showing that Maria, a child of Daniel Heyer and Catherine Bokee, was born February 7, and baptized February 28, 1798; and that Hannah Eliza, a child of Daniel Heyer and Catherine Bohea, was born September 13, and baptized October 19, 1801, and that other children of Daniel Heyer (or Hyer) and Catherine Bokee (or Bohea, or Bookee, or Bockee) were baptized at various times to the year 1809, and that Alexander, a child of Alexander Trulloch and Maria Hyer, was born December 2, and baptized December 15, 1819. There was also offered in evidence the record of marriages of said church, showing that on March 10, 1819, Alexander Tulloch and Maria Heyer were married, and that on May 24, 1823, Francis Bos and Hannah Hyer were married, and the register of deaths and burials of said church, showing that Hannah E. Boss was buried January 25, 1825. The Collegiate Reformed Church, first established on Manhattan Island in 1628, is a corporation, and has several congregations. The records of marriages and births are furnished by the various pastors of the congregations to the clerk of the corporation, and the record is made by him in books kept for that purpose. There was no proof as to the handwriting of any of the entries offered in evidence, or as to who was clerk of the church corporation at the time they were made; but they were produced as the records of the church, by its clerk, to whom they came from his predecessor in office. The trial court held that there was not sufficient proof of authenticity of these records to entitle them to be received in evidence. The court also held that without them there was no independent proof that plaintiff's ancestors were members of the family of Anna E. St. John, the deceased, sufficient to entitle declarations of deceased persons to be given in evidence, and on motion struck them from the case, and directed the jury, upon the framed issues, to find a verdict against the plaintiff.

We think the court erred in not receiving the records offered in evidence. The issue presented was one of pedigree simply. Pedigree is the history of family descent, which is transmitted from one generation to another by both oral and written declarations, and, unless proved by hearsay evidence, not competent in general issues, it cannot in most instances be proved at all. Matters of pedigree consist of descent and relationship evidence by declarations of particular facts, such as births, marriages, and deaths. In such cases hearsay evidence of declarations of persons who from their situation were likely to know is admissible when the person making the declarations is dead. Before these declarations can be received in evidence, however, it must appear that the person making them was a member of the family whose descent is sought to be traced. Only slight proof of the relationship will be required, since the relationship of the declarant with the family might be as difficult to prove as the very fact in controversey. Young

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v. Shulenberg, 165 N. Y. 388, 59 N. E. 135, 80 Am. St. Rep. 730; Eisenlord v. Clum, 126 N. Y. 563, 27 N. E. 1024, 12 L. R. A. 836; Fulkerson v. Holmes, 117 U. S. 397, 6 Sup. Ct. 780, 29 L. Ed. 915. Cases of pedigree are peculiar, in that they depend almost exclusively upon presumption, which is a process of probable reasoning from facts established or judicially noticed; and the weight to be given this character of evidence depends upon the facts surrounding each particular case. Identity of name raises a presumption of identity of person, where there is similarity of residence, or trade, or circumstances, or where the name is an unusual one. Lawson on Presumptive Evidence, Rule 57, p. 306. Identity of name is prima facie evidence of identity of person. Young v. Shulenberg, supra; Stebbins v. Duncan, 108 U. S. 32, 47, 2 Sup. Ct. 313, 27 L. Ed. 641; People v. Snyder, 41 N. Y. 397, 403; Hatcher v. Rocheleau, 18 N. Y. 86; Mahaney v. Mutual Reserve Ass'n, 69 Hun, 12, 16, 23 N. Y. Supp. 213; Trebilcox v. McAlpine, 46 Hun, 469, 473; Spotten v. Keeler, 22 Abb. N. C. 105. In a case of identity of name the presumption arises from the improbability that different persons have the same name, and therefore the onus is cast upon the party denying the identity to show that the name relates to a different person. People v. Smith, 45 N. Y. 772, 779. Mere misspelling of a name, where there is not such difference as to make it a distinct name, does not affect the identity of the person. Jackson v. Boneham, 15 Johns. 226, Jackson v. Cody, 9 Cow. 140, 147. From the nature of the case, a question of pedigree forms an exception to the general rule as to the proof of a particular fact by hearsay, reputation, or tradition; and, in addition to the declarations of deceased persons who were likely to know, unauthenticated facts and entries, made presumably with no motive to deceive—such as an entry in a family Bible, an inscription on a tombstone, a pedigree hung up in a family mansion, and recitals in deeds—are competent evidence upon that issue. Jackson v. Cooley, 8 Johns. 128, 131; Young v. Shulenberg, supra.

Notwithstanding the fact that proof of handwriting was not made, and that there was no evidence that the entries were in the handwriting of one who was then clerk of the Collegiate Reformed Church of the city of New York, or that there was a rule of the church requiring such records to be kept, we think the records of marriages and baptisms and deaths kept by that church were competent evidence, and should have been received upon the trial. These same records were received in evidence and held proper in Jackson v. King, 5 Cow. 237, 15 Am. Dec. 468, and were there considered of such a public nature that an exemplified copy might be used. In Jacobi v. Order of Germania, 73 Hun, 602, 26 N. Y. Supp. 318, and in Hartshorn v. Metropolitan Life Ins. Co., 55 App. Div. 471, 67 N. Y. Supp. 13, records of baptism kept by the pastor of a church were held competent for the purpose of showing, not when the person was born, but when he was baptized, which must have been after his birth. These authorities are said not to be applicable to the present question, because it was there shown that the records were kept by the pastors of the churches, and in the present case the record was kept only by the clerk. Nevertheless, they are records of the church, and in its custody, preserved by it, and presumably made by some one in authority. The

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church, as a corporation, had several congregations, in charge of different pastors. Each pastor might have kept a record of such marriage ceremonies as he performed, and such baptismal services as he held. If this had been done, doubtless no question would have been made as to the competency of the record. We are of the opinion that that competency with respect to pedigree was not destroyed by the fact that one general record was kept by the clerk of the church corporation of the acts of this character of the several pastors of the various congregations. There is no reason to doubt the truthfulness of the records, or to assume that they were made from any improper motive. Besides, they were ancient documents, and had been in existence for a century. They came from the custody which must be deemed proper, and that proved themselves. The general rule is that an ancient record or document, if it comes from a custody which the court deems proper, and is itself free from any indication of fraud or invalidity, proves itself. Matter of Webster, 106 App. Div. 360, 94 N. Y. Supp. 1050. Had the records been received in evidence, they would have tended to show that Anna E. St. John was a member of the family of plaintiff's grandmother and great grandmother, who were dead, and their declarations as to the relationship of Anna and her mother to the plaintiff's grandmother would have been proper, as well as their declarations as to the decease of other members of the family without issue. If the view that these records should have been received in evidence is correct, inasmuch as a new trial must be had, it is unnecessary to pass upon the question whether or not the plaintiff produced other evidence sufficient to render these declarations competent, for the records can then be introduced, and they will themselves furnish prima facie proof of common ancestry sufficient to make those declarations admissible.

Little significance, it seems to us, should be attached to the fact that Catherine Bokee's name is spelled in different ways. Daniel Hyer or Heyer is the father mentioned throughout the record, and Catherine is the mother named. That a mistake was made with respect to her maiden name of course raises a question of fact as to whether or not she is the same person, but not so serious a one as to prevent the introduction of the record in evidence.

Our conclusion is that the judgment and order should be reversed, and a new trial granted, with costs to the appellant to abide the event. All concur.

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(111 App. Div. 616.)

## DWIGHT v. LAWRENCE.

(Supreme Court, Appellate Division, First Department. March 9, 1906.)

1. APPEAL—QUESTIONS REVIEWABLE.

Whether or not the interests of certain parties to a partition suit are properly defined by the decree is immaterial on an appeal in which they do not appear as appellants, and in which the interest of appellant is in no way affected by the interests of such other parties.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3584–3590.]

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2. PARTITION—JUDGMENT—PARTIES CONCLUDED.

Under Code Civ. Proc. § 1557, providing that a judgment in partition is conclusive upon each person claiming through a party to the suit, and section 1577, providing that, if a partition sale is confirmed, the judgment is binding upon the same persons by whom a final judgment of partition is made binding by section 1557, a judgment in partition, in which all of the parties who at that time had any interest in the property were before the court was sufficient to give the purchaser at the sale a good title, although there might thereafter be unborn children who might have an interest in a part of the estate held as executor and trustee by a party to the suit.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Partition, §§ 51, 393.]

Appeal from Special Term, New York County.

Action by Julia L. Dwight against Edgar V. Lawrence and others. From a judgment for plaintiff, the defendant named and others appeal. Affirmed.

See 90 N. Y. Supp. 970.

Argued before O'BRIEN, P. J., and INGRAHAM, McLAUGHLIN, LAUGHLIN, and HOUGHTON, JJ.

Charles L. Hoffman, for appellant.

De Lagnel Berier, for respondent.

W. H. Van Steenbergh, guardian ad litem of infant defendant, Katherine R. Neumann.

PER CURIAM. The judgment appealed from must be affirmed. It properly directs a sale of the property affected. It is perfectly obvious, under the proofs presented, that an actual partition could not be made so as to do justice to all of the parties interested. Under the judgment appealed from, the plaintiff is entitled to an undivided one-fourth interest, the appellant individually, and as sole heir at law of Samuel R. Lawrence, who has died since the appeal was taken, is entitled to an undivided one-half interest, and the remaining one-fourth interest is held by Gaines Lawson as executor and trustee under the last will and testament of Laura Lawson, deceased, in trust to pay the income therefrom, one half to the defendant Katherine L. Neumann during her life, and the other half to Lawrence M. Lawson during his life. The defendants Katherine L. Neumann, Lawrence M. Lawson, and the infant defendant, Katherine R. Neumann, have an interest, either vested or contingent, in this remainder; but it is immaterial whether or not such interest be correctly stated in the judgment, inasmuch as none of them have appealed therefrom, and this part of the judgment in no way affects or concerns the appellant. It is sufficient to say that a purchaser upon the sale will obtain good title, inasmuch as there are now before the court all of the parties who at the present time have any interest in the subject-matter of the sale. Sections 1557, 1577, Code Civ. Proc. The fact that there may hereafter be unborn children who might have an interest in the one-fourth interest, or some part thereof now held by Gaines Lawson as executor and trustee, could not affect the title, because "the persons first entitled to which, or virtual representatives whereof," are parties to the action. Subdivision 3, § 1557, Code Civ. Proc. The only appellant is Edgar V. Lawrence.

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The plaintiff, after deducting the costs and expenses of the sale, will be entitled to one-fourth of the proceeds, the appellant to one-half, and the defendant Gaines Lawson, as executor and trustee under the last will and testament of Laura Lawson, to the remaining one-fourth; the same to be held by him in trust, and to be disposed of in accordance with the terms of such will.

The judgment appealed from, therefore, is affirmed, with costs to the respondent.

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(111 App. Div. 553.)

## CORN EXCH. BANK v. PEABODY et al.

(Supreme Court, Appellate Division, First Department. March 9, 1906.)

1. TROVER AND CONVERSION—MEASURE OF DAMAGES.
   In the absence of special circumstances in an action for conversion of personal property, the value of the property at the time of the conversion, with interest, is the measure of damages.
   [Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trover and Conversion, §§ 254, 263, 264.]

2. COURTS—RULES OF DECISION—PREVIOUS DECISIONS—DICTA.
   A decision has no binding force as a precedent, excepting so far as it determines the questions then before the court.
   [Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Courts, §§ 311-340.]

3. APPEAL—HARMLESS ERROR—INSTRUCTIONS.
   Error in instructing that the measure of damages for conversion is the highest value of the article converted from the time of the conversion to the time of trial is not rendered harmless by the fact that the only evidence of value given by the plaintiff was the value at the time of the conversion, and that the jury gave a verdict for a larger amount than the value shown by defendant's evidence to be the value at a later date.

Appeal from Trial Term, New York County.

Action by the Corn Exchange Bank against Henry W. Peabody and others. From a judgment in favor of plaintiff, and from an order denying a new trial, defendants appeal. Reversed.

Argued before O'BRIEN, P. J., and McLAUGHLIN, PATTERSON, LAUGHLIN, and HOUGHTON, JJ.

W. P. Prentice, for appellants.

John M. Bowers, for respondent.

McLAUGHLIN, J. This action was brought to recover the value of certain goatskins alleged to have been wrongfully converted by the defendants. These skins, consisting of two lots, one designated M. H. S. C. V. and the other D. R., were stored by plaintiff's assignor at different times with one Weber in warehouses kept by him. The defendants had also stored similar skins in the same warehouses. The warehouseman made a general assignment for the benefit of creditors, and thereupon the defendants, being unable to obtain possession of their skins from the assignees, brought an action for that purpose. A writ of replevin was issued, under which the defendants, acting through the sheriff, took possession of a large number of skins, including those alleged to belong to the plaintiff, which were subsequently sold. The plaintiff al-

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leged in its complaint that the value of the skins taken was $18,128.83, for which judgment was demanded, besides interest. The defendants denied not only the conversion, but also that the skins were of the value alleged. At the trial much evidence was given by both parties bearing upon the question of the conversion and the identity of the skins, as well as their value; the plaintiff's proof tending to show that the value of the M. H. S. C. V. skins was $8,290.06, and the value of the D. R. skins $7,175, making in all $15,465.06, while the defendants' proof tended to show that the skins were of much less value, especially the D. R. skins. The jury evidently accepted the testimony offered on the part of the plaintiff as correctly stating the value of the skins by rendering a verdict in its favor for $19,206.06, which was the value of the skins as stated by plaintiff's witnesses, together with interest from the time the conversion took place to the time of the trial. Judgment was entered upon the verdict, and defendants appeal.

Numerous errors are alleged as calling for a reversal of the judgment, both as to the admission and rejection of evidence, and especially as to the sufficiency of the proof to establish that all of the skins for which an award has been made belonged to the plaintiff. These questions, or some of them, would require very serious consideration, but, inasmuch as we are all agreed there must be a new trial on account of an error in the charge, and they may not again be presented, it is unnecessary to pass upon them.

The value of the skins taken was one of the questions seriously contested at the trial, and, while there was no great difference between the parties as to the value of the M. H. S. C. V. skins, there was a very material difference as to the value of the D. R. skins; the plaintiff's testimony tending to show that they were worth in February, when the conversion took place, at least 35 cents per pound, while the testimony on the part of the defendants tended to show that they were worth at most from 10 to 17 cents per pound. All of the skins were sold by the defendants, and there does not seem to be any serious question raised but what they obtained the best possible price at such sales, the M. H. S. C. V. skins bringing $7,680.94, and the D. R. $1,929.90, making in all $9,610.84; yet the jury found that the value of the skins was several thousand dollars more than the amount realized by the defendants. Bearing upon the question of the value of the skins, the learned trial justice, in submitting the case to the jury, said:

"The plaintiff is entitled to recover the highest value of the article converted, if you find there was a conversion in this case, from the time of the conversion to the time of the trial, and he is also entitled to recover as damages interest upon such value."

An exception was duly taken to this portion of the charge, and the plaintiff's counsel, evidently realizing that it was not the proper rule, immediately said: "I am perfectly willing that should be corrected," to which the court responded: "I refuse to correct it, and refer you both to Flagler v. Hearst, 91 App. Div. 12, 86 N. Y. Supp. 308. I reiterate that charge. It is the rule of damages in conversion cases." The learned court was in error. It is not the proper rule of damages in actions of conversion. As I understand it, the general rule is this: In

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the absence of special circumstances, in an action for conversion of personal property, the value of the property at the time of such conversion, with interest, is the measure of damage. This is fair to both parties. It compensates the one for the loss sustained, and compels the other to pay that loss for the wrong committed. Matthews v. Coe, 49 N. Y. 57; Baker v. Drake, 53 N. Y. 211, 13 Am. Rep. 507; Ormsby v. Vermont Copper Mining Co., 56 N. Y. 623; Parsons v. Sutton, 66 N. Y. 92; Barnes v. Brown, 130 N. Y. 372, 29 N. E. 760; Parmenter v. Fitzpatrick, 135 N. Y. 190, 31 N. E. 1032. No special circumstances were alleged in the complaint, nor were any facts proved upon the trial to take this case out of the general rule. The plaintiff was entitled to recover, if at all, the value of the skins at the time the conversion took place, together with interest thereon to the time of trial. He was not entitled to recover their highest value between the time of conversion and the time of trial. I have been unable to find a single authority in this state which sustains the instruction given other than Markham v. Jaudon, 41 N. Y. 255, which was expressly overruled by Baker v. Drake, supra. Flagler v. Hearst, 91 App. Div. 12, 86 N. Y. Supp. 308, relied upon by the trial court, does not sustain it. That was an action for the conversion of a yacht, which was afterwards returned to the plaintiff, who had a recovery, and defendant appealed. One of the errors alleged as calling for a reversal of the judgment was that the jury had been erroneously instructed as to the measure of damage. The trial court laid down the rule that the plaintiff's measure of damage was the value of the use of the yacht and the damage that she had suffered during the time she was in possession of the defendant. This was held to be erroneous, and for that reason a new trial was ordered; and, while there are expressions in the opinion to the effect that the plaintiff was entitled to recover the highest value of the yacht from the time the conversion took place to the time of the trial, such expressions have no binding force except as applied to that case. A decision has no binding force except in so far as it determines the question then before the court. This rule was reiterated by the Court of Appeals in the recent case of Crane v. Bennett, 177 N. Y. 106, 69 N. E. 274, 101 Am. St. Rep. 722, where the court said:

> "It was not our intention to decide any case but the one before us, * * * and our opinion should be read in the light of that purpose. If, as sometimes happens, broader statements were made, by way of argument or otherwise, than were essential to the decision of the questions presented, they are the dicta of the writer of the opinion, and not the decision of the court. A judicial opinion, like evidence, is only binding so far as it is relevant, and, when it wanders from the point at issue, it no longer has force as an official utterance."

Besides, in the Flagler Case there were special circumstances which took it out of the general rule.

But it is urged by the respondent's counsel that, even if the instructions of the court as to the measure of damage were an incorrect statement of the law, nevertheless the judgment ought not to be reversed, because such instructions could not have had any effect upon the verdict. What is claimed in this respect is that the evidence offered by the plaintiff tended to show the value of the skins at the time the conver-

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sion took place, and not at a subsequent date; that the only evidence of value of any other date than the date of conversion was introduced by the defendants, and for the most part consisted of proof of the disposition of the goods at a later date, which showed a value slightly less as to the M. H. S. C. V. skins, and much less as to the D. R.; and, as the highest value proved was of the date of the conversion, it was immaterial that the jury should be instructed, if they found a conversion, they should award the highest value between the date of conversion and the date of trial. This reasoning is plausible, but not sound. The value of the goods, as already said, was one of the serious questions litigated. Plaintiff was not entitled to the highest value, but to the actual value of the goods at the time the conversion took place, and, in determining what such actual value was at the date the conversion took place, the jury had a right to consider—indeed they were bound to consider—all of the evidence offered by both parties bearing on that subject, and this included what the skins brought when sold. Parmenter v. Fitzpatrick, supra. The instructions practically withdrew from the jury the defendants' evidence bearing upon the subject of value, and left simply the plaintiff's evidence to be considered, because that established the highest value. The jury could not, under the instruction, weigh all the evidence, and from that determine what the value was at the time of the conversion.

The case was submitted to the jury upon an erroneous theory as to the measure of damage. The instructions permitted them to award damages to which the plaintiff was not entitled. That the defendants were prejudiced by these instructions is sufficiently evidenced by the verdict rendered, and therefore justice requires there should be a new trial.

The judgment and order appealed from is reversed, and new trial ordered, with costs to appellants to abide event. All concur.

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(111 App. Div. 613.)

## LANGE et al. v. SCHILE.

(Supreme Court, Appellate Division, First Department. March 9, 1906.)

1. ACTION—NATURE AND FORM—CONTRACT—REPORT.

The complaint alleged that plaintiff's testator had placed a sum of money in defendant's hands for the purpose of paying claims which might be established during testator's absence, or of restoring to him the money on his return if the same had not been paid out, and that on the return of plaintiff's testator he requested defendant to pay claims owing by him. It then alleged that plaintiff made a demand for the return of the amount remaining in defendant's hands, and that the said defendant wrongfully and unlawfully refused to turn over and pay to the plaintiff the said amount, and converted the same to his own use. *Held*, that the action was not in tort, but for money received.

2. SAME.

If the cause of action set forth is doubtful or ambiguous, every intendment is in favor of construing it as being an action ex contractu.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Action, § 163.]

Appeal from Special Term, New York County.

Action by Frederick Lange and others against Romeo H. Schile.



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From an order affirming the taxation of costs by the clerk, and dismissing an appeal to the special term therefrom, defendant appeals. Reversed.

Argued before O'BRIEN, P. J., and PATTERSON, INGRAHAM, LAUGHLIN, and CLARKE, JJ.

E. W. S. Johnston, for appellant.
G. M. S. Schultz, for respondents.

PATTERSON, J. The court at Special Term denied a motion made by the defendant for a retaxation of costs, and affirmed the taxation of such costs by the clerk of the city and county of New York, who allowed the plaintiff the amount of $25 as costs before notice of trial. The defendant insists that such costs should have been taxed at $15. Whether the one or the other amount should be allowed depends upon the nature of the action, namely, whether it is upon contract or in tort. Section 3251, Code Civ. Proc. In support of the order, it is insisted by the respondent that the averments of the complaint set forth a cause of action for the conversion of money belonging to the plaintiff's testator. The allegations of that pleading are that Henry J. Schile, plaintiff's testator, in June, 1900, gave into the possession of the defendant moneys amounting to the sum of $4,317.74—

"The defendant agreeing to deposit the same in a trust company, and to apply the same to the payment of certain claims and liens which had been filed against real property owned by the said Henry J. Schile in the city of New York, and which were then being litigated, in the event of said litigation terminating prior to the return of the said Henry J. Schile to the city of New York; and if the litigation had not then terminated, or if it had terminated and the defendant had not paid over the said moneys, then to return the said amount, with such interest as had accrued thereon, to the said Henry J. Schile upon his return, as aforesaid."

The plaintiff then proceeds to state in the complaint that on the 1st of September, 1900, Schile returned to the city of New York; that the defendant at that time had possession of the money, and that Schile then requested the defendant to pay claims owing by him (Henry J. Schile); that such payments were made so as to reduce the sum in the defendant's hands to $3,012.62. After setting forth the death of Henry J. Schile and the appointment of the plaintiffs as executors, the complaint contains the allegation that the plaintiffs made a demand for the return of the amount remaining in the defendant's hands, but that the said defendant wrongfully and unlawfully refused to turn over and pay to the plaintiffs the said amount, and converted the same to his own use, to the damage of the plaintiffs, as executors, as aforesaid, in the sum of $3,012.62; wherefore the plaintiffs demanded judgment for that sum of money, with interest.

The contention of the respondent is that this complaint charges that the defendant, acting in a fiduciary capacity, charged with a specific duty concerning the moneys in his hands, violated his trust, and converted those moneys to his own use. It is quite apparent from the allegations of the complaint that if a particular duty devolved upon the defendant, in the first instance, of paying claims which might be estab-

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lished during plaintiffs' testator's absence, or of restoring to him the money on his return from Europe, that relation to the matter was changed when Henry J. Schile did return; for under his direction, and at his request, some of the money was withdrawn and paid to his creditors, and the balance remained in the defendant's hands. That situation would indicate that the defendant merely neglected to pay over a balance of moneys remaining in his hands belonging to the plaintiffs' testator, and the addition in the complaint of the words that the defendant "converted the same to his own use" does not characterize the cause of action, but is to be regarded as surplusage. Segelken v. Meyer, 94 N. Y. 484, and cases there cited. The cause of action is for money received. It is not to be assumed that by the insertion of the words quoted in the complaint the pleader has declared in tort. At all events, if the cause of action set forth is doubtful or ambiguous, every intendment is in favor of construing it as being an action ex contractu. Goodwin v. Griffis, 88 N. Y. 629. See, also, Foot v. Ffoulke, 55 App. Div. 617, 67 N. Y. Supp. 368; Cohn v. Beckhardt, 63 Hun, 333, 18 N. Y. Supp. 84; Reed v. Hayward, 82 App. Div. 417, 81 N. Y. Supp. 608; Town of Green Island v. Williams, 79 App. Div. 263, 79 N. Y. Supp. 791.

On the trial of this cause the statement that the defendant converted the money to his own use could have been disregarded, and a recovery had on the other allegations of the complaint, as in an action for money had and received. Town of Green Island v. Williams, 79 App. Div. 263, 79 N. Y. Supp. 791. On such a complaint an execution against the person could not issue. In an action of tort the plaintiff cannot recover unless the tort be actually proven, but under this complaint a recovery could be had upon the other allegations contained therein. In Britton v. Ferrin, 171 N. Y. 235, 63 N. E. 954, the complaint was exclusively in tort, and in Moffatt v. Fulton, 132 N. Y. 507, 30 N. E. 992, the allegations of the complaint were also held to constitute an action in tort. We are therefrom of the opinion that the order appealed from should be reversed, and the costs before notice of trial should be taxed at $15.

Order reversed, with $10 costs and disbursements, and the item of costs in question allowed at $15. All concur.

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(111 App. Div. 558.)

## PEOPLE v. LEWIS et al.

(Supreme Court, Appellate Division, First Department. March 9, 1906.)

1. INDICTMENT—COUNTS—REFERENCE—WAIVER OF OBJECTIONS.

Where, at the beginning of the trial on an indictment containing three counts—one for burglary in the third degree, one for grand larceny in the first degree, and one for receiving stolen goods—the District Attorney was granted permission to withdraw the counts for burglary and larceny, and defendant made no objection to the third count until after he was convicted, he thereby consented that the first and second counts might be retained, to explain the reference contained in the third count, and thereby to include essential allegations of time and place.

2. SAME—COUNTS—SUFFICIENCY.

The purpose of an indictment containing several counts, some of which are abandoned, to inform the defendant at the time he is arraigned of the

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crime of which he is accused, as required by Code Cr. Proc. §§ 285, 542, 684, is accomplished if the count or counts under which the trial proceeds fully state the facts constituting the crime, either directly or by reference to preceding counts.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, §§ 270, 270½.

Appeal from Court of General Sessions, New York County.

David Lewis and others were charged with receiving stolen goods, and from an order granting a motion in arrest of judgment, filed by defendant Lewis, the people appeal. Reversed.

Argued before O'BRIEN, P. J., and McLAUGHLIN, INGRAHAM, CLARKE, and HOUGHTON, JJ.

Robert C. Taylor, for the People.

Leonard A. Snitkin, for respondent.

McLAUGHLIN, J. The defendant, with others, was tried upon an indictment containing three counts, charging him with (1) burglary in the third degree, (2) grand larceny in the first degree, and (3) receiving stolen goods. At the beginning of the trial, upon motion of the District Attorney, the court granted permission to withdraw the counts of grand larcency and burglary, and the trial then proceeded under, and the case was submitted to the jury on, the third count. The defendant was convicted, and thereupon made a motion for arrest of judgment, which was granted, and the people appeal.

The motion was granted, as appears from the statement of the learned trial judge, and the briefs presented, upon the ground that the third count, under which the trial and conviction were had, standing by itself, did not state facts sufficient to constitute a crime, and the defects in the indictment were not cured, notwithstanding reference was made to the preceding counts, which set out the material facts omitted in the third count, under the authority of People v. Werbin, 27 Hun, 311. If we were disposed to follow the Werbin Case, which we are not, it would not be difficult to distinguish it from the case now before us. The indictment was found and the indictment had in that case prior to the adoption of the Code of Criminal Procedure, which provides (sections 285, 542, and 684) that an indictment is not insufficient, nor is the trial, judgment, or other proceeding affected, by reason of an imperfection in matter of form which does not tend to the prejudice of the substantial rights of the defendant upon the merits, and that all technical objections must be disregarded which do not prejudice the defendant in such respect. There the defendant was indicted for arson. There were three counts in the indictment, two of which were abandoned by the entry of a nolle prosequi. Immediately upon such entry being made, defendant's counsel moved to discharge the defendant, upon the ground that the third count was insufficient. The motion was denied, and on appeal the court held that the effect of the nolle prosequi was to strike out the first and second counts; that, those counts having been in effect expunged, the third count was insufficient, because its essential elements of time and place rested upon reference to allegations in that respect contained in the other counts. The Code of Criminal Procedure

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abolishes a nolle prosequi. Section 672. But, even if the withdrawing of the first and second counts were to be considered, in effect, the same as the entry of a nolle prosequi, the Werbin Case would not apply, because there, as soon as the first and second counts had been abandoned, the objection was taken that the third count did not justify a conviction, while here no such objection was made until after the defendant had been convicted; and it must be held, under the authority of People v. McLaughlin, 150 N. Y. 365, 44 N. E. 1017, that the failure to object was, in effect, a consent by defendant that the first and second counts be retained, for the purpose of explaining the references contained in the third count, and that, when retained for that purpose, the third count was sufficient.

It is unquestionably true that an indictment must contain every essential element of the crime charged, and the charge must be made directly, and not inferentially; but it is equally true that a count in an indictment is good if the facts there stated, and those stated in a preceding count, to which reference is made by apt and appropriate words, contain all the essential elements of the crime charged against the defendant, and for which he is tried. People v. Danihy, 63 Hun, 579, 18 N. Y. Supp. 467; People v. Graves, 5 Parker, Cr. R. 134; People v. McLaughlin, supra; Com. v. Clapp, 16 Gray, 237; State v. Dufour, 63 Ind. 567; Blitz v. U. S., 153 U. S. 308, 14 Sup. Ct. 924, 38 L. Ed. 725; Crain v. U. S., 162 U. S. 625, 16 Sup. Ct. 952, 40 L. Ed. 1097. The purpose of an indictment is to inform the defendant at the time he is arraigned of the crime which he is accused of having committed, to the end that he may prepare for and properly defend himself at the trial. This purpose is accomplished, where there are several counts in an indictment, some of which are abandoned, if the count or counts under which the trial proceeds fully set out the facts constituting the crime either directly or by reference to preceding counts. Such reference draws to and embodies in the count under which the trial is had a statement of the facts omitted. This defendant knew, at the time he was arraigned, that the third count in the indictment charged him with having received, at the time and place stated, the property mentioned in the first two counts in the indictment, knowing such property to have been stolen. It charged him with having knowingly received, "on the day and year aforesaid, at the borough and county aforesaid, the same goods, chattels, and personal property mentioned, described, and set forth in the second count of this indictment, to which reference is hereby made." That he knew this is obvious from the fact that he proceeded with the trial, and in no way questioned the validity of this count until after he had been convicted. The indictment fully advised the defendant of the crime with which he was charged. It enabled him to prepare his defense. It protects him against a subsequent prosecution for the same offense. This is all that is required in an indictment. People v. Weldon, 111 N. Y. 569, 19 N. E. 279; People v. Herlihy, 66 App. Div. 534, 73 N. Y. Supp. 236, affirmed 170 N. Y. 584, 63 N. E. 1120.

If the foregoing views be correct, then it follows that the order appealed from should be reversed, the motion in arrest of judgment

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denied, and the matter remitted to the Court of General Sessions of the place in and for the county of New York, to proceed according to law, and to render such judgment against defendant as it may be advised. All concur.

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(111 App. Div. 504.)

## PEOPLE v. LIPP.

(Supreme Court, Appellate Division, First Department. March 9, 1906.)

1. LARCENY—TRIAL—REFUSAL OF INSTRUCTION.

Pen. Code, § 529, provides that a person who willfully, with intent to defraud, by a check or draft or order for the payment of money, when such person knows that the drawer or maker thereof is not entitled to draw on the drawee, although no express representation is made in reference thereto, obtains from another any money or property, is guilty of stealing the same and punishable accordingly. *Held*, where there was evidence to show defendant's good faith in drawing a check on his bank account in exchange for jewelry purchased of the complaining witness, it was error to refuse a request to charge that the conduct of the defendant immediately prior and subsequent to the transaction, must be considered in determining the good faith of the defendant and his lack of criminal intent.

2. CRIMINAL LAW—PLACE OF CRIME—CONFLICTING EVIDENCE.

The question of jurisdiction of a crime cannot be raised on appeal where the evidence below as to the place of its commission was conflicting.

Appeal from Court of General Sessions, New York County.

Abram Lipp was convicted of larceny, and he appeals. Reversed.

Argued before O'BRIEN, P. J., and PATTERSON, McLAUGHLIN, LAUGHLIN, and HOUGHTON, JJ.

Adolph H. Rosenfeld, for appellant.

Robert C. Taylor, for respondent.

PATTERSON, J. Repeated and careful readings of the record in this case satisfy us that the judgment against the defendant entered upon the verdict of the jury convicting him of the crime of grand larceny in the first degree, should not be allowed to stand. There are three counts in the indictment and the verdict was a general one. That indictment was based upon section 529 of the Penal Code, by which it is enacted that:

"A person who willfully, with intent to defraud, by color or aid of a check or draft, or order for the payment of money or the delivery of property, when such person knows that the drawer or maker thereof is not entitled to draw on the drawee for the sum specified therein, or to order the payment of the amount, or delivery of the property, although no express representation is made in reference thereto, obtains from another any money or property, is guilty of stealing the same and punishable accordingly."

There were certain undisputed facts made to appear at the trial. They are that the defendant on the 29th day of July, 1904, purchased certain jewelry at the office of one Lindenborn, at 170 Broadway in the county of New York, and that the amount of his purchase was about the sum of $2,700. The seller parted with the possession of the jewelry. Mr. Lindenborn was not present, but the transaction was had between one Price his clerk and the defendant. The latter giving in os-

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tensible payment for the jewelry purchased, diamonds of the value of $929.20; two checks—one for $900, and the other for $955.20, and $2 in cash. Both checks were drawn upon a bank in Boston, Mass. The $900 check was paid on presentation. The check for $955.20 was dishonored. So far there is no dispute. The indictment was found and the prosecution conducted, upon the theory of criminal intent on the part of the defendant in procuring property, part consideration for the purchase price of which was a worthless and dishonored check; the defendant not having the money in bank to meet it when it was presented. The People's Case was made out principally by the testimony of one Sloman, who was a bookkeeper in the employ of Lindenborn. He testified that he was present at the transaction between Price and the defendant, and he heard conversation between those persons. He swears that he heard the defendant say that he had $2,200 in bank in Boston, thus representing that the checks were both good. The defendant's claim is that Price did not rely upon any representation; that none was made at the time the jewelry was purchased; and that Price agreed to hold the checks, and not at once forward them for collection. The learned recorder charged the jury in effect that it was immaterial whether representations were made or not, and left to them the determination simply of the question whether the defendant by the presentation of a written order for money, knowing that he had no right to present such an order, and that there was no money in bank wherewith to meet it, used it as a means of obtaining property with intent to deprive the owner thereof and if they so found he committed the crime of larceny.

Price, who represented Lindenborn in the transaction, was not called as a witness. It is true that Lindenborn swears that Price was in St. Louis; but he left for that place only a week before the date of the trial. Slowman does not testify that he heard all of the conversation between Price and the defendant, but he does swear that Price, at the request of the defendant, agreed to hold back one of the checks until the subsequent Monday. His explanation is that the defendant said he did not wish to reduce his balance in bank to less than a thousand dollars. That was, in effect, giving a credit for the amount of the check thus to be held back. The defendant claims that by reason of the forwarding of the check to the bank in Boston in violation of the agreement to hold it back, it was dishonored and he was prevented from making arrangements with the bank for its payment and he also says that a customer to whom he expected to sell the jewelry purchased of Price would not take it. It is manifest to us that the good faith of the prosecution of this defendant is seriously impeached by the record. When the check for $955.20 was returned to Price dishonored, he entered at once into negotiations with the defendant to secure its amount. From all that appears, Price made no claim of any felonious or fraudulent conduct on the part of the defendant in buying the merchandise. He went to Maine to negotiate with the defendant respecting a transfer of real estate, took a deed of that real estate to secure the indebtedness, and did so after conference with a lawyer in Maine concerning it. On August 11, 1904, Price wrote to the defendant as follows:

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"Upon receipt from you of a settlement of your account, I will deed back to you the property which you have this day deeded to me or if I have disposed of same I will give you credit on account for such amount as I receive for the equity."

The whole matter was adjusted as an indebtedness before this indictment was found. It was treated by Price as a simple indebtedness and no suggestion that the transaction involved criminal responsibility was made. This aspect of the case was not put before the jury, as we think should have been done. In view of the circumstances, disclosed, we are of the opinion that the defendant was entitled to an instruction to the jury, which was requested, but which the court refused to give, namely, that:

"The conduct of the defendant towards the complainant and his act immediately prior and subsequent to the transaction had on the 29th day of July, 1904, are circumstances which must be taken into consideration in determining the good faith of the defendant and his lack of criminal intent."

To refuse that instruction, we think, was error. It is contended on behalf of the appellant that the alleged larceny was not committed in the city of New York. The defendant testified that the goods were sent to him by express and delivered to him at Boston, and hence argue that if a crime were committed, it was at Boston, and not within the jurisdiction of the courts of this state; but Slowman testified that the jewelry was actually delivered to the appellant at Lindenborn's office in the city of New York. The question of jurisdiction cannot be raised on this conflicting evidence.

Other and by no means trivial grounds for setting aside this judgment are urged by the appellant, but we consider it unnecessary to pass upon them. Suffice it to say that under the circumstances of this case and its peculiar facts, we think the defendant should have a new trial in furtherance of justice.

Judgment reversed, and a new trial ordered. All concur.

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(111 App. Div. 480.)

## MARX v. BROGAN.

(Supreme Court, Appellate Division, First Department. March 9, 1906.)

COVENANTS—USE OF REAL PROPERTY—RESTRICTIONS.

A six-story elevator apartment house of brick and limestone, which, when erected, will present a dignified and attractive appearance, and will consist of elegantly appointed apartments, is not a tenement house, within a covenant prohibiting the owner of the property from erecting any tenement house, etc., thereon.

Submission of controversy on agreed statement of facts between Max Marx and Charles Brogan. Judgment for the latter.

Argued before O'BRIEN, P. J., and PATTERSON, INGRAHAM, LAUGHLIN, and CLARKE, JJ.

Eugene D. Boyer, for plaintiff.
H. W. Hayden, for defendant.

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PATTERSON, J. The parties to this record have submitted their controversy upon an agreed statement of facts, pursuant to sections 1279, 1280, 1281 of the Code of Civil Procedure, by which it appears that the plaintiff is the owner of a dwelling house at the southeasterly corner of Convent avenue and 148th street, in the borough of Manhattan, city of New York, and the defendant is the owner of a vacant plot of ground adjoining the plaintiff's premises. On June 10, 1889, the parties to the submission entered into an agreement in writing in which it is recited that they are desirous of increasing the value of their lots and improving the character of the neighborhood, and it is then provided in the agreement as follows:

"That for the period of twenty-five years next ensuing from the date hereof, there shall not be erected or permitted upon any part of said lots any tenement house, or any foundry, manufactory, distillery, billiard saloon, drinking saloon, store, shop or livery stable, or any noxibus trade or business whatsoever."

The defendant intending to erect a building upon his land, the plaintiff seeks to enjoin him from so doing, on the ground that the proposed building, if erected, would be in violation of the restrictive covenant above set forth, and would seriously affect the value of the plaintiff's premises. The defendant insists that there is no violation of the covenant, but, on the contrary, that his proposed building is an apartment house of a superior character, and that such a structure is not within the inhibition of the covenant. In the submission the defendant's proposed building is described as an "apartment house." It is referred to as a "six-story elevator apartment house of brick and limestone," and the details of construction are set forth. The ground floor is to consist of five apartments—three containing five rooms each, one containing six rooms, and one containing seven rooms. The five upper floors are to contain six apartments each, four of which will consist of five rooms each, and two of six rooms each. Each apartment, in addition to the rooms above mentioned, is to contain a private hall and private bathroom and closet, and each apartment includes a parlor, dining room, chamber, kitchen, and servant's room. The floors are to be of hardwood, and the rooms are to be finished in oak and birchwood, and the parlors are to have mantels and open fireplaces with gas logs. The walls are to be papered and decorated, except those of the dining rooms, which are to be paneled in antique oak. The building and all of the apartments are to be heated by steam, equipped for lighting by both electricity and gas, provided with hot and cold water conveyed in open work plumbing, with gas ranges for cooking, dumb waiter, and each apartment is to have a private long-distance telephone. The main hall is to be wainscoted with imported marble, and there is to be an electric passenger elevator for the use of all the tenants. A picture of the facade of the proposed building is annexed to the submission, and an inspection of it will show that, if and when erected, it will present a dignified and attractive appearance.

That there is a wide difference between a tenement house and an apartment house (and in the construction of covenants, such as that involved here, such difference is recognized by the courts) is well settled. Kitching v. Brown, 180 N. Y. 414, 73 N. E. 243; White v. Col-

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lins B. & Con. Co., 82 App. Div. 1, 81 N. Y. Supp. 434. While there is no actual legal definition of a tenement house, still, in the year 1889, when the covenant between these parties was made, and even prior thereto, the difference between such a house and an apartment house was a matter of common knowledge. In the submission the parties to this controversy have called the defendant's proposed building an apartment house, and the details of construction appearing in the record indicate its superior quality. In order to bring the structure, which the defendant intends to erect, within the operation of the restrictive covenant, it is necessary for the plaintiff to show that it is what was known and understood to be a tenement house within the meaning of that covenant. That he has failed to do. With the recognized distinction between apartment and tenement houses, the court cannot assume that the covenant will be violated by the defendant putting up a building of the character described in the submission.

Judgment should be ordered for the defendant, with costs. All concur.

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(111 App. Div. 585.)

## McDONOUGH v. PELHAM HOD ELEVATOR CO.

(Supreme Court, Appellate Division, First Department. March 9, 1906.)

1. MASTER AND SERVANT—FELLOW SERVANTS.

Where the owner of a hod elevator furnished it in charge of his own engineer to a building contractor for an agreed price, the engineer operating the elevator was not a fellow servant of a workman employed by the building contractor.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 480-485.]

2. SAME—INJURY TO THIRD PERSONS—PRESUMPTIONS.

In an action for injuries sustained by a workman while riding on a hod elevator which was installed for the purpose of carrying building materials, and not passengers, it was presumable that the workman was riding on the elevator without the consent of the owner thereof.

3. SAME—LIABILITY OF MASTER.

Where the owner of a hod elevator furnished it with his own engineer for an agreed price to a building contractor, the fact that the engineer consented to workman riding on the elevator gave them no right so to do unless the engineer was acting within the scope of his authority in giving such consent.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 1217-1225.]

4. SAME—IMPLIED AUTHORITY.

Where the owner of a hod elevator rented it together with his own engineer to a building contractor for the purpose of elevating materials, the engineer had no implied authority to permit workmen employed by the building contractor to ride on the elevator.

5. CUSTOMS AND USAGES—EVIDENCE—EXTENT OF CUSTOM.

In an action by a workman employed by a building contractor for injuries received while riding on a hod elevator rented to the contractor by a third person, evidence that it was customary for the workmen to ride on the elevator did not show a general custom binding upon the owner of the elevator.

6. MASTER AND SERVANT—INJURY TO THIRD PERSONS—LIABILITY OF MASTER.

Where the owner of a hod elevator rented it in charge of his own engineer to a building contractor, the fact that the engineer made a prac-

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**tice of allowing workmen employed by the contractor to ride on the elevator did not estop the owner of the elevator from insisting in an action against him by one of the workmen for injuries caused by the negligent operator of the elevator while he was riding on it, that the engineer had no authority to allow the workman to ride.**

Appeal from Trial Term, New York County.

Action by John McDonough against the Pelham Hod Elevator Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Argued before O'BRIEN, P. J., and PATTERSON, INGRAHAM, LAUGHLIN, and CLARKE, JJ.

Goeller, Shaffer & Eisker (Robert Goeller, of counsel), for appellant.

Frederick E. Fishel (George Gordon Battle, of counsel), for respondent.

CLARKE, J. This was an action to recover damages incurred by the alleged negligence of the defendant in operating a hod elevator which it had installed for hire in a building in process of erection. The plaintiff was an employé of the contractor for the erection of the building. The complaint having been dismissed, it will be necessary to consider only the claims made by the plaintiff to show that the dismissal was error. We are all agreed that the plaintiff, the employé of the builder, was not a fellow servant of the engineer of the defendant whose negligence is claimed to have caused the injuries complained of. The defendant furnished its elevator, boiler and engineer for an agreed price and there was no common employer or common employment, nor was the engineer the servant ad hoc of the builder. Mills v. Thomas Elevator Co., 54 App. Div. 124, 66 N. Y. Supp. 398, affirmed 172 N. Y. 660, 65 N. E. 1119.

The plaintiff was injured by the negligence of the defendant's servant while riding on an elevator built and installed for the purpose primarily, of carrying building materials to the different floors of the building in which plaintiff was at work. In view of the fact that this elevator was installed for the purpose of carrying building materials and the further fact that there were on it none of the safety guards or appliances to be found on a passenger elevator, the presumption is that the plaintiff was riding on it without the consent of the defendant. If such was the case plaintiff cannot recover, for defendant was under no duty to transport him from the ground floor of the building to the floors above, and if the engineer attempted to do so he was acting entirely outside the limits of his authority, and the defendant is not responsible for his negligent acts in so doing. The burden is therefore upon the plaintiff to show that he was rightfully upon the elevator, and, in order to do this, that he was there with defendant's permission, either express or implied.

It is not contended that plaintiff had defendant's express permission to go up on the elevator. Was such permission implied? The presumption is that it was not, because this elevator was not built to carry passengers. The plaintiff has not introduced sufficient evidence to overcome this presumption. He says that defendant's engineers consented to his going up on the elevator. This consent will not avail

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plaintiff, unless the engineer in giving it can be said to have acted within the scope of his authority. He had not express authority to give this consent. Had he implied authority? He was not a general agent, but an agent put there for the special purpose of running a freight elevator. He was impliedly authorized to do all acts necessary to the carrying out of this special duty. Was it necessary for the accomplishment of this object for the engineer to carry plaintiff on the elevator? Plaintiff does not claim that he was taking any materials up with him or to have been on there for the purpose of keeping materials from falling off the elevator, or for the purpose of unloading the elevator when it got to the upper floors. He was on there simply for the purpose of getting to the sixth floor of the building. Clearly, carrying him on the elevator was in no way necessary for the accomplishment of the object which the engineer was intended to carry out.

Appellant contends that the engineer was put here by the defendant for the purpose of aiding in the quick construction of this building, and, as carrying the plaintiff on the elevator enabled him to get more quickly to his work, the engineer was acting within the scope of his authority. The answer to this argument is that the engineer was not put there for the purpose of doing everything that would aid in the quick construction of the building, simply those things in the line of his duties as an engineer of a freight elevator.

Appellant contends that the contract being silent as to whether or not passengers should ride on the elevator, the contract was subject to the known usages of the business, and that it was shown that carrying passengers was customary in this business. The answer to this argument is that there is no evidence in the record of a general custom of this nature, the only evidence is to the effect that the men did it in this instance, which is not evidence of a general custom in the business, which should have been known to the defendant at the time it supplied this elevator. Appellant contends that since the men rode on this elevator openly and notoriously for weeks without the objection of the defendant, and not knowing the nature of the engineer's instructions in the matter, defendant is estopped to deny the engineer's authority, and to claim that defendant was not lawfully on the elevator. There are two difficulties with this argument: First, that the cases cited in support of it are all cases of contracts made by the agent outside the scope of his authority, where the principal has reaped the benefits thereof, and I have been unable to find any case which applies the doctrine of agency by estoppel to a case of this kind. The other difficulty with the argument is that this is not a case in which the plaintiff has been misled by the agents' acts into believing that the defendant authorized him to ride on this machine for the machine was obviously dangerous, and that the plaintiff realized the danger is shown by his confessed reluctance to riding on it.

The only case cited by appellant which approaches an authority in favor of his contention is Stringham v. Stewart, 100 N. Y. 516, 3 N. E. 575. That was a case in which plaintiff was injured while riding on a

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grain elevator. It appeared in evidence that plaintiff was in the employ of defendant who owned the elevator and that defendants' superintendent had directed the servants employed in moving grain to ride on the elevator while doing their work. It also appeared that on the trip in which plaintiff was injured he put on a load of grain, and went up with it for the purpose of taking it off the elevator. In so doing he was working for the benefit of the defendant. These facts are sufficient to show that the case is not an authority in point. In the case at bar the plaintiff was not directed by the engineer of the defendant to go up on the elevator and in going up on the elevator, he could not be said to be in any way acting for the benefit of defendant, whose servant he was not.

In Eaton v. D. L. & W. R. R. Co., 57 N. Y. 382, 15 Am. Rep. 513, it was held that conductors of freight trains cannot create any liability on the part of their principal, to a person taken by them on such trains, unless the principal in some way assents to it, and that duty to be careful toward him could only spring up on the part of the principal by an act on the conductors' part coming within the scope of his authority. The case of Morris v. Brown, 111 N. Y. 318, 18 N. E. 722, 7 Am. St. Rep. 751, seems to be directly in point. In that case, a civil engineer employed by the aqueduct commissioners got upon a car operated by the defendant as contractor for the construction of a tunnel at the Croton Dam. The cars were operated by a stationary engine and cable to draw material out of a shaft. By the omission of defendant's servant to attach the cable to the car, or otherwise control its velocity, the decedent was thrown off, and killed. Judge Danforth speaking for an unanimous court said:

"As they [the cars] were not furnished for such use, so there was no permission from the defendants or any one of them that they might be so used. But it is said this permission might be implied, because the intestate and others had before ridden upon the cars. Without permission from or duty on the part of the defendants to give it, I cannot see how that result follows. On the contrary, a person so using the car at each time took upon himself the risk and must abide by its condition and the quality of the attendant at the time he so used it, and was entitled only not to be lead into danger. Negligence is an omission of care and caution in what we do. But the duty to be actively cautious and vigilant is relative, and where that duty has no existence between particular parties, there can be no such thing as negligence in the legal sense of the term. The plaintiff was in no position to complain of the defendants or their servants. The frame and dump the intestate got upon was not a vehicle for his carriage, but an instrument of labor, a mere implement furnished by the defendants to their servants, as they might have a man with a basket or barrow, or a mule with panniers to take out the refuse, as in former times was the custom in doing such work. * * * The plaintiff had a right to be in the tunnel for its inspection. The contract put the defendants under no obligation to carry him into the tunnel, nor by it did he acquire any right to be upon the car. Nor did he acquire that right through any consent or act or acquiescence on the part of the defendants. All the witnesses agree that no permission was given by the defendants; no evidence tends to show that they even knew the car was at any time so used. The brakeman of the car had known it, but neither his knowledge nor assent could bind the defendants. He was not their agent for that purpose. It is a general proposition that a master is chargeable with the conduct of his servant, only when he acts in the execution of the authority given him. * * *

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The deceased had, in fact, ridden upon the car; he had done so under no other permission, a volunteer, but in safety. In each instance, however, he must be deemed to have assumed the risk, and this last time he was unfortunate. The consequences of that misfortune should not be thrown upon the defendants."

The judgment should be affirmed, with costs. All concur.

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## PARKS v. CITY OF NEW YORK et al.

(Supreme Court, Appellate Division, First Department. March 16, 1906.)

1. MUNICIPAL CORPORATIONS—DEFECTIVE SIDEWALK—PERSONAL INJURIES—EVIDENCE—QUESTION FOR JURY.

   In an action against a city for death alleged to have been caused by the defective condition of a bridge temporarily erected over an excavation under the sidewalk, evidence *held* sufficient to justify submission to the jury of the question of defendant's negligence.

   [Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1747.]

2. TORTS—JOINT TORT FEASORS—LIABILITY—ENTRY OF JUDGMENT AGAINST ONE.

   Where joint tort feasors were jointly sued, and a judgment against both was on appeal reversed as to one, the entry of judgment against the other did not preclude plaintiff from afterward proceeding against the one as to whom the judgment was reversed.

   [Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Torts, § 29.]

   Clarke, J., dissenting.

Appeal from Trial Term, New York County.

Action by William J. Parks, as administrator, against the city of New York and others. From a judgment for plaintiff, the city appeals. Affirmed.

Argued before O'BRIEN, P. J., and McLAUGHLIN, INGRAHAM, CLARKE, and HOUGHTON, JJ.

Theodore Connoly, for appellant.

Joseph H. Choate, for respondent.

McLAUGHLIN, J. There have been two trials of this action. On the first the plaintiff had a verdict against the city of New York and the defendants Miller & Holme for $22,000, but on appeal the judgment was reversed as to the city, and a new trial ordered, and also reversed as to Miller & Holme unless the plaintiff stipulated to reduce the verdict to $15,000, in which case the judgment was affirmed. Coolidge v. City of New York, 99 App. Div. 175, 90 N. Y. Supp. 1078. The stipulation was made and the verdict accordingly reduced against Miller & Holme to $15,000, upon which judgment was entered. The second trial was against the city alone, and resulted in a verdict against it for $25,000, which upon motion of the defendant was reduced to $15,000, and from the judgment entered for that amount, as well as from an order denying a motion for a new trial, the city appeals.

The evidence on the second was substantially the same as that offered upon the first trial, except that additional evidence was given tending to establish that the city had actual notice of the defective condi-

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tion of the sidewalk before the accident occurred. The facts relating to the accident, the construction of the bridge or temporary sidewalk, its weakness and final collapse, are fully set out in the opinion delivered on the former appeal, and therefore it is unnecessary to restate them, or refer to any but the additional bearing on those subjects. On that appeal this court held (Mr. Justice INGRAHAM writing the opinion) that there was "evidence from which the jury could find that the braces to make such a structure safe were omitted, and that it was the absence of those braces to make such a structure safe that caused the structure to fall." The reversal of the judgment so far as the city was concerned was upon the ground that it did not have sufficient notice of this defect. It then appeared that the city did not have actual notice of the defective condition of the bridge until the morning of the day the accident occurred, and this was held to be insufficient to charge the city with a failure to take precautions to strengthen the bridge. On the trial, which resulted in the judgment now appealed from, it appeared that the city had actual notice of the defects several days before the accident occurred. The witness Baxter, a policeman stationed in that locality at and immediately prior to the accident, who was not a witness on the first trial, testified, in substance, that the bridge from the time it was constructed, which was nearly a month before the accident, was shaky, and vibrated when walked upon; that five or six days prior to the accident one Hess called his attention to its unsafe condition, and advised him to report it to the station house, and at the same time said if he did not make such report he would do so himself; and he is corroborated by the witness Hess, who testified that he called Baxter's attention to the unsafe condition of the bridge in case a parade should pass there. Baxter further testified that, after his attention had been called to the bridge by Hess, he did, several days before the accident, make an oral report at the station house, to the captain in charge, that the bridge was unsafe in case a parade passed there. He also testified that he made a written report on the day of the accident, and about 18 hours before it occurred. This report was made at 12:20 a. m., and the accident occurred about 6 p. m.

The testimony was uncontradicted. It is severely criticised by appellant's counsel, but its credibility was for the jury, and, if believed by them, was sufficient to justify a finding that the city had actual notice in time to remedy the defect, and this irrespective of whether or not Baxter made his oral report. Notice to Baxter, a police officer, was notice to the city. Rehberg v. Mayor, 91 N. Y. 137, 43 Am. Rep. 657. Notice to any officer charged with police powers, irrespective of his rank or grade, is notice to the city. Johnson v. Poughkeepsie, 29 App. Div. 16, 51 N. Y. Supp. 190. Not only this, but the city had actual notice of the defects from the time the bridge was built until it collapsed. The witness Hamel, an inspector, saw it on several occasions. He was the officer detailed by the defendant's building department to, and he actually did, make several inspections. This was actual notice to the city that the bridge was defective by reason of the absence of the braces referred to. Another fact appearing upon the second, which did not appear upon the first,

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trial, was that the defendant had workmen ready to respond immediately to the call of the police in case of emergency, to remedy defects in structures of this character; and it was a question for the jury, in view of this fact, whether the city performed its full duty in not resorting to this means of strengthening the bridge after the actual notice was given by Baxter on the morning of the day of the accident.

I do not think it can be said that this verdict is against the weight of evidence, either as to the defective condition of the bridge, or as to the city's having actual notice a sufficient time prior to the accident to have enabled it to have remedied the defects. But, irrespective of any notice, the city was liable, inasmuch as the jury found the bridge was defective, and its verdict was based upon evidence which fairly sustained the same. The law imposes upon a municipality the duty of seeing that its streets and sidewalks are kept reasonably safe for public travel. Here the city issued a permit to the owner of the land abutting upon the street to excavate beneath the sidewalk, which necessitated the removal of the sidewalk itself, and the erection of a temporary bridge in place thereof. Having issued this permit, there was an absolute duty imposed upon the city to see to it that the portion of the street interfered with by reason of the permit was kept reasonably safe, or that a person using it was seasonably warned that he could not rely upon the presumption that it was safe for use. The city, by issuing the permit, became a joint actor with the owner of the land in the erection of the bridge, and by reason thereof became responsible for any neglect or fault of the owner in properly erecting the bridge. The principle is precisely the same as if an obstruction had, under a permit, been placed in the street. In Cohen v. Mayor, 113 N. Y. 532, 21 N. E. 700, 4 L. R. A. 406, 10 Am. St. Rep. 506, the injury was caused by a wagon which had been placed in a public street under a permit granted by the city, and it was held that under such circumstances the city was liable "the same as if it had itself maintained the nuisance; for the owner of the wagon was nothing more than an agent, through whom the defendant did this unlawful act." In Spier v. City of Brooklyn, 139 N. Y. 6, 34 N. E. 727, 21 L. R. A. 641, 36 Am. St. Rep. 664, the plaintiff was injured by the discharge of fireworks in a public street, and it was held that if the city directed or authorized the discharge of the fireworks which caused the injury complained of it was liable; that the mayor had, by permit, authorized the fireworks to be discharged in the street, under the provisions of an ordinance which gave him authority to grant such permit, and therefore the city was liable.

A similar question was before the court in the recent case of Landau v. City of New York, 180 N. Y. 48, 72 N. E. 631, 105 Am. St. Rep. 709, where the same rule was applied; and in Godfrey v. City of New York, 104 App. Div. 357, 93 N. Y. Supp. 899, where a pile of stones had been deposited in the street the day previous to the accident, it it was held that, even though the lapse of time was not sufficient to justify a finding that the city had actual notice of that fact, nevertheless it was negligent in not knowing the condition of the street and removing the obstruction, inasmuch as the stones were piled there

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under a permit issued by the city. Mr. Justice INGRAHAM, delivering the opinion of the court, after citing numerous cases, said:

"These cases establish a proposition that where a municipal corporation gives a permit to obstruct a street, an absolute duty is imposed upon the corporation to see to it that the obstruction is so protected and guarded that a person using the street, and entitled to rely upon the presumption that it is safe for use, will be warned of the danger in time to avoid injury. By giving the permit, it thereby becomes a joint actor with the licensee in creating the obstruction, and the city thereby becomes responsible for any neglect or default of the licensee in properly guarding, so that persons using the street will not be exposed to unnecessary danger."

Finally, it is urged that the judgment should be reversed because the plaintiff, by the entry of the judgment against Miller & Holme, elected to proceed against them alone, and thereby abandon his cause of action against the city. I do not understand this to be the law. A plaintiff may sue all joint tort feasors jointly, or each of them separately. If he brings separate actions, and has separate recoveries, the satisfaction of one judgment satisfies them all. Livingston v. Bishop, 1 Johns. 290, 3 Am. Dec. 330; Thomas v. Rumsey, 6 Johns. 26; Breslin v. Peck, 38 Hun, 623; Russell v. McCall, 141 N. Y. 437, 36 N. E. 498, 38 Am. St. Rep. 807; Palmer v. N. Y. News Publishing Co., 31 App. Div. 212, 52 N. Y. Supp. 539. Here the plaintiff elected to proceed against the city and Miller & Holme jointly, and the first trial, as we have already seen, resulted in a judgment against them jointly. The fact that that judgment was reversed as to the city and a new trial ordered did not, because the plaintiff saw fit to reduce the judgment as to Miller & Holme instead of taking a new trial, destroy his cause of action against the city. He could still retain the judgment against Miller & Holme, and continue the action, as he did, against the city. A satisfaction of either judgment, however, would be a satisfaction of both. Other errors are suggested, but they do not seem to require consideration here.

The judgment and order appealed from, therefore, should be affirmed, with costs.

O'BRIEN, P. J., concurs. INGRAHAM and HOUGHTON, JJ., concur in result. CLARKE, J., dissents.

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## McGOVERN v. MANHATTAN RY. CO.

(Supreme Court, Appellate Division, First Department. March 9, 1906.)

APPEAL—STAY OF PROCEEDINGS.

Where a party appealed to the Appellate Division of the Supreme Court from an order denying a new trial, which was affirmed, and attempted an appeal from the judgment of the trial court, which was inoperative because the notice of appeal was not served in time, he was not entitled to a stay of proceedings pending an appeal from the judgment of the Appellate Division to the Court of Appeals; he having no right to take such an appeal under Const. art. 6, § 9, permitting appeals to the Court of Appeals only from judgments or orders entered on decisions of the Appellate Division of the Supreme Court finally determining actions or proceedings.



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Appeal from Special Term, New York County.

Action by Bernard McGovern against the Manhattan Railway Company. From an order granting a stay of proceedings to enable the defendant to appeal to the Court of Appeals, he appeals. Reversed.

Argued before O'BRIEN, P. J., and PATTERSON, INGRAHAM, LAUGHLIN, and CLARKE, JJ.

Augustus Van Wyck, for appellant.

John F. McIntyre, for respondent.

INGRAHAM, J. This action was to recover for personal injuries, and resulted in a judgment for the plaintiff entered upon the verdict of a jury. A motion for a new trial was made at the Trial Term and denied, whereupon the defendant attempted to appeal from said judgment and order denying the motion for a new trial. His notice of appeal from the judgment was served too late, and that appeal was dismissed. The appeal from the order denying the motion for a new trial was then brought on for hearing at this court, and subsequently the order appealed from was affirmed; one justice dissenting. Thereupon the defendant made a motion for leave to appeal to the Court of Appeals, which motion was denied. The defendant, on an affidavit alleging that it was advised by counsel that the defendant had a right to appeal to the Court of Appeals, without leave of this court, made a motion to the Special Term for a stay of proceedings on the judgment pending such appeal, which motion was granted; and from the order granting the same the plaintiff appeals.

We think this order was unauthorized. The defendant having failed to appeal from the judgment, that judgment stands unreversed and in full force and effect. There is no power to allow an appeal from a judgment after the time to appeal therefrom had expired. The appeal to this court from the order denying the motion to set aside the verdict and for a new trial upon the judge's minutes having been affirmed, no other appeal is allowed.

Section 9 of article 6 of the Constitution provides:

"After the last day of December, one thousand eight hundred and ninety-five, the jurisdiction of the Court of Appeals, except where the judgment is of death, shall be limited to the review of questions of law. * * * Except where the judgment is of death, appeals may be taken, as of right, to said court only from judgments or orders entered upon decisions of the Appellate Division of the Supreme Court, finally determining actions or special proceedings, and from orders granting new trials on exceptions where the appellants stipulate that upon affirmance judgment absolute shall be rendered against them."

It is apparent that an order denying a motion for a new trial upon the judge's minutes was neither a judgment nor order finally determining an action or special proceeding. It was an order in the action and determined the particular motion in that action, which it denied. The judgment finally determined the action, and from that judgment no appeal was taken. An action is finally determined by the final judgment. A special proceeding is finally determined by a final order, but an order entered in an action denying a motion for a new trial is not an order finally determining a judgment or special proceeding. This has

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been again and again determined by the Court of Appeals. See Van Arsdale v. King, 155 N. Y. 325, 49 N. E. 866; Murphy v. Walsh, 169 N. Y. 595, 62 N. E. 1098; Croveno v. Atlantic Ave. R. R. Co., 150 N. Y. 225, 44 N. E. 968; People v. Miller, 169 N. Y. 339, 62 N. E. 418, 88 Am. St. Rep. 546; Hammond v. National Bank Ass'n, 168 N. Y. 262, 61 N. E. 244. It is quite true that we have no jurisdiction to determine whether or not a particular order is appealable to the Court of Appeals. That question is to be determined by that court when the question is presented to it. When, however, a party to an action applies to the Supreme Court to stay proceedings upon a final judgment against it, which has not been appealed from, upon the ground that it has taken an appeal from an order in the action to the Court of Appeals, such proceedings should not be stayed when it clearly appears, as it does in this case, that the order is not appealable. We think it clear under the decision of the Court of Appeals that the order of this court affirming the order denying the motion for a new trial is not appealable to that court, and therefore it was error for the Special Term to stay the execution of the judgment.

It follows that the order appealed from should be reversed, with $10 costs and disbursements, and the motion denied, with $10 costs. All concur.

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## STEINWAY v. STEINWAY et al.

(Supreme Court, Appellate Division, First Department. March 16, 1906.)

TRUSTS—MANAGEMENT OF ESTATE—EXPENSES—LIABILITY.

Testator gave corporate shares to trustees for the benefit of persons named, directing that an annual sum, representing an income of 5 per cent. per annum on the shares, should be paid to them equally until a specified date, when the shares should be divided among them. The will provided that the excess of 5 per cent. should be retained by the trustees as compensation for the management of the shares, which excess should be annually divided pro rata among them. *Held*, that the expenses incurred by the trustees in defending a suit attacking the validity of the trust was not chargeable against the amount of the excess of income above 5 per cent. fixed as compensation for the trustees.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trusts, §§ 324, 377.]

Houghton, J., dissenting.

Appeal from Judgment on Report of Referee.

Action by Henry W. T. Steinway against Charles H. Steinway and others, individually, and as surviving executors and trustees of Charles F. T. Steinway, deceased. From a judgment entered on the report of a referee, defendants appeal. Modified.

See 79 N. Y. Supp. 541.

Argued before O'BRIEN, P. J., and INGRAHAM, McLAUGHLIN, CLARKE, and HOUGHTON, JJ.

John Delahunty, for appellants.

Edward B. Hill, for respondent.

INGRAHAM, J. I agree with the learned referee, except in relation to the expenses incurred by the trustees in defending an ac-

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tion brought by the plaintiff to declare the trust under which the defendants, the executors of Christian Frederick Theodore Steinway, deceased, held this property invalid. The clause of the will establishing this trust provided that one-fourth of the shares of the testator in the Steinway & Son corporation was given to the trustees for the benefit of the three sons of the testator's brother, Charles Steinway, namely, Henry W. T. Steinway, plaintiff, Charles H. Steinway, and Frederick Steinway, of the city of New York, and there was to be paid to them in equal proportions an annual sum, representing an income of 5 per centum upon said shares, until the 1st day of January, 1904, when the shares were to be divided between the three beneficiaries. The will then provided:

"The excess of the annual income of such shares in the Steinway & Sons' corporation, New York, over and above said five per centum, shall be retained by my executors and trustees hereinafter named, as their compensation for the management of such shares, and such excess shall be annually divided pro rata among them or their successors until January 1, 1904."

This will was admitted to probate on the 24th day of May, 1889. The referee found that in the month of May, 1903, the plaintiff brought an action in the Supreme Court of this state against the defendant trustees and others for the purpose of having declared void the thirty-third clause of the will, to which attention has been called, which clause created the trust involved in this action. This action was decided in favor of the plaintiff at the Special Term, and said trust was declared invalid; but this determination was reversed by the Appellate Division (48 N. Y. Supp. 1046), and the complaint dismissed, which was affirmed by the Court of Appeals (57 N. E. 312); that court holding that the trust was valid. The referee further found that the amount paid by the trustees in defending said suit, for counsel fees and expenses, amounted to the sum of $39,719.11, and the only question about which I have any doubt is as to by whom this sum should be paid.

It is conceded that it was the duty of the trustees to defend this trust, and it is clear that they were entitled to be reimbursed their reasonable and proper expenses in so doing. I think this amount should be paid out of the corpus of the trust property. By the agreed statement of facts, upon which the question was submitted to the referee, it is stated that on January 2, 1904, the trust under the will of C. F. Theodore Steinway having come to an end, the trustees distributed and transferred the shares forming the principal of the trust funds, and transferred to the plaintiff 333 shares of the capital stock of Steinway & Sons, of which he is now, and ever since has been, the owner and holder; that the trustees have in their hands the amount due to the plaintiff for his share of the 5 per cent. on the capital stock of the Steinway & Co. corporation, they having deducted therefrom the sum of $3,308.93, which the trustees deducted and charged to the plaintiff as his proportionate share of their expenses in defending said suit brought by the plaintiff to have the trust declared invalid; and that the total amount paid by said trustees in defending said suit, for counsel fees and expenses, amounted to the sum of $39,719.11. Before this stipulation was presented to the referee, the question as to the liability for the expenses of this litigation was submitted to him; the parties

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stipulating that the amount of the excess of income from the trust property, over and above the 5 per cent. paid to the beneficiaries, was more than sufficient to pay the expenses incurred in defending the attack upon the validity of the trust. The learned referee held that the expense of this litigation was not chargeable to the income to which the beneficiaries were entitled, but was chargeable against the balance of the income remaining in the hands of the trustees after the payment of the 5 per cent. to the beneficiaries. In the referee's opinion it is stated that it was admitted on both sides that the reimbursement for these expenses is to be paid out of the income, and not out of the principal of the trust property. I do not find any such stipulation in the agreed statement of facts. It was agreed in the stipulation that the amount that was due to the plaintiff upon the termination of the trust was something over $12,000 for income, and 333 shares of this stock as principal. The executors, apparently with the consent of all the beneficiaries with the exception of the plaintiff, had deducted the amount paid in defending the action attacking the trust from the 5 per cent. income to which the beneficiaries were entitled. The plaintiff had refused to receive this income, and it remained in the hands of the trustees. At the termination of the trust, they then delivered to him the stock of the Steinway corporation, but had retained in their hands the income. I think it clear that these expenses were not to be paid out the amount received by the trustees under the will as the compensation for the management of these shares. If the testator had made no provision as to the compensation of the trustees, they would have been entitled to receive the legal fees which are allowed to trustees for the managment of the trust. Under no circumstances would the necessary expenses of defending the trust be payable out of such compensation. In lieu of the compensation fixed by law for trustees, the testator in his will provided for their compensation; and the trustees having accepted the trust, they were confined to the compensation fixed by the will in lieu of the fees allowed by law for their services as trustees. If this stock which was the sole property of the trust estate had paid 5 per cent. or less as dividends during the trust, the trustees would have received nothing for their services. They were bound to defend the trust, bound to retain lawyers, and to pay the necessary disbursements, and upon no principle is this expense, which it was their duty to incur, and for which they would have been responsible if they had failed to incur, for the protection of the trust, to be paid out of the compensation that the testator expressly directed that they should receive for their management of the trust. If these dividends had equaled 5 per cent. on the stock during the term of the trust, and no more, certainly the executors would not have been required themselves to pay the expense of defending the trust. The fact that the dividends exceeded 5 per cent. on the stock, so that the executors were paid for their services in managing the property as contemplated by the testator, is no reason why this compensation, which he intended should be paid to them for such services, should be reduced because of the proper performance of the duties imposed upon them as trustees. The parties having stipulated that the expenses of this obligation should be borne either by the beneficiaries or the

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trustees, as between the beneficiaries and the trustees, I think the beneficiaries should pay the expenses.

The question as to the amount of the compensation that the trustees actually received is entirely immaterial. If the views of the learned referee are to prevail, they were bound to defend the trust, and to incur the expense necessary for that purpose. Yet, if there had been no income applicable to the payment of their compensation, they would under this ruling have been required to pay them this amount personally. As I look at it, it could make no possible difference what the dividends declared upon these bonds were during the period. The beneficiaries were the ones to be benefited by the services performed by the trustees, and, as between the beneficiaries and the trustees, upon the interest of the beneficiaries in the trust property must fall the expense of maintaining the trust. The testator expressly provided that the excess of income was to be paid to the trustees "as their compensation for the management of such shares, and such excess shall be annually divided pro rata among them, or their successors, until January 1, 1904." There was to be thus an annual division of the excess when the amount divided would belong to the trustees, and it seems to me that it would be contrary to this declared intention of the testator that this compensation, which was to be paid to them for their services in the management of the trust, should be depleted by the necessary expenses incurred by them in the performance of their trust.

I think the judgment appealed from should be modified, so that as between the trustees and the plaintiff and the interest of the plaintiff in the trust was chargeable with the proportion of the expense of the litigation, with costs to the trustees against the plaintiff.

**Judgment affirmed, without costs. All concur, except HOUGHTON, J., who dissents.**

O'BRIEN, P. J. (concurring). The expenditure for the defense of the former suit is not of a kind to bring it within the expenses of "management" for which the gift of the excess income was made to the defendants. It is equally evident that it is not properly a charge upon the annual income given to the beneficiaries. The proper method of reimburing the trustees, it being admitted that they should be reimbursed, would have been to have paid these expenses out of the corpus of the trust. This would have required a sale of enough shares to pay the amount. This all the parties agreed should not be done, all being interested, evidently, in keeping the shares in the family, and so it was agreed that the expenses should be paid out of the income. It being so agreed between the parties that payment should not be made out of the corpus, the question of whether it should be paid out of the income payable to the beneficiaries, or the excess income, which was payable to the trustees, must be determined on equitable principles.

It is admitted that the excess income is more than sufficient to defray all the expenses of defending the former suit, and so payment out of the gross income will be virtually a payment out of the excess income given to the trustees. If, however, the payment is made out of the income given to the beneficiaries, while this is not in accordance

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with the terms of the trust, a result is reached which is more nearly like that which would have been effected if payment had been made out of the corpus. The beneficiaries of the annual income of 5 per centum are the ultimate donees of the trust shares. By payment out of the corpus, they would, in the first instance, therefore, have borne the entire burden. The excess income thereafter due the trustees would have been only slightly diminished by the sale of some of the shares to cover payment of these expenses, and the annual income of the beneficiaries would have been correspondingly diminished, as the gift to them was 5 per centum on the par value of the trust shares annually. As the burden should properly have fallen upon the beneficiaries, it seems more in accordance with equity that they should bear the burden out of their annual income under the trust (it being agreed that the payment should be out of income rather than corpus) than that the burden should fall upon the trustees, who were obliged to defend their trust, and who for the good of all entered into this agreement for the preservation of the trust shares intact.

McLAUGHLIN, J., concurs.

HOUGHTON, J. (dissenting). All parties to this appeal concede the general rule that the expenses incurred by trustees in defending a trust, are payable out of the corpus of the estate. The parties hereto, however, all desired that the corpus of the trust involved should be relieved from the payment of the large expenses incurred in defending it. The only issue between the plaintiff and the defendants was whether that expense should be paid out of the 5 per cent. which the cestuis que trust were to receive annually, or out of the large surplus of dividends arising from the stock held in trust. The issue tendered to the referee by the parties (the defendants by their account, which charged the 5 per cent. with these expenses, and the contesting allegations of plaintiff thereto, which alleged that these expenses should be paid out of that part of the general income which went to the trustees individually, and were not chargeable against any beneficiary receiving but 5 per cent.) did not involve the question whether the corpus of the fund should pay the expenses, but only which fund of income should be chargeable with them. The parties selected their own issue, and narrowed it to this simple question. I do not think the court should strive to fasten these expenses upon the 5 per cent. fund simply because the corpus eventually passed to the same persons who received the 5 per cent. per annum. The referee decided as between these two funds, both made up of income, that the larger surplus fund, which went to the trustees individually, should bear these expenses, rather than the 5 per cent., which was in the nature of an annuity, payable to the cestuis que trust annually. I think he was right in so holding. The fair interpretation of the trust provision made by the testator in his will was that the 5 per cent. should be practically an annuity. The testator must have known that the stock which he was placing in trust by his will paid much more than 5 per cent. annually, for about the time of his death a dividend of 15 per cent. was declared thereon. If this 5 per cent. is to be treated as a simple annuity, from anything that appears

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in the record the annuitants cannot be made to pay the expense of defending the trust. They had a right to attack the trust, as well as the defendants had a right to defend it. The annuitants, although defeated, were not punished by even having the taxable costs of that action charged against them personally, but such costs were directed to be paid "out of the income of the fund." Steinway v. Steinway, 163 N. Y. 183, 57 N. E. 312.

I concede that it is straining the language giving to the trustees individually the excess of annual income over 5 per centum "as their compensation for the management of such shares, and such excess," to say that the testator meant they should pay all expenses connected with administration out of such excess. On the other hand, it cannot be said that the testator intended that the 5 per cent. should be chargeable with such expenses. The defendants having voluntarily eliminated the corpus of the fund from bearing such expenses, there remains only the surplus of income from which it can be paid; and, as between the two, I think that fund which went to the trustees for managing the estate should be charged with it.

All concur in the view that the other questions raised were promptly disposed of by the referee, and I think the judgment should be affirmed without any modification.

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## DREXEL v. HOLLANDER et al.

**(Supreme Court, Appellate Division, First Department. March 16, 1906.)**

**ACTIONS—JOINDER—TORT AND CONTRACT.**

**Under Code Civ. Proc. § 484, subd. 9, providing that plaintiff may unite causes of action on claims arising out of the same transaction and consistent with each other, an action on the theory that defendant has converted to his own use property belonging to plaintiff cannot be joined with an action on the theory that the title to the property is by agreement in defendant, and demanding payment therefor, though the two causes of action arise out of the same transaction.**

**[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Action, §§ 490–510.]**

**O'Brien, P. J., and Ingraham, J., dissenting.**

Appeal from Special Term, New York County.

Action by George W. C. Drexel against Elmer R. Hollander and another. From an interlocutory judgment overruling a demurrer to the complaint, defendants appeal. Reversed.

Argued before O'BRIEN, P. J., and McLAUGHLIN, INGRAHAM, CLARKE, and HOUGHTON, JJ.

Almet R. Latson, for appellants.

J. Woolsey Shepard, for respondent.

McLAUGHLIN, J. The defendants appeal from an interlocutory judgment overruling their demurrer to the complaint, upon the ground that the causes of action alleged are inconsistent, and have been improperly joined. The material facts alleged, and admitted by the demurrer, are that a written contract was entered into between the parties, by which the defendants agreed to sell, and the plaintiff to pur-

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chase, an automobile for $8,500, $5,500 to be paid in cash, and the balance by the delivery to the defendants of a second-hand automobile, at a valuation of $3,000; that the plaintiff performed on his part by paying the amount of cash stipulated, and delivering the old automobile; that thereafter the defendants were unable to deliver the new automobile, and the contract, by mutual arrangement, was rescinded, and defendants returned to the plaintiff the $5,500 cash paid by him, but neglected and refused to return the old automobile. The first cause of action set out in the complaint sets forth the transaction between the parties, the rescission of the agreement, a demand for the return of the old automobile, and the defendants' refusal, and that they "wrongfully converted the same to their own use," to plaintiff's damage of $3,000. In the second cause of action substantially the same facts are pleaded, except as to the demand of the old machine, defendants' refusal to return, and its wrongful conversion, and alleges an agreement by the defendants, in consideration of the cancellation of the original contract, to return to the plaintiff the purchase money paid, viz., $8,500, no part of which had been repaid except the sum of $5,500, and judgment is demanded for the balance.

The appellants contend that the two causes of action pleaded are inconsistent, and are therefore improperly joined. Whether or not this contention be sound depends upon the construction to be put upon section 484 of the Code of Civil Procedure. The first cause of action being in tort and the second on contract, they do not fall within either of the first eight subdivisions of this section, and cannot be joined under those subdivisions. If properly joined, it is because they come within the provisions of subdivision 9 of the section, which provides that causes of action may be united if they arise "upon claims arising out of the same transaction, or transactions connected with the same subject of action, and not included within one of the foregoing subdivisions of this section. * * * But it must appear, upon the face of the complaint, that all the causes of action so united belong to one of the foregoing subdivisions of this section; that they are consistent with each other."

It may be assumed, as contended in the opinion of Mr. Justice INGRAHAM, that the facts pleaded show the two causes of action arise out of the same transaction; but are they "consistent with each other?" To this inquiry it seems to me there can be but one answer. The first cause of action proceeds upon the theory that the title to the automobile was in the plaintiff, and that the defendants wrongfully deprived him of it by converting the same to their own use. The second cause of action proceeds upon the theory that the title to the automobile was, by agreement, in the defendants. The causes of action are not only inconsistent, but contradictory. The proof to establish one would destroy the other. For conversion plaintiff would have to prove that at the time the conversion took place he either had the title, or was entitled, by reason of a special property therein, to possession. To recover under the second cause of action plaintiff would have to prove a breach of contract; that the title to the automobile was in defendants, they having purchased it from him at the agreed price of $3,000. The measure of damage in one case would be the value of the automobile at the

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time the conversion took place, which might be more or less than $3,000, while in the other case the measure of damage would be the amount which the defendants agreed to pay or apply on the purchase price of the new machine. It is difficult to see how these two causes of action could be tried together, unless the court received evidence first as to one and then as to the other, and, if such trial were had, it is equally, if not more, difficult to imagine how the trial court could properly submit the subject to the jury. The truth is, the nature of the two actions is essentially different. The facts to establish the liability are unlike, the measure of damage is different, and the defense is different. That the causes of action are inconsistent and improperly joined in the complaint seems to be established by the following authorities: Keep v. Kaufman, 56 N. Y. 332; Wiles v. Suydam, 64 N. Y. 173; Conde v. Rogers, 74 App. Div. 147, 77 N. Y. Supp. 518; McClure v. Wilson, 13 App. Div. 274, 43 N. Y. Supp. 209; Teall v. City of Syracuse, 32 Hun, 332.

For these reasons, we think that the interlocutory judgment should be reversed, with costs, and the demurrer sustained, with costs, with leave to the plaintiff to amend on payment of costs in this court and in the court below.

CLARKE and HOUGHTON, JJ., concur.

INGRAHAM, J. (dissenting). There are two causes of action alleged in the complaint: first, for the conversion of an automobile delivered by the plaintiff to the defendants under a contract by which the defendants sold to the plaintiff an automobile for $8,500, for which the plaintiff was to pay in cash $5,500, and $3,000 by delivering an automobile, the property of the plaintiff, to the defendants. It is alleged in this cause of action that the plaintiff performed the contract on his part, paid the $5,500 in cash, and delivered his automobile to the defendants; that subsequently, the defendants being unable to carry out the contract, it was rescinded, the defendants returning to the plaintiff the sum of $5,500; that the plaintiff has demanded the return of the automobile delivered by him to defendants, but that the defendants failed and refused to return the same, and wrongfully converted the same to their own use. The second cause of action alleges the making of the contract, the performance by the plaintiff, and the cancellation of the contract by mutual consent; the defendants agreeing to return to the plaintiff, as a consideration for such cancellation of the said contract, the purchase money paid by the plaintiff, to wit, the sum of $8,500; that no part of said money has been paid to the plaintiff, except the sum of $5,500, and the complaint demands judgment against the defendants for the sum of $3,000, with interest.

The defendants demurred to the complaint upon the ground that several causes of action had been improperly united in said complaint, namely, that a cause of action in tort is therein joined with a cause of action on contract, and that the said several causes of action are not consistent with each other. This demurrer was overruled at the Special Term, and the defendants appeal.

These two causes of action arose out of the same transaction. The

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first cause of action is based upon a conversion by the defendants of the plaintiff's property. To sustain this cause of action the plaintiff must prove that he was entitled to the possession of the automobile that he had delivered to the defendants, and that by the refusal of the defendants to deliver it to him the defendants converted it to their own use. The second cause of action is based upon an agreement by the defendants to return the consideration that the plaintiff had paid upon the contract to sell and deliver to the plaintiff an automobile for the sum of $8,500, of which sum the defendants had returned to the plaintiff $5,500, leaving still owing by the defendants to the plaintiff the sum of $3,000, for which the plaintiff asks judgment.

Section 484 of the Code of Civil Procedure provides that the plaintiff—

"May unite in the same complaint two or more causes of action, whether they are such as were formerly denominated legal or equitable, or both, where they are brought to recover as follows: * * * (9) Upon claims arising out of the same transaction, or transactions connected with the same subject of action, and not included within one of the foregoing subdivisions of this section. * * * But it must appear upon the face of the complaint, that all the causes of action, so united, belong to one of the foregoing subdivisions of this section; that they are consistent with each other; and, except as otherwise prescribed by law, that they affect all the parties to the action; and it must appear upon the face of the complaint, that they do not require different places of trial."

The ground upon which the defendants claim that these causes of action cannot be united is that they are not consistent with each other, in that one is based upon a conversion of the plaintiff's property by the defendants, and the other is based upon a violation of a contract by which the defendants agreed to return to the plaintiff the consideration that the plaintiff had paid for the purchase of an automobile from the defendants, and which contract the defendants had failed to perform.

I think that these causes of action are consistent with each other. The fact that the defendants have converted the personal property of the plaintiff is not inconsistent with their agreement to repay to the plaintiff the consideration that the plaintiff paid to them for the sale of the property which they have never delivered, and which obligation arose under a special agreement, by which the contract of sale was rescinded, and the defendants agreed to repay to the plaintiff what he had paid upon the contract.

The second cause of action is not based upon the value of the automobile that the plaintiff had delivered to the defendants, but is based upon an express contract, which included the rescission of the agreement to deliver an automobile to the plaintiff. This does not appear to be inconsistent with a conversion by the defendants of the plaintiff's property. If by the second cause of action the plaintiff had attempted to recover possession of the same automobile which he had alleged in the first cause of action had been converted by the defendants, these two causes of action would have been inconsistent, as by one it is alleged that by the conversion the title to the plaintiff's property passed to the defendants, and therefore the defendants were bound to pay to the plaintiff its value, while an action for replevin would be based upon the right of the plaintiff to the possession of the property, and such

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an inconsistency is condemned by the cases cited by the defendants. But here the two causes of action, while arising out of the same transaction, are based upon two distinct obligations; the one an express contract to repay to the plaintiff a sum of money, and the other a liability for the conversion of the plaintiff's property bv the defendants. In Teall v. City of Syracuse, 32 Hun, 332, the demurrer was sustained upon the ground that it did not appear in the complaint that both causes of action belonged to one of the subdivisions of section 484 of the Code of Civil Procedure; the court saying that the first cause of action belonged to the sixth class of the causes of action mentioned in section 484 of the Code, and the second to the first class, and that the ninth subdivision did not aid the respondent, because it did not appear that both causes of action that alleged belonged to one of the subdivisions of the section. But here both of the causes of action did belong to one of the subdivisions of section 484 of the Code, because they were included within the ninth subdivision as claims arising out of the same transaction. The question of the consistency of these two causes of action was not discussed in the opinion, and therefore the case is not in point. What was decided in that case seems to have been disapproved in subsequent cases, as in People v. Wells, 52 App. Div. 583, 65 N. Y. Supp. 319, the Appellate Division in the Fourth Department, after considering the authorities, held:

"As a result of the decisions, however, we think it must now be regarded as settled that, under subdivision 9 of the section, causes of action specified in two or more of the preceding subdivisions—1 to 8 inclusive—may be united if it appears upon the face of the complaint that they arose out of the same transaction, or connected with the same subject of action, are not inconsistent with each other, affect all the parties to the action, and do not require different places of trial."

McClure v. Wilson, 13 App. Div. 274, 43 N. Y. Supp. 209, also relied upon by the appellants, is not at all in point. It was held that the causes of action there set forth were inconsistent, as the first and second were based upon the theory that the contract was invalid between the parties, and was adopted by the corporation, and, because of that, the money belonged to the corporation, and should have been paid over to it; that the third proceeded upon the theory that the contract was invalid and illegal, and no rights were acquired under it, and repudiates it—a situation not presented in this case. I think, therefore, that as it does not appear upon the face of the complaint that these causes of action are inconsistent, the defendants' demurrer fails.

The judgment appealed from should therefore be affirmed, with costs, with leave, however, to the defendants to withdraw the demurrer within 20 days, and answer upon payment of costs in this court and in the court below.

O'BRIEN, P. J. I concur in the opinion of Mr. Justice INGRAHAM, on the ground that the two causes of action are not inconsistent. Both actions proceed on the theory of rescission, and the only inconsistency is in the relief demanded, which upon the trial will be accorded in consonance with the facts proved.

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## BLAIR v. HAMPTON et al.

(Supreme Court, Appellate Division, First Department. March 16, 1906.)

1. TRUSTS—UNAUTHORIZED LOAN BY TRUSTEE—CONSENT OF BENEFICIARY—EFFECT.

Where beneficiaries of a trust fund indorsed notes to secure an unauthorized loan by the trustee, their consent to the loan thus given does not render them liable to reimburse the other beneficiaries beyond the amount of their liability on the notes.

2. SAME—RATIFICATION OF ACTS OF TRUSTEE.

Where a trustee made an unauthorized loan with the consent of part of the beneficiaries, and on his accounting the other beneficiaries, after being duly served with notice, failed to make any objection to the loan, they cannot afterwards assert a liability of the beneficiaries consenting to it to reimburse the amount lost thereon.

3. JUDGMENT—MATTERS CONCLUDED.

Where beneficiaries of a trust indorsed notes given to secure the loans made by the trustee, and in an action against them the amount of their liability on the notes was fixed by the judgment, they cannot, on an accounting with the trustee, assert that the judgment included interest on the trust fund belonging to the life tenant, which she had waived.

4. TRUSTS—ACCOUNTING BY TRUSTEE—COSTS—EXTRA ALLOWANCE.

On an accounting by a trustee, an extra allowance of costs may properly be allowed the trustee.

5. SAME.

In an action by a trustee for an accounting, where the defendants were divided into groups litigating against each other, an extra allowance of costs to them out of the estate was improper.

Appeal from Judgment on Report of Referee, New York County.

Action by Charles H. Blair, as trustee of the estate of David Cargill, deceased, against Panola C. Hampton and another, impleaded with Andrew H. Cargill and others. From a portion of the judgment entered on the report of a referee, and from an order granting to the plaintiff an extra allowance of costs, defendants Hampton and another appeal. From an order granting an extra allowance of costs to the defendants, plaintiff appeals. Judgment modified, order granting extra allowance to plaintiff affirmed, and order granting extra allowance to defendants reversed.

Argued before O'BRIEN, P. J., and McLAUGHLIN, INGRAHAM, CLARKE, and HOUGHTON, JJ.

Henry A. Prince, for appellants.

Alexander S. Lyman, for plaintiff respondents.

Frederick R. Coudert, for defendant respondents.

HOUGHTON, J. The defendants are residuary legatees of the fund held in trust under the will of David Cargill, deceased. On the termination of the trust, the plaintiff brought this action to account and to charge the shares of defendants Hampton and Stearns with the amount of certain unauthorized loans made by former trustees to defendant Andrew H. Cargill, a co-beneficiary, on the ground that they consented to and participated in such loaning of the funds of the trust During the trusteeship of Frederick A. Brown, and in 1892, the trustee loaned to Andrew H. Cargill out of the trust fund $20,000, taking his

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note therefor indorsed by defendants Hampton and Stearns; and later in 1897 he loaned $1,800 more, taking therefor a note indorsed by defendant Stearns. Frederick A. Brown died, and Walston H. Brown was substituted as trustee, and in the years 1898 and 1899 he loaned from the trust fund to Cargill $13,200 more, upon two joint notes of Cargill, Hampton, and Stearns. The moneys were used by Cargill in establishing a ranch in California, which was owned by a corporation, and on the last loan to him he caused the corporation to give to the trustee a mortgage for the entire $35,000 which had been loaned to him. Walston H. Brown resigned as trustee, and this plaintiff was appointed in his stead, and an action was instituted in the superior court of the state of California for the foreclosure of this mortgage. Defendants Hampton and Stearns were made parties thereto, and judgment was asked against them for the full amount of the notes which they had severally signed or indorsed. They appeared, and interposed several defenses, including the statute of limitations, and on the 7th day of October, 1901, a judgment was rendered relieving them from liability as indorsers on the notes, aggregating $13,200 and interest. The real property was sold, and the proceeds of the sale applied, leaving unpaid of their liability thus established the sum of $3,435.80. On the death of trustee, Frederick A. Brown, and the appointment of Walston H. Brown as his successor, an accounting of the trust fund was had. In the account appeared the item "California ranch loan $21,800." All of the defendants signed an instrument duly acknowledged, ratifying, approving, and accepting the account containing this item, waiving every objection which might be made thereto, ratifying and approving the acts of the trustee therein set forth, and agreeing and consenting that, upon the turning over of the securities therein mentioned to the substituted trustee, the estate of the deceased trustee should be fully absolved from liability, and his bondsmen discharged. When Walston H. Brown petitioned the Supreme Court to be permitted to resign, and that this plaintiff be appointed, he annexed to his petition a statement of the securities held by him belonging to the trust fund, and among them appeared "California ranch loan $36,350," being the $35,000 loaned by him and by his predecessor, in the manner specified, with accumulated interest. On this petition the court appointed a referee to take and state the accounts of the retiring trustee, and, on the coming in of such report, made an order directing all these defendants to show cause why such report, inventory, and account should not be confirmed, and why the then trustee should not be discharged, and his bond canceled. This order was duly served by publication and mailing on all beneficiaries, and, no one appearing in opposition, a final order was made confirming the report and approving of the account, and discharging the trustee and his bondsmen.

There is no suggestion that every one connected with the estate did not understand that "California ranch loan" referred to the loan made to Andrew H. Cargill, and evidenced by his notes indorsed or signed by appellants, Hampton and Stearns. The referee found that the loan was made direct to Cargill, the trustee taking the notes referred to as security, and there is no proof that appellants, Hampton and Stearns, received any of the moneys. The appellants, Hampton and Stearns,

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conceded, except as hereinafter considered, their liability for the amount of the deficiency established by the California judgment; being the sum of $3,435.80. The judgment, from which they appeal, however, charges them with liability, notwithstanding they were relieved therefrom by the judgment in the California court, upon the $21,800 of notes, and directs that, after the share of Andrew H. Cargill shall have been exhausted in satisfaction thereof, their shares shall be charged with the deficiency, and impounded for its payment. The theory upon which this recovery was had, and upon which it is sought to be sustained, is that knowledge that the trustee was making an improper loan, and consenting that he do it, was sufficient to charge them with liability to their co-beneficiaries for the loss which resulted, although they received none of the money, and there was no fraud on their part, nor any fraudulent connivance to deplete the trust fund; and this, notwithstanding they had given their notes as security, which were accepted by the trustee, and which he permitted to outlaw as against them, and notwithstanding, also, the approval of the investment by the other beneficiaries, and the discharge by them of the trustees from any liability therefor.

If the plaintiff is to be permitted to go behind the legal obligations which Mrs. Hampton and Mrs. Stearns gave in the form of notes, and disregard the amount which was adjudged to be due upon them by the California judgment, it must be upon the theory that they committed some wrong, with respect to the trust fund and towards their beneficiaries, which was not wiped out by that judgment, and which was not condoned or approved by the other beneficiaries themselves. On the facts established, we fail to see that they incurred any such liability. Eliminating all fraud, as we must, the worst light in which they stand is that they knew an improper loan was being made to Cargill, and assented to his receiving the money, and consented to sign his notes therefor, and thereby to bind themselves during the lifetime of the notes for repayment of the money. The loan was negotiated between Cargill and the trustee. They were asked to become liable on the notes as additional security. This amounted in law to no more than a forceful assent. The question is not one between a beneficiary and a delinquent trustee, where it is sought to charge him with loss upon an illegal or improvident loan. The present trustee did not make the improper loans; they came to his hands from the former trustees. If the delinquent trustee were accounting, undoubtedly Mrs. Hampton and Mrs. Stearns would be estopped from claiming that he should make good to them the loss arising from the improper loan, for he would have a right to say that they could not question its propriety because they consented to it. The rule of law between beneficiaries themselves is quite different from that existing between a beneficiary and a trustee. Residuary legatees are under no obligation to restore, in the absence of fraud or collusion, a trust fund which has been wasted by the executors. Mills v. Smith, 141 N. Y. 256, 36 N. E. 178.

Counsel upon both sides concede their inability to find an authority in which the precise question is decided. After considerable research, the one nearest in point in principle seems to be Raby v. Ridelegh, 7 DeG. M. & G. 104. There two life tenants prevailed upon the trustees to invest the trust in an unauthorized security, in order to obtain an

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increased income. A loss of principal arose. The trustees were charged by the vice chancellor with this loss, and the life tenants were held liable to reimburse them for the whole amount. On appeal this decree was modified, and the life tenants were held responsible only for such amount as the trustees had in fact paid over to them; the decision going upon the theory that there was no independent liability, but only one to restore that which they had received through the improper acts of the trustees induced by them. Ehlen v. Mayor, etc., of the City of Baltimore, 76 Md. 576, 25 Atl. 917, relied upon by the respondents, is not in point. There, four of the five beneficiaries had consented to the transfer of stocks held in trust and released to the trustees, and four-fifths of the funds realized had been thereby wasted. It was very properly held that the beneficiary who did not consent should take the one-fifth that remained.

Our conclusion is that mere knowledge of, and consent to, an unauthorized loan by a trustee, on the part of a beneficiary, in the absence of fraud or collusion or the receipt of any of the money, is not sufficient to create a liability against him to reimburse his co-beneficiaries for such loss as may occur. But, if the rule be more stringent than we conceive it to be, there is another reason why the judgment cannot be upheld. The respondent defendants waived any objection which they might have had that the loan was not one authorized by law, or that it was improperly secured or improvidently made. They accepted the investments, and ratified the accounts of the deceased trustee, which included the $21,800 loan, and approved his acts, and released him from liability therefor by a formal instrument in writing. So, too, by failing to appear when the order was made discharging the retiring trustee, and to object that he had also made improvident and unauthorized loans, they must be deemed to have assented to the propriety of making them, and to have waived their illegality or the insufficiency of security. Parties of full age may arrange and settle and distribute an estate in which they are interested among themselves without any formal decree of the court, and such settlement and arrangement, in the absence of fraud or undue advantage, is binding. Matter of Wagner, 119 N. Y. 28, 23 N. E. 200; Matter of Hodgman, 11 App. Div. 344, 42 N. Y. Supp. 1004. A release to a trustee in respect to a breach of trust committed in the investment of trust funds operates as an acceptance of the securities in which the funds have been invested. Blackwood v. Burrows, 2 Con. & Laws, Rep. 459. A decree upon an accounting approving investments binds all parties to the proceeding, even though the investment be unauthorized by law. Matter of Denton, 103 N. Y. 607, 9 N. E. 490; Matter of Tilden, 98 N. Y. 434. A beneficiary may authorize his trustee to do what otherwise would be a breach of trust, or release and agree to hold him harmless for such an act after it is done. 2 Perry on Trusts (5th Ed.) § 851; Pope v. Farnsworth, 146 Mass. 339, 16 N. E. 262. The legal effect, therefore, of the ratification and of the order sanctioning the account of the retiring trustee was to make the investments, so far as the respondent defendants are concerned, legal and proper ones. It became the duty of the present trustee, as it had been the duty of the discharged trustees, to enforce their collection. To do this the plaintiff went to the courts

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of California, and upon issue joined it transpired that the plaintiff could obtain judgment against defendants Hampton and Stearns only upon the two notes aggregating $13,200, because the former trustees had permitted the statute of limitations to run against the prior notes. These former trustees had both been released, not only from any liability that might arise out of their improper investments, but for any negligence because of failure to enforce the obligations which they had taken. They were the primary debtors.

The California judgment must be given due faith and credit, and by it is fixed the liability of the appellants, Hampton and Stearns, to the trust estate. The accounts of the trustees, which the defendant respondents accepted as true, stated that the liability was $35,000. On testing that question it was found to be only $15,000, and they are bound by that determination.

It is insisted that the deficiency established against appellants, Hampton and Stearns, by the California judgment is not wholly principal of the trust fund, but is made up, in part, of interest belonging to the life tenant, and which she had waived. If this were the fact, it was incumbent upon the appellants to see that the judgment so provided. We think they are bound by the amount thereby established as principal due from them to the trust estate, and cannot now question its correctness.

The court granted an extra allowance to the plaintiff and to the defendants appearing separately. The defendants were divided into groups, litigating against each other, and there is no reason why their counsel fees should be taken from the estate. The plaintiff was accounting, and the allowance to him was proper. In so far as the order appealed from grants an extra allowance to any of the defendants, it should be reversed.

The judgment appealed from should be modified by providing that there be deducted from the shares of appellants, Hampton and Stearns, on account of the loan to Andrew H. Cargill, the sum of $3,435.80 only, with interest thereon from the date of entry of final judgment in the California action, and, as so modified, affirmed, with costs of the appeal to them, payable out of the estate.

The order granting extra allowances should be reversed in so far as it grants allowances to the defendants, and affirmed as to the allowance to the plaintiff, without costs. All concur.

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## OZARK COOPERAGE CO. v. QUAKER CITY COOPERAGE CO.

(Supreme Court, Appellate Division, Fourth Department. March 21, 1906.)

CORPORATIONS—ACTION BY FOREIGN CORPORATION—COMPLAINT—COMPLIANCE WITH STATUTE.

A complaint by a foreign corporation alleging the execution of two contracts of sale between it and defendant, was not demurrable for failure to allege a compliance with Laws 1892, p. 1805, c. 687, § 15, requiring foreign corporations to obtain a license to do business in the state; the two transactions alleged not necessarily amounting to "doing business."

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, §§ 2520–2526, 2647.]



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Appeal from Trial Term, Erie County.

Action by Ozark Cooperage Company against Quaker City Cooperage Company. From an interlocutory judgment overruling a demurrer to complaint, defendant appeals. Affirmed, with leave to defendant to plead over on payment of costs and disbursements.

Argued before McLENNAN, P. J., and SPRING, WILLIAMS, NASH, and KRUSE, JJ.

James O'Malley, for appellant.

L. A. Groat, for respondent.

SPRING, J. The complaint alleges that the plaintiff is a corporation organized in the state of Missouri, and with its principal office in the city of St. Louis in that state. It also alleges that the defendant is a foreign corporation, with a branch office and doing business in the city of Buffalo. It then alleges that a contract in writing was entered into with the defendant at Buffalo on the 17th day of June, 1904, whereby the plaintiff sold to the defendant 1,000,000 staves, for which the defendant agreed to pay a stipulated price for each 1,000 staves on delivery thereof at Buffalo. The complaint further alleges that the plaintiff, in pursuance of said agreement, delivered 185,000 feet of said staves, for which the defendant paid, but that the defendant has refused to receive the remainder of said staves, although the same has been tendered, and damages for the breach of such contract are sought to be recovered.

For a second cause of action the complaint alleges that on the 15th day of July, 1904, another contract was executed by the parties in the city of Buffalo, for the purchase, sale, and delivery to the defendant at Buffalo of another specific quantity of staves. It further alleges a partial delivery and payment thereof, but a refusal on the part of the defendant to perform its contract by accepting the residue of said staves, and asks for damages for its breach.

The essence of the demurrer to the complaint is that it fails to show that the plaintiff "has obtained a license to do business within this state," as required by section 15 of the general corporation law (Laws 1892, p. 1805, c. 687).

We think the contention of the appellant is untenable. Section 15, referred to, prohibits a foreign corporation from doing business in this state "without having first procured from the Secretary of State a certificate that it has complied with all the requirements of law to authorize it to do business in this state"; and further, that "no foreign stock corporation doing business in this state shall maintain any action in this state upon any contract made by it in this state unless prior to the making of such contract it shall have procured such certificate." The statute is primarily a revenue measure, and intended to place a foreign corporation carrying on its business within the state on the same plane as a domestic corporation. Penn Collieries Co. v. McKeever, 183 N. Y. 98, 75 N. E. 935; Emmerich Co. v. Sloane, 108 App. Div. 330, 95 N. Y. Supp. 39. It is a rigorous measure, and should receive a reasonable interpretation, having in view the extensive interstate trade carried on, and the necessity of maintaining comity in business among

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the several states. Trade should be encouraged, not unreasonably restricted.

The complaint charges only two distinct sales, and we must assume the business conducted in this state is limited to these two transactions. This is not necessarily "doing business," within the meaning of the statute. In Penn Collieries Co. v. McKeever, supra, the plaintiff, a foreign corporation, sued to recover for a cargo of coal sold in the state of New York. It kept no coal, books of account, nor bank deposit in this state. The sale was an isolated transaction. The defendant endeavored to defeat a recovery, for the reason that the defendant had not procured a certificate authorizing it to transact business in this state. The Court of Appeals held that the plaintiff was not "doing business," within the contemplation of the statute. The court used this language at page 103 of 183 N. Y., and page 936 of 75 N. E.:

"To be 'doing business in this state' implies corporate continuity of conduct in that respect, such as might be evidenced by the investment of capital here, with the maintenance of an office for the transaction of its business, and those incidental circumstances which attest the corporate intent to avail itself of the privilege to carry on the business. In short, it should appear, as it was intimated in the opinion in People ex rel. Armstrong Cork Co. v. Barker, 157 N. Y. 159–165, 51 N. E. 1043, that the corporation and its officers intended 'to establish a continuous business in the city of New York, and not one of a temporary character.'"

Kindred cases are People ex rel. Tower Co. v. Wells, 98 App. Div. 82, 90 N. Y. Supp. 313, affirmed on opinion below, 182 N. Y. 553, 75 N. E. 1132; Vaughn Machine Co. v. Lighthouse, 64 App. Div. 138, 71 N. Y. Supp. 799. In Welsbach Co. v. Norwich Gas. & El. Co., 96 App. Div. 52, 89 N. Y. Supp. 284, affirmed 180 N. Y. 533, 72 N. E. 1152, the complaint alleged that the plaintiff, a New Jersey corporation, "has an office and offices within the state of New York." It further alleged a sale of merchandise from "the New York, N. Y., department," and also other sales "from its Buffalo, N. Y., department." There were, therefore, definite allegations showing an office in this state, indicating at least a continuous business, and allegations denoting there were departments of that business in at least two cities of this state. In Emmerich Co. v. Sloane, supra, the extent or character of the business was not up for consideration. In that case the plaintiff had made an attempt to comply with section 15 of the corporation law, but the court held that its endeavor was ineffective.

It may appear upon the trial that a more extended business has been carried on than the complaint sets forth, but, so far as its allegations disclose, the plaintiff is not barred from maintaining the action.

The interlocutory judgment should be affirmed, with costs and disbursements of this appeal, with leave to the defendant to plead over by paying such costs and disbursements and the costs of the court below. So ordered. All concur.

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(111 App. Div. 465.)

## McDONALD v. SUN PRINTING & PUBLISHING ASS'N.

(Supreme Court, Appellate Division, Second Department. March 16, 1906.)

1. LIBEL—PUBLICATION LIBELOUS PER SE.

A newspaper publication, charging a student of and writer on criminology and kindred subjects, and a former employé in the government service as specialist in education as a preventive of pauperism and crime, as a "humbug" and a "psuedo scientist" is libelous per se.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Libel and Slander, §§ 4, 80–88.]

2. SAME—COMPLAINT—ALLEGATION OF SPECIAL DAMAGES—NECESSITY.

A complaint in libel which alleges a publication libelous per se need not allege special damages.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Libel and Slander, §§ 213, 214.]

Appeal from Special Term, Kings County.

Action by Arthur McDonald against the Sun Printing & Publishing Association. From an interlocutory judgment sustaining a demurrer to the complaint on the ground that it does not state facts sufficient to constitute a cause of action, plaintiff appeals. Reversed.

See 92 N. Y. Supp. 37.

The action is for a libel in the publication by the defendant of the following:

"Congress and the Patho-Social Humbug.

"To the Editor of the New York Sun—Sir: I was very much pleased to see your vigorous and healthy editorial in the Sun of Feb. 18, exposing the patho-social humbug and 'specialist in education,' Arthur MacDonald. There is indeed cause for wonderment that his filthy nonsense should have been tolerated for so long a period. As an apostle of Lombrosian doctrines he has the distinction of being, perhaps, both the shallowest and cheekiest American promulgator of the half truths and whole falsehoods, the fallacies and follies, of this Italian School of Degeneracy. 'Doctor' Arthur MacDonald is never so happy as when he can delve in the mire and mud of derelict humanity, but for the bystanders, this 'horrible example,' for one, is not a useful or instructive exhibit. That any committees of Congress should fail to appreciate the nauseous character of this individual's 'work' is to be deplored by decent people, and the writer sincerely hopes that the Sun will continue fearlessly to expose this persistent self-advertiser and psuedo-scientist.

"New York, Feb. 19. Anthropos."

Argued before JENKS, HOOKER, RICH, MILLER, and GAYNOR, JJ.

Wales F. Severance, for appellant.

Franklin Bartlett, for respondent.

JENKS, J. The plaintiff alleges that he was graduated from the University of Rochester and from the Union Theological Seminary, and that thereafter, in this country and in Europe, he was a university student of medical subjects, especially of a medico-legal and criminological nature; that he served the government at Washington as a clerk, under the title "Specialist in Education as a Preventive of Pauperism and Crime." He further alleges that he was widely and favorably known here, in Canada, and in Europe both as a student of criminology and a writer of various publications on that and kindred subjects.

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He complains that the defendant had printed certain articles relating to his vocation, work, and writings, which were followed by the publication of the letter, upon which his action is brought.

The word "humbug" has become accepted as good English, and has an approved and well-understood meaning, as imposter; deceiver; cheat. Cent. Dict.; Worcester's Dict.; Standard Dict.; Stormonth's Dict.; Imperial Dict.; March's Thesaurus. Writers of pure and elegant English, like Lowell and Whipple, use it without the apology of quotation marks or of italics. In Nolte v. Herter, 65 Ill. App. 430, the appellant uses the word "humbug" in conversation, and the court say:

"Humbug is an imposition; imposture; deception; and as a verb signifies to impose upon; to cozen; to swindle—all implying intention to misrepresent by the assertion of what is not the actual condition, or the suppression or concealment of what is."

"Pseudo" is derived from the Greek "pseudein," to cheat; to deceive; and is defined as a "quasi prefix in compounds of Greek origin, meaning 'false'; 'counterfeit'; 'spurious'; 'sham.' It is freely used as an English prefix with words of any origin." Cent. Dict. Stormonth, a most accurate lexicographer, derives it from the Greek "pseudes," lying; false; and defines it as "a word frequently prefixed to another, and meaning 'false, spurious.'"

I think that the letter brands the plaintiff as an imposter, and as a false or sham scientist, and that therefore it is a libel upon its face. In Smith v. Stewart, 41 Minn. 7, 42 N. W. 595, the words held libelous per se were "irresponsible, unadulterated, first-class humbug and fraud." In Meas v. Johnson, 185 Pa. 12, 39 Atl. 562, the words were, "You are a first-class fraud, and of the first water." In Commonwealth v. Clap, 4 Mass. 163, 3 Am. Dec. 212, the term was "liar, scoundrel, cheat, and swindler." The books contain many other cases where equipollent words were pronounced libelous per se. I think it clear that the letter passed beyond any legitimate criticism of the work of the plaintiff to stamp him personally as an imposter, and that it cannot be held, as a matter of law, that the plaintiff pleads no cause of action therefor. Triggs v. Sun Printing & Pub. Ass'n, 179 N. Y. 144, 154, 71 N. E. 739, 66 L. R. A. 612, 103 Am. St. Rep. 841; Whistler v. Ruskin, cited in Odgers on Libel and Slander (page 35). The words "had a tendency to hurt, or are calculated to prejudice the plaintiff in his calling," and are actionable per se. Moore v. Francis, 121 N. Y. 199, 23 N. E. 1127, 8 L. R. A. 214, 18 Am. St. Rep. 810.

In the view I take of this demurrer, it is not necessary to pass upon the point whether special damages are well pleaded, for the plaintiff was not bound to plead them at all. Moore v. Francis, 121 N. Y. 204, 23 N. E. 1128, 8 L. R. A. 214, 18 Am. St. Rep. 810; Baylies, Code Pleading, 240, and authorities cited. When pleaded, it seems that the rule is the same as in an action for slander. Newell on Libel and Slander, p. 865.

The interlocutory judgment is reversed, with costs, and the demurrer overruled, with costs, with leave to the defendant to plead over within 20 days. All concur.

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(111 App. Div. 467.)

## McDONALD v. SUN PRINTING & PUBLISHING ASS'N.

(Supreme Court, Appellate Division, Second Department. March 16, 1906.)

LIBEL—PUBLICATION LIBELOUS PER SE—IMPROPER CRITICISM.

A newspaper publication, alleging that a student of and writer on criminology and kindred subjects, and a former employé of the government as specialist in education as a preventive of pauperism and crime, entrapped females into disclosing their delicate confidences, and publishing and selling the same, and imputing to him, in reviewing the publication by him of the results of his work, indecent and lascivious conduct toward young girls under the cloak of professional investigation, is libelous per se, and is not within the purview of fair criticism.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Libel and Slander, §§ 81, 84, 88, 145–147.]

Appeal from Special Term, Kings County.

Action by Arthur McDonald against the Sun Printing & Publishing Association. From an interlocutory judgment sustaining a demurrer to the complaint on the ground that it does not state facts sufficient to constitute a cause of action, plaintiff appeals. Reversed.

See 92 N. Y. Supp. 37.

The article complained of, as published by the defendant in its newspaper, reads:

"The Abnormal 'Doctor.'

"Ejected from the Bureau of Education, 'Doctor' Arthur McDonald, the patho-social investigator, is pestering Senators and Representatives with the request that he be enacted into the Department of Justice, and provided with a laboratory there for 'the study of the abnormal classes,' under the supervision of the Attorney General. How eagerly the Department of Justice yearns for the presence and assistance of this patho-social investigator of abnormal femininity may be inferred from a letter written last Saturday by Attorney General Knox to the Secretary of the Charity Organization Society of this City:

" 'Department of Justice,

" 'Washington, D. C. Feb. 21, 1903.

" 'Sir: Replying to your letter of the 18th instant, in which you ask whether this Department has any connection with the bill now pending in Congress to establish a laboratory for the study of the criminal, pauper, and defective classes, I have to say that this department is not a party in any way to the proposed legislation. Respectfully, P. C. Knox,

" 'Attorney-General.'

"The Department of Justice repudiates 'Doctor' Arthur MacDonald, his abnormal laboratory bill, and the patho-social humbug. This is merely what might be expected of any administrative establishment where sanity and clean habits of thought prevail. That there should be need now of warning Congress against such a measure as Senate Bill 6,032 is a circumstance essentially grotesque to any one who knows the facts about 'Doctor' MacDonald and his 'work.' Yet the bill has actually been reported by the Senate Committee on the Judiciary, and is now on the calendar; and it is only about three weeks since the chairman of that committee, the venerable Senator from Massachusetts, in asking for its immediate consideration and passage, referred to this 'Doctor' MacDonald as 'the very earnest and devoted gentleman who has been engaged in that work formerly in the Bureau of Education.' We have already inspected some characteristic specimens of 'Doctor' MacDonald's methods of study. We have seen how he carried his enthusiasm for the investigation of abnormal femininity to the extent of entrapping young girls and foolish married women by means of a personal advertisement, leading them on to the disclosure of their most intimate affairs of the heart

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or of sexual propensity, sometimes by letter to him, and sometimes at a personal interview which he arranged, and then publishing their confidences in a book advertised by him for sale at fifty cents a copy through a lock box in the Washington Post Office. Any Senator or Representative who wants to know just what sort of a person this 'very earnest and devoted gentleman' really is, and how far the impulse of his pursuits is genuinely scientific, may procure from the library of Congress 'Doctor' MacDonald's notorious treatise on 'Girls Who Answer Personals.' Since then the 'Doctor' (he is not a doctor of medicine, of law, of philosophy, or of divinity) has turned himself loose upon the helpless schoolboys and schoolmaidens of the Washington Public Schools. He has measured and tested the boys and girls to the extent to which he was permitted to go. His professed purpose was to obtain with his tape or his testing machines data for scientific generalizations concerning the relations between the physical conformation and moral or intellectual character. He has published statistics and conclusions. The conclusions are the laughing stock of competent scientific authority, but the statistics do really suggest thought, in one particular at least. For example, after consulting 'Doctor' McDonald's 'Girls Who Answer Personals,' let the congressman who desires to vote intelligently and properly on Senate Bill 6,032 procure a copy of his 'Experimental Study of Children, Including Anthropometrical and Psycho-Physical Measurement of Washington School Children.' This was published at the expense of the government as a public document. Amid its worthless conclusions and heterogeneous statistics, the one fact that stands forth conspicuously is the propensity of the 'Doctor' to exercise his anthropometric energy and psycho-physical curiosity upon girls rather than boys, and especially upon girls of sixteen or over, rather than upon boys of sixteen or over. In a partly similar investigation conducted several years ago by a real doctor of medicine (Dr. H. P. Bowditch) for the Boston Board of Health, the number of children measured and examined was 24,626, of whom 13,722 were boys, while only 10,904 were girls. 'Doctor' McDonald was more interested in the cases of the Girls than in the cases of the Boys, in the proportion of 8,520 girls to 7,953 boys; and the increase of his interest as the age of the girls increased in shown very significantly and somewhat unpleasantly in these tables, summarizing the results of his activity in the matter of 'psycho-physical' measurements:

| Boys Examined. | | Girls Examined. | |
|---|---|---|---|
| Age. | Number. | Age. | Number. |
| 6 | 147 | 6 | 131 |
| 7 | 533 | 7 | 508 |
| 8 | 787 | 8 | 754 |
| 9 | 878 | 9 | 883 |
| 10 | 930 | 10 | 939 |
| 11 | 862 | 11 | 931 |
| 12 | 986 | 12 | 876 |
| 13 | 926 | 13 | 966 |
| 14 | 784 | 14 | 838 |
| 15 | 524 | 15 | 655 |
| 16 and over | 592 | 16 and over | 1,044 |
| Total | 7,953 | Total | 8,520 |

The table we print next is our own, and not 'Doctor' McDonald's although its figures are derived from his:

| | |
|---|---|
| Boys under 14 examined | 6,049 |
| Girls under 14 examined | 5,988 |
| Boys of 14 and over examined | 1,904 |
| Girls of 14 and over examined | 2,532 |

"We observe that the text of the bill which this indefatigable measurer wants Congress to pass in the interest of 'patho-social science' provides expressly that he shall continue his investigation in 'hospitals and schools'; his alleged purpose being that 'the causes of social evils shall be sought out with a view to lessening or preventing them.' Look sharp after the 'Doctor' McDonald bill until the very end of the session."

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Argued before JENKS, HOOKER, RICH, MILLER, and GAYNOR, JJ.

Wales F. Severance, for appellant.
Franklin Bartlett, for respondent.

JENKS, J. The plaintiff alleges that he graduated from the University of Rochester and from the Union Theological Seminary, and that thereafter, in this country and in Europe, he was a university student of medical subjects, especially of medico-legal and criminological nature; that he served the government at Washington as a clerk, under the title of "Specialist in Education as a Preventive of Pauperism and Crime." He further alleges that he is widely and favorably known here, in Canada, and in Europe, both as a student of criminology and a writer of various publications on that and kindred subjects. This article charges that the plaintiff, who it states is not a doctor, "intrapped" young girls and married women into disclosing their delicate confidences (and it is not even stated that this information was gained primarily to aid or to treat these women), and then published them in a book, which he hawked for sale by advertisements assuring secret delivery; in other words, that the plaintiff gained confidences of women, and compiled and offered to sell them, not in the interest of scientific information or good morals, but for money, in a way that would attract those of morbid and unclean minds. If the charge is true, the plaintiff did a vile thing. The rest of the article is in form of imputations, based upon the plaintiff's report in a public document of his professional work. The fact that the article states that the statistics suggest a particular thought, but neither makes a direct charge nor asserts that but one conclusion is possible, does not afford immunity to the defendant. Sanderson v. Caldwell, 45 N. Y. 398, 6 Am. Rep. 105; Odgers on Libel and Slander, 134; Rundell v. Butler, 7 Barb. 260. It is clear enough that the article states that the statistics justify the conclusion that the plaintiff in his professional work applies his testing machine and his tape more frequently to girls than to boys because of the sex of the former, and it is almost unnecessary to say that the tape measurements at least indicate manual contact. The "thought" is more clearly indicated by the statement that the propensity increases when the girls and boys are 16 years of age and over, and by the comparison made in the relative number of boys and girls examined by Dr. Bowditch. The article may be construed as an imputation of indecent and lascivious conduct toward young girls under the cloak of professional investigation.

Upon demurrer we cannot hold that the article is within the purview of fair criticism, in that it is confined to attack upon the work of the plaintiff, and does not brand the workman as an object for public contempt, scorn, and obloquy. Triggs v. Sun Printing & Pub. Ass'n, 179 N. Y. 144, 154, 71 N. E. 739, 66 L. R. A. 612, 103 Am. St. Rep. 841; Whistler v. Ruskin, cited in Odgers on Libel and Slander, p. 35; Newell on Libel and Slander, 557. Ordinarily, such a question is for the jury (Triggs v. Sun Printing & Pub. Ass'n, supra), and we think that it is in this case.

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The other points raised by the learned and able counsel for the appellant are discussed in the opinion in McDonald v. Sun Printing & Publishing Association (handed down herewith) 98 N. Y. Supp. 116.

The interlocutory judgment is reversed, with costs, and the demurrer is overruled, with costs. All concur.

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## LAWRENCE BROS. v. HEYLMAN et al.

(Supreme Court, Appellate Division, First Department. March 16, 1906.)

1. FRAUDULENT CONVEYANCES—PRESUMPTIONS.
   A voluntary conveyance by one indebted at the time is presumptively fraudulent.
   [Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Fraudulent Conveyances, §§ 186, 188, 189, 799.]

2. SAME—PROOF.
   Fraud, as well as the fact of notice or knowledge, need not be established by direct evidence, but may be inferred from the circumstances.
   [Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Fraudulent Conveyances, § 870.]

3. SAME—GRANTEE'S INTENT—BURDEN OF PROOF.
   Where a grantor conveys property with intent to defraud his creditors, it is presumed that the intent was shared by the grantee, and the burden is on him to show that he was not only a purchaser for value and in good faith, but that he had no knowledge of facts which would put him on inquiry.
   [Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Fraudulent Conveyances, § 817.]

4. SAME—EVIDENCE—ADMISSIBILITY.
   In an action to set aside a deed as fraudulent against creditors, it appearing that the consideration was $4,000, there was no error in the admission of evidence that half of the property had been taken for the widening of the street, and that an award of $22,000 was made shortly after the conveyance.

5. APPEAL—RIGHT TO APPEAL—JUDGMENT FAVORABLE TO APPELLANT.
   Where, in a suit to set aside a deed as fraudulent as against creditors, the evidence was sufficient to warrant the court in setting aside the deed entirely, defendants were not entitled to complain because the court declared the conveyance to be a mortgage, instead of setting it aside absolutely.
   Ingraham and McLaughlin, JJ., dissenting.

Appeal from Trial Term, New York County.

Action by Lawrence Bros. against Harriet A. Heylman and another. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Argued before O'BRIEN, P. J., and McLAUGHLIN, INGRAHAM, CLARKE, and HOUGHTON, JJ.

Richard Krause, for appellants.

Ralph Earl Prime, Jr., for respondent.

HOUGHTON, J. The plaintiff is a judgment creditor of defendant Henry B. Heylman, and brings this action after return of execution to set aside a conveyance of real property made by him to his mother, appellant Harriet A. Heylman, or, in the alternative, to have the deed from him to her declared to be a mortgage only. While plaintiff's

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original action was pending against him, and shortly before entry of judgment thereon, defendant Henry conveyed to appellant Harriet, who resided with him, real property which the trial court found to be of the value of $40,000, upon which there were incumbrances, including back taxes and mechanics' liens, amounting to $8,420.46, and which constituted all the property, real or personal, that he owned subject to execution, for the expressed consideration of $4,000; the deed not being recorded until some months after its date. Defendant Henry answered, but did not appear upon the trial. Appellant Harriet appeared, but was not sworn, and produced no witnesses. On the trial the plaintiff read the testimony of Henry given upon supplementary proceedings, and gave the substance of his testimony in another action, in both of which he detailed the transaction which resulted in his conveyance to his mother, and from which it appeared that no present consideration passed at the execution of the deed, but that it was given for a past indebtedness, claimed to be at least $5,000, which his mother had frequently importuned him to pay. Proof of the value of the premises was made by showing that the city had taken about one-half for the purpose of widening an avenue, and made an award of $22,597 therefor shortly after the conveyance. Independent proof was made that Henry, a lawyer, acted as agent for his mother in certain matters, including the premises in question. The trial court found that the transfer was for a grossly inadequate consideration, and, although absolute in form, was not intended to be an absolute conveyance, but only as security for whatever indebtedness might be owing from Henry to appellant, and that the value of the premises above the incumbrances was greatly in excess of such indebtedness, and that as to such excess the conveyance was made with intent to hinder, delay, and defraud the plaintiff. From the judgment in conformity with this finding Harriet appeals, alleging that there is no proof that she was a party to any fraud, or that the conveyance was not intended to be an absolute one, or that any case was made against her which called for explanation on her part.

We think the plaintiff made a prima facie case of fraud against the grantor, Henry. His declarations were, of course, competent against himself. Courts will scrutinize with care business transactions between parent and child. First Nat. Bank of Amsterdam v. Miller, 163 N. Y. 167, 57 N. E. 308. Inadequacy of price, when great, is a badge of fraud. Sandman v. Seaman, 84 Hun, 337, 32 N. Y. Supp. 338, affirmed 156 N. Y. 668, 50 N. E. 1122; Briggs v. Mitchell, 60 Barb. 288. A voluntary conveyance by one indebted at the time is presumptively fraudulent. Smith v. Reid, 134 N. Y. 569, 31 N. E. 1082. Fraud, as well as the fact of notice or knowledge, need not be established by direct evidence, but may be inferred from circumstances. Parker v. Conner, 93 N. Y. 119, 45 Am. Rep. 178. One is presumed to have intended the natural and inevitable consequences of his acts, and when those acts point to an intent to defraud creditors, it is the duty of the court to find in accordance with the presumption. Coleman v. Burr, 93 N. Y. 17, 31, 45 Am. Rep. 160; Smith v. Reid, 134 N. Y. 576, 31 N. E. 1082.

The plaintiff, having made a prima facie case of fraudulent intent on the part of appellant's grantor, it was incumbent upon her, in order to relieve herself from the presumption of fraud on her part, to prove

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that she was a purchaser in good faith for a valuable consideration. Where a deed is executed with intent on the part of the grantor to defraud his creditors, a presumption arises that such intent was shared by the grantee, and it is incumbent upon the grantee to show that she was not only a purchaser for value and in good faith, but that she had no knowledge of facts which put her upon inquiry as to the grantor's intent. Gilmour v. Colcord, 96 App. Div. 358, 89 N. Y. Supp. 689; Bailey v. Fransioli, 101 App. Div. 140, 91 N. Y. Supp. 852.

The appellant makes no point upon the argument that the declarations of her grantor were improperly received, even as against herself; nor could she well do so, in view of the character of the objection which she made to the reception of such evidence. The objection was not on the ground that the declarations were hearsay as against her, but only upon the ground that they were incompetent because not properly sworn to or authenticated. This objection was not well taken, and she not only neglected to raise the point that they were hearsay as against her, but she afterwards introduced in her own behalf all this evidence which she had previously objected to. It is said, however, that, even if the declarations are properly in the case, they have no probative force as against her. If they proved fraud on the part of the grantor (as we think they legitimately did), and if the burden of explanation was thereby cast upon her, it is of no moment whether they are of probative force against her or not.

Nor do we think there was any error in the proof as to the value of the premises. Even if it cannot be inferred that the other half of the premises not taken in the condemnation proceedings were as valuable as the half which was taken, still there was a gross inadequacy of consideration, even if the $4,000 mentioned in the deed was actually due the appellant.

It is also urged that the court could not declare the conveyance to be a mortgage, but must set it aside absolutely, or let it stand as a valid conveyance. "It is an established doctrine that a court of equity will treat a deed absolute in form as a mortgage when it is executed as security for a loan of money. That court looks beyond the terms of the instrument to the real transaction." Mooney v. Byrne, 163 N. Y. 86, 92, 57 N. E. 163. The court might have set aside the deed entirely. That it gave to the appellant a judgment more favorable than she was entitled to is not a cause of complaint on her part. Where one party submits to a judgment, the other cannot be heard to insist that it shall be set aside because it is unjust to the one recovering it. Rockefeller v. Lamora, 106 App. Div. 345, 94 N. Y. Supp. 549.

Our conclusion is that the evidence was sufficient to sustain the findings of the court, and that the judgment must be affirmed, with costs. All concur, except INGRAHAM and McLAUGHLIN, JJ., who dissent.

INGRAHAM, J. I do not think that the deposition of the defendant Henry B. Heylman was competent evidence against the appellant, or that such deposition, which was admissible merely as declarations of the defendant Henry B. Heylman, was sufficient to sustain a recovery against the appellant. Such declarations were admissible as evidence,

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as Henry B. Heylman had interposed an answer, and, while evidence against him, were incompetent against the appellant, and their admission did not tend to prove any fact which the plaintiff was bound to establish as against the appellant. As these declarations of Henry B. Heylman were the only evidence to sustain the plaintiff's cause of action, I think, as against this appellant, the complaint should have been dismissed. I therefore dissent.

McLAUGHLIN, J., concurs.

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(111 App. Div. 353.)

## MORHARD v. RICHMOND LIGHT & R. CO.

(Supreme Court, Appellate Division, Second Department. March 16, 1906.)

1. NEGLIGENCE—PERSONAL INJURIES—PROXIMATE CAUSE—PROOF.
   In an action for death by wrongful act, plaintiff must make it appear with reasonable certainty that the injury was inflicted as the result of defendant's negligence, and the jury cannot be permitted to arrive at a verdict by speculation or guesswork.
   [Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, §§ 267, 273.]

2. ELECTRICITY—NEGLIGENCE—PERSONAL INJURIES—EVIDENCE—QUESTION FOR JURY.
   In an action against an electric light company for the death of a person alleged to have been killed by coming in contact with a wire which defendant had negligently allowed to become charged with a dangerously high voltage, evidence *held* to justify submission to the jury of the question of defendant's negligence.
   [Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Electricity, § 11.]

3. SAME—DUTY TO EXERCISE CARE.
   An electric light company maintaining wires charged with a voltage so high as to be deadly is required to exercise a high degree of care to protect persons using the current for domestic lighting.
   [Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Electricity, § 7.]

4. DEATH—DAMAGES—EXCESSIVENESS.
   In an action for negligence causing the death of a dentist 37 years old, having a family of four children and earning an income of from $17,000 to $20,000 a year, a verdict for $40,000 was not excessive.
   [Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Death, §§ 125-130.]

Appeal from Trial Term, Kings County.

Action by Anna C. Morhard, as administratrix of Francis Louis Morhard, deceased, against the Richmond Light & Railroad Company. From a judgment for plaintiff, and from an order denying a motion for new trial, defendant appeals. Affirmed.

Argued before HIRSCHBERG, P. J., and WOODWARD, JENKS, RICH, and MILLER, JJ.

Frank Harvey Field, for appellant.

Herbert C. Smyth (Millard F. Tompkins, on the brief), for respondent.

RICH, J. This appeal is by the defendant from a judgment in plaintiff's favor for $40,000 for damages alleged to have been sustained

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in consequence of the killing of plaintiff's intestate. His death was caused, it is alleged, by his body coming in contact with a 2,400 voltage current of electricity, which was negligently permitted to flow into the residence of the deceased by the defendant. At the time of the accident defendant was engaged in the business of supplying electricity to various customers at Giffords, in the county of Richmond, of whom the deceased was one. The electric current of 2,400 volts was delivered to a transformer placed upon a pole in front of his residence by two primary wires carrying an alternating current. The office of the transformer was to reduce the 2,400 voltage of the primary circuit to 120 volts, and deliver this voltage of 120 to deceased's residence over a secondary circuit, consisting also of two wires running from the transformer.

The case was tried by plaintiff upon the theory that the transformer was in an imperfect condition, and that because of this condition a deadly voltage of electricity was permitted to pass over the pole of the secondary wire. Plaintiff's intestate was a strong man. He went into his cellar in perfect health, and was dead when found lying upon the cellar floor about an hour later. An electric lamp, suspended by an insulated cord, was lighted. His position was such as to indicate that he had fallen while engaged in lighting this lamp. It was suspended from a nail in the ceiling, to which also was attached a wire hanging down, supporting a swinging shelf. There was a burn between the fifth and sixth rib on the left side of deceased's body, and there was also directly over this a small hole burned in both the outer and under shirt worn by him at the time. Evidence was introduced tending to show that there was a burn on his left foot, and also a burn in the stocking and slipper directly over this burn. The burden of establishing that the accident was the result of defendant's negligence, and that plaintiff's intestate was free from contributory negligence, was upon the plaintiff, and the verdict will not be sustained unless plaintiff has made it appear with reasonable certainty that the injury was inflicted as a result of defendant's negligence. A jury cannot be permitted to arrive at a verdict by speculation or guesswork. Menzies v. Interstate Paving Co., 106 App. Div. 107, 94 N. Y. Supp. 492. It appears that the wire attached to the droplight was defective, and not properly insulated at the point where it came in contact with the wire sustaining the swinging or hanging shelf. This wiring was put in the house and maintained by the deceased, but was only intended to carry a voltage of 120, which was harmless. Defendant contends that it is more reasonable to suppose that deceased met his death as the result of injuries sustained by falling from a small box standing directly in front of the shelf, and that it is at best but a guess as to whether his death was caused by an electric shock or a broken neck occasioned by the fall. If this is correct, of course the verdict cannot be sustained. It has been held repeatedly, and is the law of this state, that where the damages have been inflicted by one of two causes, for one of which the defendant is responsible and for the other of which he is not responsible, the plaintiff cannot succeed where it is just as probable that the damage was done by one cause as by the other. But is the learned counsel correct as to the conclusion he reaches? It is true that the

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cause of death has not been established to an absolute certainty; no autopsy was held, and Dr. Hutchinson, a witness called by defendant, testified that: "In order to tell if a man has died from electric shock, in the first place an autopsy is necessary to eliminate absolutely every other cause of sudden death." Yet I think the evidence predominates in favor of plaintiff's theory. It appears that on the night of the accident, and at different times at night antedating the accident, the transformer had been observed to have been surrounded by blue lights and sparkling, and that a buzzing noise was at times observed, resembling rapid hammering; that on the evening of the accident a blue light was observed where the primary wires came in contact with the trees. The transformer was taken from the pole by the defendant after the accident, but was produced upon the trial, and evidence is given that it was tested after the accident and worked properly. It appeared, however, that about one-half of an inch of the insulation was gone off the primary wire in the transformer in one place, and that this bare wire was about 9/64 of an inch from the iron transformer case. The pole to which this transformer was attached was wet. Evidence was given tending to show that 2,400 volts will jump in the open air from one wire to another two-sevenths of an inch away, and the greater the voltage the greater distance the voltage will jump. Expert evidence was given tending to show that the primary current got on the secondary circuit through the transformer, and in support of this theory our attention is called to the fact that, besides the noise and blue light emanating from the transformer, upon the night of the accident blue lights were observed on the secondary wire leading from the transformer to the house; also that lights in the house were unsteady, at times giving a very bright light (brighter than usual), and then that they would go out entirely, which indicated, the experts testified, that the wires were instantaneously short circuited, and that a ground might be effected through the wooden pole, which was wet. Professor Sever testified that these phenomena indicated "that there was some breakdown in the insulation."

The learned counsel for the appellant admits in his argument that if "manifestations of electrical energy, as described by witnesses, came from the secondary circuit, there must have been a high voltage current on the secondary circuit." Evidence was given on the part of plaintiff that standing on the cellar floor, in reaching up to turn on the light, the wires at the point where they were attached to the shelf would touch over the region of deceased's heart. His shirt showed a burn, corresponding with the apex of his heart, where the burn on the body was found. Experts gave it as their opinion that deceased received a shock from a high potential current of nearly, if not the entire, electric force of the primary circuit. It appears, however, that from 200 to 220 volts in the secondary circuit, upon both legs of the circuit, would burn out all lights in the house because of the high potential force. The fact that the lamps did not burn out is explained by an expert, who gives it as his opinion that the voltage was connected with but one leg of the secondary circuit. He says: "The deceased came in contact with one leg of the secondary circuit, and in that way got the entire voltage, or very nearly the entire voltage, of the primary." He

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admits that if the primary circuit had been connected to both legs of the secondary that the fuses would have blown, or all the lamps would have gone out. The fact that the lamps did not go out is a positive manifestation that the current—the high potential—did not go on both legs of the secondary circuit. "This is also shown by the fact that only one of the wires—the insulation of one of the wires—is burned off."

I must confess my inability to understand how there could have been any light in the house if the power was not connected with both legs, unless this great potential force was instantaneous. Mr. Southard stated:

"The fact that the lights in the house did not blow out but remained lit indicated, first, that the circuit fuses in the primary did not blow out. From the fact that they did not blow out when this occurrence took place, why, there was not sufficient amount of current drawn to blow the fuse, and also that the application of the current was not of long enough duration to heat the fuses up sufficiently to blow them. The doctor could have only been in contact a very short space of time, as indicated in the outer shirt—the puncture on the outer shirt, the other shirt, the stocking, and slipper. * * * The burning there would continue after the current was actually through going through his body, due to the fact that woolen will smoulder and will burn."

There was sufficient evidence to warrant the submission of the question of defendant's negligence to the jury. Defendant maintained this primary circuit, charged with an alternating current of 2,400 volts. This was a deadly force, and it was defendant's duty to exercise a high degree of care to protect the deceased from this current. Caglione v. Mt. Morris Electric Light Co., 56 App. Div. 191, 67 N. Y. Supp. 660. It appears that the primary wires were in contact with trees, and that sparks and blue light were observed at the transmitter for some months before the accident, and yet no examination was made of the transformer.

The jury found, after a fair and impartial charge by the learned trial justice, that plaintiff's intestate was killed by reason of a breaking down of the transformer, which permitted the high potential force of electricity to enter the house of the deceased; that this was due to the negligence of the defendant; that deceased was free from any negligence which contributed to his death; and the verdict is supported by the evidence. Deceased was 37 years of age at the time of his death. He was a dentist, and his income from his dental profession was shown to have been from $17,000 to $20,000 a year. He left three children, the eldest being eleven years of age, besides a posthumous child born six months after his death. We do not think the verdict was excessive under the circumstances.

The exceptions have been examined with care, and we find none warranting a reversal.

The judgment and order must therefore be affirmed, with costs. All concur.

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(111 App. Div. 358.)

THOMPSON-STARRETT CO. v. BROOKLYN HEIGHTS REALTY CO.

(Supreme Court, Appellate Division, Second Department. March 16, 1906.)

1. MECHANICS' LIENS—GROUNDS FOR LIEN—PERFORMANCE OF WORK.
Where the contractor for the erection of a building on a lot on which there were old buildings took down the old buildings, and sold the materials at a profit, and prepared plans for the proposed new building, and during the preparation of the plans an engineer employed by the contractor visited the site and made certain examinations, and the contract was then breached by the owner, the contractor was not entitled to a mechanic's lien.

2. ACTION TO ENFORCE LIEN—RECOVERY ON QUANTUM MERUIT.
Code Civ. Proc. § 3412, in relation to mechanics' liens, provides that, if a lienor shall fail for any reason to establish a valid lien in an action, he may recover judgment for such sums as are due him, or which he might recover in an action on a contract against any party to the action. *Held*, that a personal judgment is not authorized in favor of one who never could have had a lien.

3. SAME—CONDITIONS PRECEDENT TO RECOVERY.
Where a building contract required an architect's certificate as a condition precedent to the contractor's right to a payment in an action to enforce a mechanic's lien, the contractor could not recover a personal judgment under the statute, where he had not proved that he had obtained the required certificate.

Appeal from Special Term, Kings County.

Action by the Thompson-Starrett Company against the Brooklyn Heights Realty Company. From a judgment dismissing the complaint, plaintiff appeals. Affirmed.

Argued before HIRSCHBERG, P. J., and JENKS, HOOKER, RICH, and MILLER, JJ.

Charles L. Kingsley, for appellant.
John Hill Morgan, for respondent.

RICH, J. This is an appeal from a judgment dismissing the plaintiff's complaint. The action was brought to foreclose a mechanic's lien. The defendant was the owner of real property in the borough of Brooklyn upon which were old buildings. On March 9, 1904, it entered into a contract with the plaintiff, in which the latter undertook and agreed to furnish all the materials and perform all the labor necessary and required for the erection and completion of an apartment hotel upon said premises for the sum of $892,500. Under the provisions of this contract, the plaintiff caused the buildings to be torn down and removed, receiving therefor from a subcontractor $3,500, without incurring or paying any expense in connection with such work. The contract was silent in regard to the ownership of the materials in such buildings after demolition, but it was established on the trial that when a building contract was silent on such subject all materials in the buildings torn down belonged to the contractor. The plaintiff caused plans for the proposed new building to be made by its employés, during the preparation of which an engineer in plaintiff's employ went to the site, examined the buildings and condition of the earth, to determine the weight and style of the foundation to be constructed, and also examined a party wall between the old building and an adjoining one that had

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to be cared for and guarded against injury in excavating by plaintiff. This was done to learn existing conditions, in order to intelligently make the required plans for the new building. Aside from this nothing was done by the plaintiff under the provisions of the contract. The defendant was required, when the buildings were "razed to the ground," to pay all existing incumbrances upon the property, and execute a bond, secured by a first mortgage thereon in favor of plaintiff or any person it might designate, in the sum of $800,000; to pay $50,000 when the steel work was erected to a height of four stories, and $42,500 when all the steel frame was up. The defendant was unable to perform its agreement to pay the existing mortgages on the property, and the plaintiff thereupon filed the mechanic's lien to foreclose which this action was brought.

The memorandum opinion of the learned trial justice is as follows:

"Plaintiffs have a claim against defendant for breach of contract, but cannot foreclose it in this lien action because the making of plans for building gives no lien. Rinn v. Electric Power Co., 3 App. Div. 305, 38 N. Y. Supp. 345. The tearing down of a building gives no lien. In this case plaintiffs have been more than paid for that work. As there could not be a lien, there can be no personal judgment. Mowbray v. Levy, 85 App. Div. 68, 82 N. Y. Supp. 959. Judgment for defendant, with costs."

In this conclusion we think he was clearly right. There is nothing in the case under consideration tending to remove it from the principle declared in Rinn v. Electric Power Co., 3 App. Div. 305, 38 N. Y. Supp. 345, that the simple preparation of plans and specifications gives no right to a lien, and is not embraced within the lien law of the state, with the exception of the fact that, in order to qualify himself for the proper preparation of such plans, plaintiff's engineer visited the premises, and inspected the building, ground, and adjoining party wall, and the tearing down of the buildings; which does not constitute such an active participation in the manual functions of the construction of a proposed building as to take the case out of the operation of such principle. There was no construction in fact of any kind. The excavation for the foundation was not even done; consequently, there was no supervision or superintendence of construction. All that was done was the preparation of the plans, the tearing down of the old buildings, and removal of the materials of which they were composed. There is an entire absence of the "concurrence of plans and superintendence upon which liens were sustained in the cases to which our attention is directed."

The plaintiff contends that the demolition of the old buildings is the performance of labor for the "improvement of real property," within the meaning of the mechanic's lien law, and makes its lien, to the extent of the value of such work, valid and enforceable, and, being valid in part, authorizes and entitles it to a personal judgment for the damages it has sustained by defendant's breach of contract. But this contention overlooks the fact that for such services the plaintiff incurred no expense whatever, and actually received $3,500 over and above the value of such labor. For such work there was nothing due it from the defendant, and, there being no debt of the owner, there can be no lien upon the owner's land; as well as the further fact that the statute re-



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ferred to defines the word "improvement" as being "work done upon such property or materials furnished for its permanent improvement." The tearing down of an old building can hardly be said to permanently improve the naked land. I do not think that it was within the intention of the law makers that such work should give the person performing it a lien, and such a construction of the statute is not warranted. While the plaintiff may have a cause of action against the defendant for a breach of contract, and be entitled in such action to recover the damages it has sustained, such cause of action furnishes no basis for a lien, and gives no right of recovery in this action.

The appellant also urges that it was entitled to recover in this action upon a quantum meruit; its complaint alleging the existence and breach of a contract by defendant without fault on its part, and that the reasonable cost and value of the labor done and performed by it was $2,500. In support of this contention section 3412 of the Code of Civil Procedure, and Shirk v. Brookfield, 77 App. Div. 295, 79 N. Y. Supp. 225, Boyd v. Vale, 84 App. Div. 414, 82 N. Y. Supp. 932, and Baumann v. Manhattan Consumers' Brewing Co., 97 App. Div. 470, 89 N. Y. Supp. 1088, are cited. There is no question of the correctness of the principle declared in these cases, but it is not applicable to the case at bar, for the reason that before it could avail the plaintiff it must have been established that some portion of the lien sought to be enforced was valid and enforceable; in which event a personal judgment for the balance due and unpaid might properly have been rendered, and the case is barren of such evidence. This court has held that where no valid lien is acquired a personal judgment is not authorized by the section of the Code cited. Mowbray v. Levy, 85 App. Div. 68, 82 N. Y. Supp. 959. If a personal judgment is not authorized, there could be no recovery upon a quantum meruit. Were this not so the right to such recovery, given by section 3412, is expressly limited to such sums as are due plaintiff, "or which he might recover in an action on a contract against any party to the action." Here again the plaintiff is confronted by an unsurmountable obstacle, for it failed to allege or prove upon the trial that it obtained of the architect the certificate required in the contract as a condition precedent to a right of payment, or that such certificate was reasonably withheld. The evidence, therefore, fails to establish that there was anything due from the defendant when the lien was filed, and the provisions of section 3412 do not aid or sustain plaintiff's contention.

No errors appear that would justify reversal, and the judgment must be affirmed, with costs.

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(111 App. Div. 473.)

## PEOPLE ex rel. LAWSON v. LAWSON.

(Supreme Court, Appellate Division, Second Department. March 16, 1906.)

1. DIVORCE—CUSTODY OF CHILDREN—TO WHOM AWARDED.

The paramount consideration in awarding the custody of children to either parent in a divorce action is the welfare of the children.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Divorce, §§ 781-787.]

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2. SAME—EVIDENCE.

**Where the affidavits in a proceeding for the award of the custody of children of parties to a divorce showed that the children were old enough to be impressed with their surroundings, that they had lived a life of hotels and boarding houses; that the mother was gay, indiscreet, and infirm of temper, kept late hours, and arose late; so demeaned herself as to be censured by prudent persons both for her carriage and for her neglect of the children, even to their bodily cleanliness; there being no such showing against the father, who offered his married sister's home (apparently one of educated and respectable people) as a home for the children, his sister assenting thereto—the custody of such children was properly awarded to the father pending the trial of the divorce issues.**

**[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Divorce, §§ 781–784.]**

**Hirschberg, P. J., dissenting.**

Appeal from Special Term, Kings County.

Proceeding by the people on the relation of William M. Lawson, against Lena L. Lawson. From a final order awarding the custody of the parties' children to respondent pending the trial of divorce issues, relator appeals. Reversed.

Argued before HIRSCHBERG, P. J., and WOODWARD, JENKS, RICH, and MILLER, JJ.

Frank Harvey Field (R. Percy Chittenden, on the brief), for appellant.

Edmund L. Mooney, for respondent.

JENKS, J. The paramount consideration is the welfare of the children. People ex rel. Elder v. Elder, 98 App. Div. 244, 90 N. Y. Supp. 703, and authorities cited. They are not of years so tender as to require award to the woman because the mother is essential to their daily living. The record of life with the mother is before us. It is not enough that the children have not been naked and have not been hungry. They should have received care like unto that which moves a parent not only to clothe and feed his child, but to train him up in the way he should go. There has been a lack of such tutelage. A child is apt to pattern its life after that of its parent. These children are old enough to be impressed with their surroundings, to be moulded by the course of their parents' life, and to remember even what they may not now understand. The lads have lived a life of hotels and boarding houses. Disinterested affiants describe the mother as gay, indiscreet, intemperate of speech, and infirm of temper. They depose that her habits are not good; that she rises late, keeps late hours abroad, and passes much time in the society of men whose influence is bad. In short, these people say that she so demeans herself as to be censured by prudent persons both for her carriage and for her neglect of her children, even to their bodily cleanliness. No reason appears why we should discredit these affidavits, and no sufficient answer is made to them. This proceeding, then, must be determined by them, and we must take the situation as they describe it. It is not necessary to attribute it to intention, for inattention may have caused it. Though the father is the subject of counter attack, there is no such showing against him. He is affluent. He offers his married sister's home (apparently one of educated and respectable people) as a home for his

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children, and his sister assents. The presumption is clear enough that the lads will be far better off there than in their present atmosphere. By this decision we do not prejudice the issues in the pending action for an absolute divorce, for the welfare of the children and the wrongdoing of a parent are quite different questions. The trial of these issues may reveal that the woman has been belied by these affiants, but we are clear that the question of custody as now presented must be determined in favor of the father. The mother should not be entirely cut off from access to the children, but should be allowed to visit them for two hours at a time twice in each week.

The order must be reversed, and the custody awarded to the father, with such provision for access by the mother as we have indicated.

All concur, except HIRSCHBERG, P. J., who dissents, and RICH, J., who takes no part.

HIRSCHBERG, P. J. I dissent. As the case contains counter charges, and a former trial was decided in defendant's favor; as the present custody of the children is the result of the plaintiff's abandonment of them; as they are very young, and no serious injury has apparently been occasioned by their mother's care of them; and as the case can be tried speedily on the merits if the plaintiff wishes—I think it would be wiser not to interfere with the discretion of the Special Term.

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## ZIRINSKY v. POST et al.

(Supreme Court, Appellate Division, Second Department. March 22, 1906.)

1. APPEAL—SCOPE OF REVIEW—DIRECTION OF VERDICT—MOTION BY BOTH PARTIES.

   Where at the close of the evidence both parties move for the direction of a verdict, this gives the court authority to determine the facts, and its determination has the same effect as the verdict of a jury.

   [Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3474, 3475, 4024; vol. 46, Cent. Dig. Trial, § 400.]

2. SAME—PRESUMPTIONS—FACTS.

   Where at the close of the evidence both parties moved for a directed verdict, the facts most favorable to the plaintiff must be deemed to have been found where there is any conflict in the evidence.

3. VENDOR AND PURCHASER—CONTRACT—DEFAULT IN PERFORMANCE.

   Where a contract for the sale of land provided that the deed should be delivered and the price paid at a certain place at 12 o'clock noon of a certain day, at which time the purchaser appeared ready and willing to perform, and left after having waited an hour for the vendors, the purchaser was entitled to recover a portion of the price which he had paid upon the execution of the contract, although the vendors were ready to perform at a later hour on the day set for performance.

Appeal from Trial Term.

Action by Jacob Zirinsky against Abram S. Post and another. From a judgment for plaintiff, and from an order denying a motion for a new trial, defendants appeal. Affirmed.

Argued before WOODWARD, JENKS, HOOKER, RICH, and GAYNOR, JJ.

George Murray Brooks, for appellants.

Harry Zirn, for respondent.

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WOODWARD, J. At the close of the evidence both parties asked the court for the direction of a verdict, thus giving authority for the determination of any facts to the court, and the verdict is to have the same effect as though found by a jury. The facts most favorable to the plaintiff must be deemed to have been found where there is any conflict in the evidence, and these facts are that the plaintiff entered into a contract with the defendants, as executors of the will of the late William Post, for the purchase of three lots of land with the buildings thereon in the borough of Brooklyn. The purchase price was to be $25,400, $500 on signing the contract, $3,900 in cash on the delivery of the deed, and $21,000 by executing and delivering three purchase money bonds and mortgages for $7,000 each. The deed of the premises, it was agreed, should be delivered at the office of George Murray Brooks, No. 43 Wall street, New York, on the 7th day of January, 1904, at 12 o'clock noon, upon receipt of said payments. The plaintiff was present at the appointed hour, ready, willing, and able to perform his contract, and offered to do so, making a tender of his money to the persons in charge of the office, and demanding the deed, which was refused. He waited at the office a reasonable length of time, and, the defendants or their attorney not appearing, plaintiff left the office, and subsequently invested his money in another piece of property. He brings this action to recover the $500 deposited upon signing the contract, and the defendants, without ever having tendered the deed, without asking for specific performance of the contract, insist that the judgment in favor of the plaintiff should be reversed, because it is alleged that the defendants were ready to deliver the deed at an hour subsequent to the time agreed upon within the same day, and after the plaintiff had left the office.

If the defendants presented any equities, it might be that the court would be disposed to disregard the exact time, and to hold that a substantial compliance was all that was necessary, but in the case at bar it is conceded that the defendants subsequently sold the property at an advance in price, and their effort to keep the $500 paid by the plaintiff, where they are alone in default, hardly calls for any effort on the part of this court to interfere with the judgment, and we find no case which would warrant such interference. The action is at law. The equities, if there are any involved, are all with the plaintiff, and the defendants having stipulated to close the transaction at a particular time, and the plaintiff having appeared prepared to perform his part of the contract, and having waited at the appointed place for an hour —for a reasonable length of time—and the defendants never having appeared or tendered a deed to the plaintiff, it is clear that there is no defense to the action to recover the $500 paid on account of the purchase, even though it appears from the evidence that the defendants would probably have been prepared to act within a few hours of the appointed time.

The judgment and order appealed from should be affirmed, with costs. All concur; JENKS, J., in result.

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## VENTRESCA et al. v. BECKWITH.

(Supreme Court, Appellate Division, Second Department. March 22, 1906.)

TRIAL—RECEPTION OF EVIDENCE—MOTIONS TO STRIKE OUT.

In an action for breach of contract for the erection of a wall, where a witness testified as to measurements of the completed and uncompleted portions of the wall at the time defendant compelled plaintiff to stop work thereon, and also gave certain estimates without objection by defendant, a motion to strike out all his testimony, on the ground that he was not shown to be an expert, was properly overruled; the part referred to not being subject to that objection.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 248.]

Appeal from Trial Term.

Action by Gennaro Ventresca and another against Clinton Beckwith. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

Argued before WOODWARD, JENKS, HOOKER, and RICH, JJ.

William H. Weeks, for appellant.

Abram J. Miller, for respondents.

WOODWARD, J. The plaintiffs bring this action to recover damages for a breach of contract, and have been awarded a verdict by the jury, and the only question presented upon this appeal from the judgment is the refusal of the court to grant a motion to strike out the testimony of a witness called to prove the relative value of the work performed under the contract; the defendant having prevented the plaintiffs from completing the work, as the jury has found upon sufficient evidence.

The plaintiffs had a contract with the defendant for the construction of certain stone wall, for which the defendant was under contract with the city of New York. Some portion of this wall had been finished; other portions were at various stages of completion. The contract provided that the plaintiffs should be paid $9.25 per rod for the completed wall, and plaintiffs called one Waite, an architect, to prove the amount of work which had been done under the contract at the time the defendant prevented further work. Mr. Waite testified that he was familiar with this general kind of wall; that he had constructed walls of the same general character, and knew the value of the work, etc.; and then testified to the measurements which he had made of the completed work and of the uncompleted portions, the stone which had been drawn upon the ground, etc. On his cross-examination defendant's counsel asked him some questions, the answers to which might be construed into an admission that he was not familiar with walls of exactly the same character. Then he was asked a variety of questions as to the details of the wall, the cost, etc., and then a motion was made to strike out all of his testimony, on the ground that the witness was not shown to be an expert. Upon further questioning by the court, it appeared that the witness was familiar with work of the same kind, except that he had never constructed a double-faced wall, and that the witness was called for the purpose of showing the proportion of the work which had been performed; the estimates as to

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values being based upon the contract price of $9.25 per rod, and the court denied the motion to strike out the testimony. Obviously the witness had shown himself competent at least to testify to the measurements which he had made, and, having testified without objection as to the relative values of the different portions, it would seem that the court was entirely justified in denying the motion which was before it, which was to strike out all of the testimony of the witness. This would be true even though the witness had shown no qualifications as an expert. He made measurements, and he could tell of these, and, having told of them without objection as to his estimates, the plaintiffs were entitled to the benefit of the evidence.

On the merits there is evidence sufficient to justify the verdict of the jury entirely independent of this witness, and, as only questions of law are presented by an appeal from the judgment (Alden v. Knights of Maccabees, 178 N. Y. 535, 71 N. E. 104), and it was clearly not error for the court to deny the motion as made by the appellant, the judgment must be affirmed, with costs. All concur.

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## STOKES v. NEW YORK LIFE INS. CO.

(Supreme Court, Appellate Division, Second Department. March 22, 1906.)

MASTER AND SERVANT—INJURIES TO SERVANT—LABOR LAW APPLICATION.

Labor Law, Laws 1897, p. 467, c. 415, §§ 18, 19, declaring that a master shall be liable for injuries to servants from the negligence of his contractor or servants in building scaffolds in certain specified cases, does not apply to a scaffold or platform consisting merely of planks laid on horses, used by the janitors of a building for the purpose of washing the walls.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 374, 397, 459.]

Appeal from Trial Term, Kings County.

Action by Thomas Stokes against the New York Life Insurance Company. From a judgment in favor of plaintiff, and from an order denying defendant's motion for a new trial on the minutes, it appeals. Reversed.

The action was for personal injuries from negligence. The defendant owns a large building and keeps a corps of men continually employed to clean it and do the ordinary repairs to it from day to day. These men or some of them, including the plaintiff, were instructed by the janitor to wash the ceiling of one of the rooms. To do this they set up wooden horses and put the necessary beams and planks on top of them to make a platform or scaffold 12 feet high to work on. These things, and the like, were all kept on hand in the building by the defendant for daily use. The plaintiff testified that he did not help put up the platform, and the judge charged that if he did he could not recover.

The plaintiff fell from the platform while at work washing the ceiling. He testified that one of the planks tilted or tipped sidewise under his weight, and that the cause was that it was warped.

Argued before WOODWARD, JENKS, HOOKER, GAYNOR, and RICH, JJ.

Frank V. Johnson (E. Clyde Sherwood, on the brief), for appellant.

Rufus W. Williams, for respondent.

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GAYNOR, J. The learned trial judge charged the jury that the provisions of the Labor Law (sections 18, 19, p. 467, c. 415, Laws 1897) in effect making the master liable for the negligence of his contractor or servants in building scaffolds in certain specified cases, applied to this case. In this he was in error according to a case afterwards decided. Schapp v. Bloomer, 181 N. Y. 125, 73 N. E. 563. This case is not distinguishable from that. The scaffold or platform on horses on which the plaintiff was working, and which was set up by his fellow workmen, was not within the meaning of the labor statute, but a simple affair used every day to wash walls and ceilings by janitors and their help. It did not present the possibilities of danger contemplated by the statute. As there were plenty of planks furnished and on hand, the workmen had no need to use the warped one (if, indeed, it was warped); but this does not need to be considered now.

The judgment and order should be reversed.

**Judgment and order reversed, and new trial granted; costs to abide event. All concur.**

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## SCHLESINGER v. BOROUGH BANK OF BROOKLYN.

**(Supreme Court, Appellate Division, Second Department. March 22, 1906.)**

**PLEADINGS—ANSWER—TIME FOR AMENDMENT.**

**Under Code Civ. Proc. § 798, providing that where service of notice or pleading is by mail the adverse party has double the time specified for the doing of an act by him, and section 542, providing that, within 20 days after a pleading is served, or at any time before the period for answering it expires, it may be once amended by the party of course, where an answer is served by mail the defendant may amend it of course within 40 days.**

**[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 595.]**

**Jenks, J., dissenting.**

Appeal from Special Term, Kings County.

Action by Leo Schlesinger, as receiver of the Federal Bank of New York, against the Borough Bank of Brooklyn. From an order permitting the defendant to amend its answer as of course, plaintiff appeals. Affirmed.

Argued before HIRSCHBERG, P. J., and WOODWARD, JENKS, RICH, and MILLER, JJ.

Stillman F. Kneeland, for appellant.

John T. Smith, for respondent.

HIRSCHBERG, P. J. I cannot concur either in the views expressed in the opinion of Mr. Justice JENKS or in the conclusion reached by him. The appeal is from an order made by Mr. Justice Lambert, permitting the defendant to amend its answer as of course within 40 days of the time when it was served by mail. In making the order Mr. Justice Lambert wrote as follows:

"I feel constrained to follow the decision in Binder v. Met. St. R. R. Co., 68 App. Div. 281, 74 N. Y. Supp. 54, which in effect holds that service by mail operates to double the time of the party serving as well as his adversary. This

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**decision disregards Toomey v. Andrews, 48 How. Prac. 332, and the reasons upon which the court rested its decision. It follows that the answer was served in time, and hence the motion is granted, but, owing to the confusion of authorities on the subject, without costs."**

The case of Toomey v. Andrews, referred to by Mr. Justice Lambert, was a Special Term case, and was not well considered. The court appears to have been influenced by the fact that the original answer in that case did not call for a reply, which the original answer in this case may have done for aught that appears upon the record. Whether or not the Binder Case was properly decided is a matter of no consequence on this appeal. It applied a settled rule of practice in relation to the amendment of pleadings to another question on assumed authority. If that decision was right, the decision herein was of course right; but, even if the Binder decision is wrong as applied to the question then before this court, the decision herein at Special Term was nevertheless right, for it is in accordance with the statutory rule in this state ever since the existence of a Practice Code. That rule is not an unreasonable one, but is one well calculated to subserve the interests of both litigants and the courts. It provides, in effect, that a party may once amend a pleading as of course at any time before the time has expired for his adversary to demur to or answer it. The defendant in this case did not double its time to amend its answer by serving it by mail. The defendant by such service doubled the time of the plaintiff to respond to it by either demurrer or reply, and, if its own time to amend the answer was thereby doubled, it was not doubled by section 798 of the Code of Civil Procedure, but by virtue of section 542 of that Code.

It seems to me to be a serious mistake to suppose that the question at issue depends upon the construction to be placed upon section 798 of the Code of Civil Procedure. On the contrary, the question depends entirely upon the construction to be placed upon section 542 of the Code; in other words, the question of the right to serve an amended pleading as of course cannot be properly determined without considering or construing the section of the Code of Civil Procedure which confers that right. Section 798 relates generally to the time given or allowed to an adverse party to do an act after notice or service either under the Code of Civil Procedure or the general rules of practice, and it provides that, if the required notice is received by mail, the adverse party shall double the time which he would have had in case the service upon him had been made personally. The provision, of course, embraces the service of pleadings, and unquestionably gives to the party served with a pleading by mail 40 days' time in which to answer, reply, or demur to it; but the provision also includes the service of every other paper or notice which is prescribed by the general rules of practice or the Code of Civil Procedure. It was not intended of itself to double the time of the server of any paper for any purpose, whether the paper served be notice or pleading, nor has it any relation, other than incidental, to the right of a party to serve an amended pleading as of course. That right is given by section 542 of the Code of Civil Procedure, which provides, in effect, that any pleading may be amended as of course at any time before the period for answering

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it has expired. If the pleading, therefore, shall have been served by mail, the time to answer it will not expire until 40 days, and the pleader will consequently have 40 days' time within which to amend it, not because he has given himself double time under section 798, but because the Code has given him double time under section 542. This applies only to an amendment of a pleading, and has no necessary application to the time allowed to either the server or the adverse party with respect to the many other papers and notices which are included in the purview of section 798.

The right of a litigant to amend his pleading as of course at least once within the time allowed for his opponent to plead to it has been a part of the statute law of this state for nearly 60 years. In the Code of Procedure of 1848 the right was given by section 148, and the number of times when the pleading might be amended was not prescribed; but it was enacted in the most comprehensive terms that any pleading might be amended at any time before the period for answering it shall have expired. The section was numbered 172 in 1849, and it was then amended so as to give the pleader not only the right to amend his pleading once at any time before the period for answering it had expired, but further extended his time to so amend it to 20 additional days after the answer or demurrer to the pleading had been served. The section, however, contained a further provision to the effect that, if it appeared that the amendment was made for the purpose of delay, or that the party would lose the benefit of a circuit or term for which the cause was noticed, the amendment might be stricken out, and such terms imposed as to the court might seem just. The language of the section was changed by subsequent amendments, which it is unnecessary to consider in detail. The distinctive features remained during the existence of the Code of Procedure, namely, a limit of the pleader to a single amendment as of course; an effective guard against the possibility of abuse of the privilege in the accomplishment of delay; and the extension of the period granted for the amendment to the time during which the opposite party had the privilege of answering the pleading in case such period exceeded 20 days.

The provision of the Code of Procedure allowing one amendment to a pleading as of course at any time before the period had expired in which to assail it, namely, to answer it by answer, demurrer, or reply, was re-enacted in the Code of Civil Procedure by section 542 in language even more comprehensive than that contained in the old Code. There is no indication to be found of any intent to change the law, or to take away this reasonable and salutary privilege. Mr. Throop makes no note of such intent, and had the intent existed, it is difficult to understand why the provisions of the former section should have been re-enacted. The present enactment is as follows:

"Within twenty days after a pleading, or the answer, demurrer, or reply thereto, is served, or at any time before the period for answering it expires, the pleading may be once amended by the party, of course, without costs and without prejudice to the proceedings already had."

The English language furnishes no words which could have been employed to confer more clearly upon the defendant in this case the right to serve an amended answer in good faith within the period of

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40 days which it had given to the plaintiff in which to demur or reply to the original answer served by mail. What the original answer was is not disclosed, neither is the scope or nature of the proposed amendment. The original answer may have been demurrable, or it may have called for a reply, but the provision allowing an amendment as of course until the expiration of the time to answer is explicit and unequivocal; the only qualification being that it shall not be for the purpose of delay, or to deprive the plaintiff of a term of court, neither of which is charged in this instance.

The decisions under the Code of Procedure were uniformly in harmony with the views herein expressed. They conflict with the Special Term decision in Toomey v. Andrews, supra, and also with the decision in Armstrong v. Phillips, 60 Hun, 243, 14 N. Y. Supp. 582. In the latter case the court fell into the same error as Mr. Justice JENKS in treating the question as though the party was giving himself double time by serving his answer through the mail, instead of treating it as a case in which the party gives his adversary double time by such service, and only receives equal time for a proper amendment in good faith by virtue of the positive law which allows him to so amend at any time before the period for attacking his pleading by counterpleading has expired.

So far as there is any conflict of authority upon the question under consideration, the matter should be set at rest, and this can only be done by uniformity of ruling by the same members of the same court. The order appealed from is expressly based upon a unanimous decision of this court, and it also gives to the language of section 542 that broad and liberal interpretation which is prescribed by the Code of Civil Procedure. It is in the interest of ample opportunity for perfecting pleading without delaying the progress of litigation, and accomplishes a result which is both just and salutary. It is of importance that the court should be consistent, while it is of no great importance whether the amendment in this particular instance be allowed or not. This will be apparent on the reflection that, even if this court reverse this order, or if it affirm the order and it be subsequently reversed by the Court of Appeals, the defendant could even at that late day unquestionably obtain at Special Term leave to amend the answer if the amendment desired is material and proper. and could obtain such leave without costs, inasmuch as in taking the 40 days' time it relied upon a unanimous decision of this court. I vote for an affirmance of the order.

Order affirmed, with $10 costs and disbursements. All concur, except JENKS, J., dissenting.

JENKS, J. I dissent. The sole question is whether the defendant by serving its original answer by mail thereby doubled the time to serve its amended answer. The answer to it requires the construction of section 798 of the Code of Civil Procedure. I see no reason why a defendant may thus acquire such a privilege. The mere fact that the defendant avails itself of the privilege of serving its answer by mail affords no reason why it should thereby gain for itself a further privilege, namely time double that time generally prescribed by statute

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within which he must serve his amended answer. The language of section 798 does not require or even justify such construction, and there are no decisions which should constrain us to so hold lest we should depart from precedent to the confusion of practice. On the other hand, there is good reason why the party who is served through the post should have an extension of the statutory time prescribed in case of personal service, for it has been held that deposit in the mail is the service (Elliott v. Kennedy, 26 How. Prac. 422; Green v. Warren, 14 Hun, 434; Van Horne v. Montgomery, 5 How. Prac. 238), and it is more reasonable that the Legislature should inflict a penalty rather than confer a privilege in point of time when having him in mind who serves his pleading through the post.

Section 798 reads as follows:

**"Where it is prescribed in this act, or in the general rules of practice, that a notice must be given, or a paper must be served, within a specified time, before an act is to be done; or that the adverse party has a specified time, after notice or service, within which to do an act; if service is made through the post office, the time so required or allowed is double the time specified; except that service of notice of trial may be made, through the post office, not less than sixteen days before the day of trial, including the day of service."**

The section may be resolved into two parts. The first provision is: "Where it is prescribed * * * that a notice must be given, or a paper must be served, within a specified time, before an act is to be done." I think this provision means that he who proposes to do an act, and must give notice or serve a paper as a prerequisite to such action, if he choose to give such notice or make such service through the post office, cannot do the act until the lapse of twice the time specified in case he had made personal service or had given personal notice. That is, the time "so required or allowed is double the time specified." The case of Lesser v. Williams, 52 Hun, 610, 5 N. Y. Supp. 97, hereinafter examined, affords an apt illustration. The defendant served by mail on October 10th his demand for a change of the place of trial. If such service had been personal upon the plaintiff, the plaintiff would have had five days to serve his written consent, and the ten days within which the defendant could move to change the place of trial only began to run after the flight of the period afforded to the plaintiff to serve his written consent. Section 986, Code Civ. Proc. But the service of the demand by mail by the defendant doubled the time within which plaintiff could serve his written consent, and consequently the defendant could not move to change the place of trial until 10 days after his service of a demand, namely, October 20th. Hence the court was right when, after referring to the provision now under consideration, it said: "The result is that the service of the demand having been made on the 10th, the plaintiff had until and including the 20th to comply."

But this provision does not apply to this case. The defendant by serving his original answer did not thereby either give a notice or serve a paper "before an act is to be done," i. e., as preliminary to the doing of any act, or as a prerequisite step to the doing of any act. He simply responded to the plaintiff's summons, the mandate of the court, and joined issue with the complaint.

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The second provision of section 798 is: "Where it is prescribed * * * that the adverse party has a specified time, after notice or service, within which to do an act." This provision applies to the present case. The defendant who serves his answer thereby affords occasion to the plaintiff to take such action thereupon as he may be advised, to reply, etc. At this stage the plaintiff is the adverse party who has afforded to him double the time prescribed by the Code or the rules of practice in case the service had been personal. Certainly the defendant, perforce of his original answer, is not an adverse party when he serves an amended answer. He may become an "adverse party," but only when, in sequence to some action of the plaintiff, he takes counter action. The term "adverse" is relative to the action of the other party. For these reasons, I am of opinion that the defendant could not double his own time. Armstrong v. Phillips, 60 Hun, 243, 14 N. Y. Supp. 582; Mr. Throop's note to section 798 in Throop's Code; Toomey v. Andrews, 48 How. Prac. 332, 336.

The precise question was presented in Armstrong v. Phillips, supra, where the General Term (Learned, P. J., and Mayham and Landon, JJ.) said, per Landon, J.:

"The defendant had but twenty days in which to serve his amended answer as of course. Section 542. He could not by serving his original answer by mail give himself double time in which to amend it. It was the adverse party, and not himself, who acquired double time. Section 798 and Throop's note."

Mr. Throop in his note (supra) says:

"Code Proc. § 412, amended so as to remove doubts as to its meaning. The original is not universally construed so as to allow forty days in which to answer a pleading served by mail, but a party cannot entitle himself to double time by serving his pleading in this way. See the section, and Toomey v. Andrews, 48 How. Prac. 332."

I think that the decision in Binder v. Metropolitan Street R. Co., 68 App. Div. 281, 74 N. Y. Supp. 54, which is expressly based upon Lesser v. Williams, supra, affirmed 119 N. Y. 639, 23 N. E. 1148, should not control this case. The question in those cases arose upon motion to change the place of trial. In Lesser's Case the General Term in the First Department held that the defendant who had served his demand by mail on October 10th moved seasonably on October 26th. This was right, because the plaintiff, perforce of service by the mail, had his time (five days) within which he could serve his written consent to the change doubled, and so he had until October 20th to comply with the demand. As the defendant could not move until 10 days thereafter, and then had 10 days to make his motion, the motion made on October 26th was timely. Section 986, Code Civ. Proc. Thus Brady, J., after referring to the first provision of section 798, said: "The result is that, the service of the demand having been made on the 10th, the plaintiff had until and including the 20th to comply." But the learned judge added, "and the defendant twenty days from that date to make a motion." Of course, this statement was unnecessary to the conclusion, for the Code gave the defendant 10 days absolutely, and the motion was made within 6 days. I regard the statement as obiter and incorrect. The Court of Appeals affirmed without opinion. As the result reached was right, and in no way dependent

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upon this statement last quoted, we should not assume that such an affirmance was approval of this expression. Rogers v. Decker, 131 N. Y. 491, 30 N. E. 571.

The learned counsel for the respondent says that the argument that a party should not be "allowed to lengthen his own time by making service by mail overlooks the fact that in the interim the other party may amend his complaint or demur to the answer, and thereby shorten the time." The fact that the effect of a rule may, under certain circumstances, be obviated by the opposite party, is no cogent reason why the rule should exist. Suppose that the plaintiff has no good reason either to amend or to demur, what then? See, too, Toomey v. Andrews, supra, at page 336. Certainly I have not "overlooked" this fact, inasmuch as I have not dwelt upon the vice that such a rule if it existed was in every case beyond any counter move by the plaintiff.

Again, the learned counsel contends that "at any rate there is no hardship in allowing a party the right to amend so long as his adversary has the right to demur or to amend the pleading to which it was served." I think that there might be great hardship, for if this principle were to obtain, it might be argued therefrom that a defendant might properly be afforded 40 or 400 days to serve his amended answer, provided, only, that the plaintiff could thereupon and thereafter demur or amend. Presumably the plaintiff wishes to progress beyond the joinder of issue to the trial of his cause of action.

The cases cited by the respondent do not deal with the present statute. Washburn v. Herrick, 4 How. Prac. 15; Cusson v. Whalen, 5 How. Prac. 302; Evans v. Lichtenstein, 9 Abb. Prac. (N. S.) 141. These Special Term decisions are directly opposed to other decisions of the Special Term based upon the statute as it now reads. Ward v. Gillies, 11 N. Y. Supp. 797; Bucklin v. Buffalo, Attica & A. R. R. Co., 41 Misc. 557, 85 N. Y. Supp. 114.

The order should be reversed, but without costs.

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## PEOPLE ex rel. LAHEY v. WOODBURY, Street Com'r.

(Supreme Court, Appellate Division, Second Department. March 22, 1906.)

1. CERTIORARI—REVIEW OF NONJUDICIAL PROCEEDINGS.

Under New York City Charter, Laws 1901, p. 242, c. 466, § 537, providing that no member of the uniformed force of the department of street cleaning shall be removed till informed of the cause and allowed an opportunity of making an explanation, and that in every case of removal the true grounds thereof shall be entered on the records, and impowering the commissioner in his discretion, on evidence satisfactory to him that such a member of the force has been guilty of certain misconduct, to dismiss him from the force, the proceedings for removal are not judicial, and so cannot be reviewed by certiorari.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Certiorari, §§ 34–38.]

2. SAME.

New York City Charter, Laws 1901, p. 242, c. 466, § 537, which, after providing proceedings for removal of members of the street cleaning department, states that, in the event of the removal of a member, he shall

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**have the right to sue out a writ of certiorari or other appropriate remedy for the purpose of reviewing the action of the commission, does not make certiorari the appropriate remedy for review; it not otherwise being the appropriate remedy because of the proceedings for removal being nonjudicial.**

Certiorari, on the relation of William Lahey, against John McGaw Woodbury, commissioner of street cleaning of the city of New York. Writ dismissed.

See 92 N. Y. Supp. 444.

Argued before JENKS, HOOKER, GAYNOR, RICH, and MILLER, JJ.

Edmund F. Driggs, for the relator.

Edward H. Wilson (James D. Bell, on the brief), for respondent.

RICH, J. This is a proceeding by certiorari to review an order made by the defendant dismissing the relator, a member of the uniformed force, from the street cleaning department of the city of New York. The action of the commissioner was taken under the provisions of section 537 of the charter of said city (Laws 1901, p. 242, c. 466), and this remedy is sought under the last clause of that section, which is as follows:

**"In the event of the removal of any member of the clerical or uniformed force, he shall have the right to sue out a writ of certiorari or other appropriate remedy for the purposes of reviewing the action of the commissioner or his deputy."**

The contention of the respondent is that the relator has mistaken his remedy; that mandamus, and not certiorari, is the appropriate proceeding for the relief which he seeks. Section 537 does not provide for a judicial proceeding. There is no right of trial upon evidence before the commissioner given by its provisions to a member of the uniformed force. He must be informed of the cause of his proposed removal, and given an opportunity of making an explanation, and, if removed the true grounds thereof must be entered upon the records of the defendant. These proceedings are in no sense judicial, and cannot be reviewed by certiorari. People ex rel. Kennedy v. Brady, 166 N. Y. 44, 59 N. E. 701. The relator was entitled to personal notice of the commissioner's proposed action. It is conceded, however, that none was given. The commissioner, therefore, never obtained jurisdiction to make the order, his proceedings were for that reason invalid, and there is nothing to review by certiorari.

The relator has mistaken his remedy. The section does not confine the remedy to certiorari. Its language is, "He shall have the right to sue out a writ of certiorari or other appropriate remedy." This is, in effect, saying to an aggrieved person, "If certiorari is an appropriate remedy in your case, you may avail yourself of it; if not, you may have any other remedy that is appropriate."

The writ of certiorari must therefore be dismissed, with costs. All concur.

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## MOSSEIN v. EMPIRE STATE SURETY CO.

(Supreme Court, Appellate Division, Second Department. March 22, 1906.)

PLEADING—AMENDMENT—AFFIDAVIT BY ATTORNEY.

In an action on a bond in a legal proceeding, where the court held on appeal that the complaint failed to state a cause of action, because it was not alleged that plaintiff had agreed to or did actually refrain from seeking to reap the fruits of his successful motion, an amendment may be permitted by the trial court on remand of the cause, on an affidavit of the counsel for the plaintiff setting forth the facts, and alleging that the affidavit is made by the counsel rather than the plaintiff; the facts being peculiarly within the knowledge of the counsel.

Appeal from Special Term.

Action by Edward P. Mossein against the Empire State Surety Company. From an order permitting plaintiff to amend his complaint, defendant appeals. Affirmed.

Argued before WOODWARD, JENKS, GAYNOR, and RICH, JJ.

F. J. Moissen, for appellant.

William F. Hagarty, for respondent.

WOODWARD, J. Upon a former appeal in this action this court held that the complaint failed to state a cause of action, because it was not alleged that the plaintiff had "agreed to or did actnally refrain from seeking to reap the fruits of his successful motion"; it being held that such allegation was necessary to bind the defendant, a surety company, which has given a bond in a proceeding, and upon which a recovery is sought in this action. Mossein v. Empire State Surety Co., 97 App. Div. 230, 89 N. Y. Supp. 843. The judgment in favor of the plaintiff was reversed, and a new trial granted; costs to abide the event. The granting of a new trial of course assumed that the plaintiff would take the steps necessary to state a cause of action if the facts justified him in doing so, and when the case reached a second trial the defendant moved to dismiss the complaint, upon the ground that it failed to state a cause of action, whereupon the court permitted the plaintiff to withdraw a juror, that he might make an application to the Special Term for an amendment of the complaint, upon the payment of $30 term costs. The plaintiff accepted these terms, and made a motion for an amendment of the complaint, which was granted upon the payment of $10 motion costs, and from the order so granted defendant appeals to this court.

The defendant urges that the affidavit on which the application for an amendment was made to the court was made by counsel rather than the plaintiff, and that it is insufficient, and cites various authorities to the effect that an affidavit by an attorney or counsel as to facts within the knowledge of the moving party is not a good foundation for granting an amendment. But in the present instance counsel states in his affidavit the history of this case on its former trial and appeal, and alleges that:

"From the statement of the case in this action to deponent, * * * by the plaintiff and his witnesses, deponent verily believes that the plaintiff has a good and sufficient cause of action upon the merits, and that he has so in-

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formed the said plaintiff. That the affidavit herein is made by deponent rather than by the plaintiff, for the reason that the facts herein set forth are peculiarly within deponent's knowledge."

That is, the deponent, knowing the history of the case, states the facts to the court, and asks, under the provisions of section 723 of the Code of Civil Procedure, to be permitted to insert "an allegation material to the case." It does not change the cause of action, except that it completes a state of facts necessary to sustain a judgment in favor of the plaintiff. The defendant has entered into a contract of suretyship, and it succeeded upon a former appeal because of the failure of the plaintiff to complete an allegation which imposed the liability; and, the case being within the jurisdiction of the court, and a new trial having been awarded for no other purpose than to permit the plaintiff to complete his cause of action if he has one, it seems to us that the affidavit of plaintiff's counsel, who was familiar with the facts, that the plaintiff had a good cause of action, accompanied, as it was, by the verified amended complaint, in which the necessary allegation is made by the plaintiff, meets all the requirements of this case. The plaintiff, by his amended complaint, states the fact to be that he had not undertaken to enforce the order, relying upon the contract of suretyship made by the defendant, and this constitutes a part of the moving papers on a motion to amend, so that there is no failure on the part of the plaintiff to place the facts before the court.

The order appealed from should be affirmed, without costs of this appeal. All concur.

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## MacMULLEN v. CITY OF MIDDLETOWN.

(Supreme Court, Appellate Division, Second Department. March 22, 1906.)

CONSTITUTIONAL LAW—RIGHT TO REMEDY FOR INJURIES.

Section 30 of the charter of the city of Middletown (Laws 1902, p. 1367), providing that no action shall be maintained for injuries to a person from the existence of snow or ice on a sidewalk or street, unless written notice thereof was actually given to the common council, and there was a failure to cause the snow or ice to be removed within a reasonable time after receipt of the notice, is invalid, as depriving persons injured of a legal remedy for the wrong done them.

Appeal from Special Term, Orange County.

Action by Charles MacMullen against the city of Middleton. From an interlocutory judgment (92 N. Y. Supp. 410) overruling a demurrer to the complaint, on the ground that it does not state facts sufficient to constitute a cause of action, defendant appeals. Affirmed.

Argued before BARTLETT, JENKS, HOOKER, RICH, and MILLER, JJ.

Russell Wiggins, for appellant.

Thomas Watts (Abram F. Servin, on the brief), for respondent.

MILLER, J. We are required to determine the constitutionality of section 30 of the charter of the city of Middletown, which provides:

"But no such action shall be maintained for damages or injuries to a person sustained in consequence of the existence of snow or ice upon any sidewalk,



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cross-walk or street, unless written notice thereof, relating to the particular place, was actually given to the common council and there was a failure or neglect to cause such snow or ice to be removed and the place otherwise made reasonably safe within a reasonable time after the receipt of such notice." Laws 1902, p. 1367, c. 572.

And we are to determine this question without the aid of any direct authority on the proposition. McNally v. City of Cohoes, 53 Hun, 202, 6 N. Y. Supp. 842, is not, as supposed, analogous. The statute there construed exempted the city from liability, unless actual notice of the dangerous or obstructed condition of the street or sidewalk should have been given to the common council of the city, at least 24 hours previous to the injury, and, while the General Term held that "notice given" implies a "giver," and that the statute was not satisfied by proof of actual knowledge, the Court of Appeals (127 N. Y. 350, 27 N. E. 1043) placed its affirmance upon the distinct ground that actual notice could be established by either direct or circumstantial evidence, and that, if the defendant had actual information, intelligence, or knowledge of the dangerous conditions, the requirements of the statute were complied with, and to the like effect are the subsequent cases bearing on this question. Smith v. City of Rochester, 79 Hun, 174, 29 N. Y. Supp. 539, affirmed on the opinion of the General Term, 150 N. Y. 581, 44 N. E. 1128; Sprague v. City of Rochester, 159 N. Y. 20, 53 N. E. 697. Perhaps the case nearest in point is Gray v. City of Brooklyn, 2 Abb. Dec. 267, which held valid a provision of the charter of the city of Brooklyn which exempted the city from liability for any nonfeasance or misfeasance on the part of the common council or any officer of the city, or appointee of the common council, and provided that the remedy of the party aggrieved for such nonfeasance or misfeasance should be against such officer; but this case is not an authority here, for two reasons: First, said statute was construed to have the effect of relieving the city of the duty of caring for the streets theretofore imposed upon it, and of devolving such duty on said officers, which is not the effect of the statute now under consideration, because it leaves the duty on the city; second, Gray v. City of Brooklyn has been overruled by subsequent decisions holding that the act did not have the effect of relieving the city from liability for the nonperformance of the primary duty imposed upon it respecting the care of its streets and bridges, but that said statute only applied to such duties as were primarily imposed upon the officers. Fitzpatrick v. Slocum, 89 N. Y. 359; Hardy v. City of Brooklyn, 90 N. Y. 435, 43 Am. Rep. 182; Bieling v. City of Brooklyn, 120 N. Y. 98, 24 N. E. 389.

It is suggested that the statute under consideration might be satisfied by proof of actual knowledge. It is easy to see how a statute requiring notice is satisfied by proof of knowledge, but it is difficult to see how "knowledge" can be substituted for "written notice." The canon of construction "that a thing which is in the letter of the statute is not within the statute itself, unless it is within the intention of the makers," has justified many judicial departures from the strict letter of statutes, but it is difficult to find in it excuse for saying that an intention unmistakably expressed did not exist. The effort to discover some relief from the injustice of this statute results from the fact that it shocks

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our sense of right and wrong, and immediately suggests the inquiry whether it does not offend the fundamental law. If the Legislature had the power to impose such a condition, they have imposed it by the use of language as clear as could possibly have been used, and it seems to me therefore that, instead of attempting to make over the statute to fit our notions, we should ascertain whether the impression created by the first reading of the act, that it is not in consonance with the fundamental principles of our government, is borne out by an examination of the instrument limiting the powers of the Legislature; but if, giving the act every intendment in its favor and every presumption in support of its validity to which it is entitled, we are unable to find any substantial reason for saying that it is unconstitutional, it is our duty to give it effect.

In order to decide this question, we must first determine the nature of the liability of cities and villages for omission to discharge the duty imposed upon them respecting the care of their streets resulting in injury to individuals. Fortunately this question is easy of solution. In the opinion of Selden, J., found in the note to Conrad v. Trustees of Village of Ithaca, 16 N. Y. 158, the principle is stated:

"That whenever an individual or a corporation, for a consideration received from the sovereign power, has become bound by covenant or agreement, either express or implied, to do certain things, such individual or corporation is liable, in case of neglect to perform such covenant, not only to a public prosecution by indictment, but to a private action at the suit of any person injured by such neglect. In all such cases, the contract made with the sovereign power is deemed to inure to the benefit of every individual interested in its performance."

A distinction exists in this state between duties imposed upon the municipality for its private or local interests and those imposed upon officers appointed or elected by it for the benefit of the public generally. In the one case, the municipality is regarded as a legal individual, the same as a private corporation, exercising powers for its corporate and individual benefit; in the other case, as a political division of the state, exercising sovereign power. In the one case, the primary duty is on the municipality, which is liable to a person injured by its breach of duty. In the other case, the duty is on the officer who is liable for either nonfeasance or misfeasance. In the one case, the rule respondeat superior applies to the corporation; in the other, to the officer primarily charged with a ministerial duty. This distinction is made clear by many authorities in this state, among which are: Maximilian v. Mayor, 62 N. Y. 160, 20 Am. Rep. 468; Ham v. Mayor, 70 N. Y. 459; Ehrgott v. Mayor, 96 N. Y. 264, 48 Am. Rep. 622; Fire Ins. Co. v. Village of Keeseville, 148 N. Y. 46, 42 N. E. 405, 30 L. R. A. 660, 51 Am. St. Rep. 667; Missano v. Mayor, 160 N. Y. 128, 54 N. E. 744; Martin v. Mayor, 1 Hill, 545; Bailey v. Mayor, 3 Hill, 531, 38 Am. Dec. 669; Rochester White Lead Co. v. City, 3 N. Y. 463, 53 Am. Dec. 316; Lloyd v. City, 5 N. Y. 369, 55 Am. Dec. 347; Quill v. City of New York, 36 App. Div. 476, 55 N. Y. Supp. 889; Fitzpatrick v. Slocum, supra; Bieling v. City, supra. Whatever may be said of the reasons which have moved the courts to resolve particular duties under the one or the other of said classes, it is settled beyond dispute that the duty of caring for its streets belongs

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to the first class, and that respecting such duty the municipality is governed by precisely the same rules as an individual or private corporation, and is liable for the acts of agents selected by it under the rule respondeat superior. See cases cited, supra. Therefore this action is a common-law action, and in no sense can be said to be statutory. The statute created the defendant, but that can be said of every corporation. See, also, City of Cleveland v. King, 132 U. S. 295, 10 Sup. Ct. 90, 33 L. Ed. 334; Barnes v. District of Columbia, 91 U. S. 540, 23 L. Ed. 440. We are now prepared to determine the effect and validity of the act in question. There can be no doubt as to its effect. It grants immunity to the defendant from the consequence of its neglect of duty, in so far as such neglect relates to the removal of accumulations of ice and snow, and thus presents the question whether it is competent for the Legislature to exempt a city from the consequence of its breach of a duty which it owes as an individual, without taking away the duty and devolving it upon some one else. While there is no direct authority upon the proposition, the question has been ably discussed by Mr. Justice Woodward in three cases (Barry v. Village of Port Jervis, 64 App. Div. 268, 72 N. Y. Supp. 104; Williams v. Village of Port Chester, 72 App. Div. 505, 76 N. Y. Supp. 631; Id., 97 App. Div. 84, 89 N. Y. Supp. 671); and, while perhaps the discussion was obiter, in view of the decision of the Court of Appeals in Walden v. City of Jamestown, 178 N. Y. 213, 70 N. E. 466, to the effect that a reasonable compliance satisfied the condition imposed by the statute then under consideration, the conclusion that a statute having the effect to deprive one of a remedy in such case was not a valid exercise of the legislative power was concurred in by every member of the court, except one in the first case cited, supra, and by every member of the court in the second case.

At the threshold of the investigation it is proper to consider that the Constitution is to be interpreted and given effect according to its object and purposes and in harmony with the spirit of our institutions. See opinion of Chase, J., in Calder v. Bull, 3 Dall. (U. S.) 386, 1 L. Ed. 648, and of Allen, J., in People v. Albertson, 55 N. Y. 50. It is a maxim of the common law that there shall be a legal remedy for the invasion of every legal right, and the language of Chief Justice Marshall, in Marbury v. Madison, 1 Cranch, 163, 2 L. Ed. 60, cannot be quoted too often:

> "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. * * * The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested right. If this obloquy is to be cast on the jurisprudence of our country, it must arise from the peculiar character of the case."

The injury suffered in this case is not damnum absque injuria, the damages are direct, not consequential—the result of a breach of duty owed the plaintiff, not the indirect effect of the performance of a lawful act. It is a familiar rule of our law that, for every duty imposed, there is a correlative right to have it performed, and that every one interested in its performance may recover his damages suffered by its breach. Pauley v. S. G. & L. Co., 131 N. Y. 90, 29 N. E. 999, 15 L.

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R. A. 194; Willy v. Mulledy, 78 N. Y. 310, 34 Am. Rep. 536. The plaintiff has suffered an injury to his person from the breach of a duty which the defendant, as an individual, owed him. Can he lawfully be denied a remedy? It is not clear that he has a remedy against any one except the defendant. The primary duty is not on some officer, as it would be if the defendant were an involuntary subdivision of the state, like a town, in which case the officer would be liable at common law. Hover v. Barkhoof, 44 N. Y. 113. It is possible that the plaintiff may have a remedy against some officer of the defendant, but that would have to depend on such officer's personal neglect (Bennett v. Whitney, 94 N. Y. 302), not on the breach of the primary duty resting on the defendant, and, as that duty has not plainly been devolved upon any officer against whom a remedy for nonfeasance can be had (as said by Judge Finch, in Fitzpatrick v. Slocum, supra), it is not certain that the plaintiff could maintain an action against any officer of the defendant; and the validity of the act is to be tested by what may be done under it. Stuart v. Palmer, 74 N. Y. 183, 30 Am. Rep. 289. Does the act in question deny the plaintiff a remedy for the wrong done him? It in effect says he shall have none, except upon the chance that some third person has served a written notice, which in my judgment is worse than saying he shall have none at all, because the right to a remedy is made to depend upon mere accident, not affecting the merits. The person in whose case there is the accident of a written notice may have a remedy —of course it is just as improbable that a third party will have given written notice as that the injured person will have informed the city how, when, and where he was going to get hurt. To all others the remedy is denied. There are phases of the subject from which it may be argued that the statute violates the constitutional provision guaranteying equal protection of the laws, but I prefer to rest my vote upon another ground.

Under this statute the grossest culpability of the defendant, the plainest breach of its duty, the clearest actual knowledge on its part, give no remedy for the wrong, except for the chance of a written notice, which nobody expects will be given. This is equivalent to a denial of any remedy, and it is unnecessary to cite authority upon the proposition that, what the Legislature cannot directly do, it cannot do by indirection. Does the constitutional guaranty against the deprivation of life, liberty, or property without due process of law apply to such a case? The following quotations will show how sacred this constitutional guaranty is regarded by the courts, and with what liberality it is construed to protect those rights for the preservation of which government was established: This clause in the bill of rights is to have "a large and liberal interpretation," say the court, per Andrews, J., in People v. King, 110 N. Y. 423, 18 N. E. 245, 1 L. R. A. 293, 6 Am. St. Rep. 389, "The fundamental principle of free government, expressed in these words, protects not only life, liberty, and property, in a strict and technical sense, against unlawful invasion by the government, in the exertion of governmental power in any of its departments, but also protects every essential incident to the enjoyment of those rights." "The term 'liberty,' as protected by the Constitution, is not cramped into a mere freedom from physical restraint of the person of the citizen, as by incarceration, but

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it is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare"—per Rapallo, J., in People v. Marx, 99 N. Y. 377–386, 2 N. E. 29, 52 Am. Rep. 34. "The constitutional guaranty that no person shall be deprived of his property without due process of law may be violated without the physical taking of property for public or private use. Property may be destroyed, or its value annihilated. It is owned and kept for some useful purpose, and it has no value unless it can be used. Its capability for enjoyment and adaptability to some use are essential characteristics and attributes, without which property cannot be conceived; and, hence, any law which destroys it or its value, or takes away any of its essential attributes, deprives the owner of his property"—per Earl, J., in Matter of Jacobs, 98 N. Y. 98–105, 50 Am. Rep. 636. "By the term 'life,' as here used [referring to the fourteenth amendment of the federal Constitution], something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body by the amputation of an arm or leg, or the putting out of an eye, or the destruction of any other organ of the body through which the soul communicates with the outer world. The deprivation not only of life, but of whatever God has given, to every one with life, for its growth and enjoyment, is prohibited by the provision in question, if its efficacy be not frittered away by judicial decision"—per Field, J., in Munn v. People, 94 U. S. 113, 24 L. Ed. 77. " 'Due process of law' is not confined to judicial proceedings, but extends to every case which may deprive a citizen of life, liberty, or property, whether the proceeding be judicial, administrative, or executive in its nature. Weimer v. Bunbury, 30 Mich. 201. This great guaranty is always and everywhere present to protect the citizen against arbitrary interference with these sacred rights"—per Earl, J., in Stuart v. Palmer, 74 N. Y. 183–191, 30 Am. Rep. 289.

In the light of these utterances, can it be possible that the Constitution does not guaranty a remedy for a wrongful injury to one's person? If not, what becomes of our vaunted security in person and property? Would a law, providing that a person should not have a civil remedy for an assault, be constitutional? No one will argue that it would. Does it make any difference what the particular breach of duty happens to be which results in personal injury? Violated duty is the basis of all actions of this character, and, in determining this question, we must not at any stage of the discussion lose sight of the fact that the defendant is an individual whose violated duty has injured the plaintiff. Suppose the act had provided immunity to the defendant from the consequences of a trespass resulting in injury to private property, would any one contend that it was valid? Manifestly such an act would authorize the taking of property without due process of law. Is it possible that the Constitution regards one's person as less sacred than his property? "We do not think it is competent for the Legislature to deny, for any cause, to a party who has been illegally deprived of his property, access to the constitutional courts of the state for relief. If, as we have seen, he is denied all remedy for the wrong inflicted upon him, the deprivation

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of his property becomes just as effectual as though it had been taken from him by direct legislative enactment," say the court, per Ruger, C. J., in Gilman v. Tucker, 128 N. Y. 190–202, 28 N. E. 1040, 13 L. R. A. 304, 26 Am. St. Rep. 464. "Until a right exists, there can be no remedy. But when a right is given, whether by the common law or statute, there must be some remedy when it is withheld," say the court, per Grover, J., in Dougan v. Champlain Transportation Co., 56 N. Y. 1–5. The plaintiff had the right to the discharge of the duty owed him by the defendant respecting the care of its streets. That right has been violated, and, if he can have no remedy for the injury resulting from such violation, it seems to me we must revise our notions respecting the security in life, liberty, and property guarantied us by the bill of rights. The plaintiff's cause of action for the wrong done him is property. Angle v. Chicago, etc., R. Co., 151 U. S. 1, 14 Sup. Ct. 240, 38 L. Ed. 55; Dyett v. Hyman, 129 N. Y. 351, 29 N. E. 261, 26 Am. St. Rep. 533; Reid v. Mayor, 139 N. Y. 534, 34 N. E. 1102; Gilbert v. Ackerman, 159 N. Y. 118, 53 N. E. 753, 45 L. R. A. 118; Levy v. Dunn, 160 N. Y. 504, 55 N. E. 288, 73 Am. St. Rep. 699.

To be sure, the plaintiff's cause of action had not accrued when the act was passed, but, if he did not then have a vested right in the particular cause of action, he did have a vested right to be secured from wrongful injury to either person or property. It will not be argued that the Legislature could deprive a person of all remedy for injuries already sustained. That would be the taking of property. Can it matter whether immunity is granted to the wrongdoer in advance of the injury, or whether the person wronged is deprived of a remedy after the infliction of the injury? In the one case property is taken, in the other, one's right to personal security is invaded. It is conceded by the demurrer that the defendant is a wrongdoer. The statute has not attempted to lessen its duty of caring for its streets. This duty was thus, in an early case, described by Chief Judge Nelson:

> "It is upon the like distinction that municipal corporations, in their private character as owners and occupiers of lands and houses, are regarded in the same light as individual owners and occupiers, and dealt with accordingly. As such, they are bound to repair bridges, highways, and churches, are liable to poor rates, and, in a word, to the discharge of any other duty or obligation to which an individual owner would be subject." Bailey v. Mayor, etc., of the City of New York, supra.

Speaking of the breach of this duty, Judge Earl, in Fitzpatrick v. Slocum, supra, said:

> "There must be a remedy in such a case, where one is injured without fault of his own by a defect in one of the streets or bridges of the city, either against the city or some one of its officers."

If it is desirable to relieve municipalities of the obligation to respond to one injured without fault by reason of a defective condition of the streets, the duty of caring for the streets should be taken from the city and should plainly be devolved upon some officer who can be held accountable for his nonfeasance. But, unless we are prepared to overturn the principle now firmly fixed in the jurisprudence of this state that a voluntary municipal corporation must respond for a breach of this duty, upon the same theory as an individual is required to respond for

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breaches of duty, the same rules should be applied to both. If the liability were statutory, I should admit that the Legislature could impose such conditions as it saw fit, or take it away altogether. But until it is decided by controlling authority that the courts of this state have been wrong for more than 60 years on the principle upon which such liability has been made to depend, or that, adhering to the principle, an exception may be made of this particular class of individuals, I shall insist that the Legislature has no power to do what has been attempted in this case.

The interlocutory judgment overruling the demurrer should be affirmed, with costs. All concur.

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## BUFORD v. EQUITABLE LIFE ASSUR. SOCIETY et al.

(Supreme Court, Special Term, New York County. December 6, 1905.)

1. INSURANCE—LIFE POLICY—HOLDER'S—RIGHT TO SHARE IN ENTIRE SURPLUS.
   A holder of a life policy which entitles him to "participation in profits" is not entitled as a matter of right to his equitable share of the surplus over the legal reserve provided for by Insurance Law, Laws 1892, p. 1968, c. 690, §§ 84, 86, though the charter of the insurer provides for the accumulation of earnings over and above dividends, losses, and expenses, and for the crediting of each policy holder with an equitable share of the surplus, after deducting a sufficient amount to cover outstanding risks, either in reduction of premiums or for the purchase of additional insurance.

2. SAME—ACTION—ACCOUNTING.
   Where a policy holder entitled to participation in the profits is entitled to a share in a greater proportion of the surplus than has been distributed by the insurer, the amount to which he is entitled can be ascertained only by an accounting which under the express provisions of Insurance Law, Laws 1892, p. 1958, c. 690, § 56, may not be decreed at the suit of a policy holder.

3. SAME—PARTIES.
   Where a policy holder, in an action to compel the insurer to credit him with his share in the surplus after providing for the legal reserve, accepts the insurer's statement showing the surplus, the officers of the insurer are not proper parties, though the complaint charges them with wastefulness and wrongdoing.

Action by one Buford against the Equitable Life Assurance Society and others. Heard on demurrers to complaint. Demurrers sustained.

A. S. Bacon, for plaintiff.
Wallace McFarlane, for defendants.

SCOTT, J. The plaintiff is insured in the defendant society by a policy issued in 1871 in favor of his wife and children. His policy is what is termed a "plain life policy," without any of the peculiar features to be found in policies of later dates, which have been involved in the adjudicated cases to which reference will hereafter be made. It assures the life of the plaintiff in the amount of $1,000, "with participation in profits," and this sum the society agrees to pay upon plaintiff's death (if the policy be then in force) to the persons named therein. The complaint is aptly described by its draughtsman as "very largely

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a plagiarism." In other words, it is an unsymmetrical mosaic of unrelated extracts from statutes and excerpts from judicial opinions cemented together by generalizations of fact and statements of the pleader's views as to the law. The demurrers, upon which the action now comes before the court, are urged, not to the form of the complaint, but to the cause or causes of action sought to be set up. It will not be necessary, therefore, to attempt to analyze the complaint, or to separate the revelant and well-pleaded facts from the irrelevant and ill-pleaded.

The plaintiff's grievance is that there has not been credited upon his policy in the year 1904 so much of the accumulated surplus of the defendant society as should have been credited thereon. He shows that he has fulfilled all the obligations imposed upon him by his policy; that there has annually been credited upon his policy certain profits, by way of dividends, which have decreased his premium payments, such sums so credited amounting in each year from 1898 to 1904, inclusive, to the sum of $13; that the assets and liabilities of the society on the 31st of December, 1904, were as is shown by a table inserted in the complaint, the significant features of which, for the purposes of this action are that the "legal reserve required by law" amounted to $327,-738,358, that the "surplus above said legal reserve" amounted to $80,-794,269.21, and the sum paid by way of dividends to policy holders in the year 1904 amounted to $6,001,906.51. His contention is that it was the duty of the defendant society to credit or to pay by way of dividends to its policy holders its entire surplus over and above the "legal reserve required by law," and that, instead of paying or crediting only six million and odd dollars, it should have credited or paid that sum and the amount described as "surplus above the legal reserve"; or, in other words, that, instead of distributing to its policy holders $6,001,906.51, it should have distributed $86,796,175.72, and that there should be credited upon plaintiff's policy, instead of $13, that proportion of $86,796,175.72 which $13, the amount actually credited thereon, bears to $6,001,906.51, the whole amount actually credited or distributed to policy holders.

The plaintiff urges, by way of argument, that since he is willing to accept the society's own statement of the amount of its legal reserve, and its surplus above said legal reserve, and is also willing to accept the ratio, or principle, adopted by the society in apportioning to his policy the proportion which it did credit of the six million and odd dollars actually distributed, the determination of the amount to which he is entitled of the whole surplus involves merely a simple mathematical computation, and consequently that the court can award to him the relief demanded without the necessity of a decree providing for an accounting of the affairs of the defendant society, which it is conceded could not be made in this action. Chapter 400, p. 758, Laws 1890, now section 56 of chapter 690, p. 1958, Laws of 1892, known as the "Insurance Law." The act cited forces plaintiff to take the position that the defendant society is bound to distribute to its policy holders its whole surplus over the legal reserve which it is by law required to maintain. It forbids the granting or entry of any order, judgment, or decree providing for an accounting of the affairs of a domestic insurance corpora-

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tion otherwise than upon the application of the Attorney General. Unless the policy holders are entitled to the whole surplus over the legal reserve, they are only entitled either to such amount as the society shall deem it prudent to distribute or to such amount as a court of equity may determine should be distributed. It is clear that such a determination could only be made after the ascertainment of a great number of facts, such as could only be ascertained by an accounting, or a proceeding in the nature of an accounting.

The principal question suggested by this complaint, therefore, is whether or not the policy holders of the defendant society are entitled as a matter of strict legal right to the proportionate distribution of the entire surplus of the society over and above the legal reserve required by law. A policy holder and the company by which he is insured bear to each other only the relation of two contracting parties, and the policy constitutes a contract between them. Uhlman v. N. Y. Life Ins. Co., 109 N. Y. 421, 17 N. E. 363, 4 Am. St. Rep. 482. The plaintiff's policy entitles him to "participation in profits," but makes no agreement in terms as to the extent of such participation, or even that it shall be ratably with the participation of any other policy holder or class of policy holders. The plaintiff, however, insists that the charter of the defendant society must be read into the contract, and that, if so read, it will sustain his contention. Assuming, without deciding, that the charter may be so read into the contract, it falls short of sustaining the plaintiff's position. It provides that the holders of the capital stock may receive as semiannual dividend not to exceed 3½ per cent., and that the earnings and receipts of said company, over and above the dividends, losses, and expenses, shall be accumulated. Article 3. It further provides that the insurance business of the company shall be conducted upon the mutual plan, and that the officers of the company shall periodically cause a balance to be struck of the affairs of the company which shall exhibit its assets and liabilities, both present and contingent, after deducting a sufficient amount to cover all outstanding risks and other obligations. Each policy holder shall be credited with an equitable share of the said surplus, to be applied to the purchase of additional insurance or to the reduction of premiums. Article 6. The plaintiff's reading of this article is that the "sufficient amount to cover all outstanding risks and other obligations" means the same thing as the "legal reserve required by law" shown in the statement of the society's financial standing incorporated into the complaint and admitted by the demurrer. The legal reserve required to be maintained by every life insurance company is ascertained upon rules laid down by statute. Sections 84, 86, Insurance Law. The directors and officers of the company have no discretion to exercise concerning it. It assumes as factors for its computation a valuation of the assets of the corporation, the nature and extent of its outstanding policies, a specified experience table of mortality, and a stated rate of interest. It may be said to represent the minimum sum necessary to have in hand to avoid the imputation of insolvency. The amount to be set aside under the defendant's charter to cover all outstanding risks and other obligations is left to the determination of the officers of the company. Doubtless their calculation would take into account the same factors prescribed by statute for the

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ascertainment of the legal reserve, but it is quite conceivable that additional considerations might properly be given weight to. There is nothing in the statute which says that no more surplus shall be retained than what is denominated the "legal reserve." There is nothing in the charter which would justify a belief that, when its framers provided for setting aside a portion of the surplus to meet existent and prospective claims, they had in mind what is now known as the "statutory legal reserve," or that they intended to limit the officers to setting apart that amount, and no more. As has already been said, the exact legal reserve marks the line of solvency. It is easy to see that securities might decrease in value, that the obtainable rate of interest might fall below the legal standard, and that for a period the mortality among policy holders might exceed the probable amount indicated for that period by the experience tables. Any one of these happenings might, if only the legal reserve had been retained, force the company below the line of solvency into insolvency. As was well said by the learned and experienced judge who wrote for the Court of Appeals in Greef v. Equitable Life Assur. Soc., 160 N. Y. 19, 54 N. E. 712, 46 L. R. A. 288, 73 Am. St. Rep. 659:

"The policy holder is to be credited only with an equitable share of such surplus, which must, we think, be regarded as such a share as might, with due regard to the safety of all its policy holders, the security of its business, and in the exercise of a proper discretion, be thus credited. The adoption of principles or methods for the distribution of the surplus by which it was all distributed each year would not only place in jeopardy every existing policy, but its tendency would be to prevent any increase of its business by obtaining new policies and thus diminish its future receipts. * * * No prudent person would be inclined to take a policy in a company which had so improvidently conducted its affairs that it only retained a fund barely sufficient to pay its present liabilities, and therefore was in a position where any change by the reduction of interest upon or depreciation in the value of its securities, or any increase in mortality, would render it insolvent and subject to be placed in the hands of a receiver."

It is true that the policy before the court in the case in which these words were written differed in an important particular from the policy now under consideration. But the words above quoted were written not with reference to any particular policy, but with reference to the identical clause in the charter of the defendant society upon which the plaintiff now relies, and are as applicable to the present case as they were to the one then under consideration. It must, I think, be held that the officers of the society were not limited by the charter to what is now known as the "legal reserve" in determining how much of the accumulated surplus should be retained and set aside to "cover all outstanding risks and other obligations." The amount to be thus set aside is determinable, in the first instance at least, by the officers of the company.

Whether this court has power to review the exercise of that discretion and under what circumstances and to what extent it should do so are questions which do not arise here, for the plaintiff's case rests upon the proposition that the officers of the society have no discretionary power to set apart and retain any portion of the surplus over the strict legal reserve. The officers in the year 1904 exercised the discretion vested in them by the charter by applying some $6,000,000 to be credited as dividends upon outstanding policies. To determine whether they

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should have applied more, and, if so, how much, would necessarily involve an accounting of the business and affairs of the company, and a decree for such an accounting cannot be made in an action by a policy holder. The case of Hackett v. Equitable Life Assur. Soc., 50 App. Div. 266, 63 N. Y. Supp. 1092, much relied upon by the plaintiff, is not in point. It was an action at law upon a matured obligation, in which the complaint alleged, and the demurrer admitted, that a precise, definite sum was due to the plaintiff. As to another sum, also claimed to be due as a distributive share of the surplus, the Appellate Division distinctly held that no recovery could be had if it should be found that the ascertainment of the amount would involve an accounting. I am, therefore, of opinion, so far as regards the cause of action attempted to be stated against the defendant society, that this action cannot be maintained, because, in the first place, the plaintiff is not entitled as a matter of strict right to have credited to his policy a proportionate amount of the whole surplus over the "legal reserve required by law," and, secondly, because, if he is entitled to have so credited any greater proportion of such surplus than has already been credited, the amount to which he is so entitled could, from the very nature of the case, be ascertained only by an accounting, which may not be decreed at the suit of a policy holder.

The plaintiff has joined as defendants with the society, all of its officers, and directors, and they also severally demur to the complaint. Why they were deemed to be necessary or even proper parties to the action is not apparent from the face of the complaint, and is not attempted to be explained on the briefs of counsel. Certainly no cause of action is stated against them, and their presence is not necessary to the relief which the plaintiff seeks against the society. He sues upon a contract in which the society, and not its officers as individuals, is the other contracting party. His judgment, if he should obtain one, would run against the society, and obedience to it, if resisted, would be enforced by action against those who are its officers at that time, who might be quite different persons from those who were officers when the action was commenced. It is true that the complaint contains general charges of extravagance, wastefulness, and wrongdoing against the defendant officers, but those charges are not supported by allegations of specific facts, and, even if they were, they would be irrelevant to the plaintiff's asserted cause of action against the defendant society. If the officers were extravagant and wasteful, it may be that the apparent surplus of the society is less than it should be. But the plaintiff makes no such claim. On the contrary, he accepts the surplus as it appears on the society's statement as the sum in which he is entitled to participation, and it is therefore immaterial, so far as his cause of action is concerned, to consider whether the surplus should be greater than it appears to be. So far as concerns the cause of action against the society, therefore, no cause of action is stated against the officers individually, and they are neither necessary nor proper parties. I am unable to find that any other cause of action is stated against them, and, even if one could be spelled out of the complaint, it would be bad for duplicity. Of course, the prayer that, if the officers of the society refuse to carry out the judgment of the court, they be removed and others be appointed

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in their place, asks for no relief which any court would incorporate into a decree. Whatever coercive measures might be necessary to enforce a decree will be determined after refusal to comply, and not in anticipation of such refusal.

It follows that the demurrers must be sustained and the complaint dismissed, with costs to each defendant separately demurring, but one bill of costs, however, being taxed in favor of all defendants appearing by the same attorney, with leave to the plaintiff to amend his complaint within 20 days upon payment of costs.

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## TOWN OF NORTH HEMPSTEAD v. ELDRIDGE.

(Supreme Court, Appellate Division, Second Department. March 2, 1906.)

1. PUBLIC LANDS—PATENTS—CONSTRUCTION—LAND UNDER WATER.
   The Kieft patent of 1664, to the town of Hempstead granted a certain quantity of land on Long Island, with all the havens, harbors, rivers, creeks, woodland, marshes, and all other appurtenances, from the East river to the South sea, from Hempstead Bay westward as far as Matthew Garretson's Bay, to begin at the head of said two bays, and so to run in direct lines that there may be the same latitude in breadth on the south side as on the north. *Held*, that such patent conveyed a body of land stretching across the island, partly bounded by high-water mark in Hempstead Bay and Matthew Garretson's Bay, but did not include land under water in either of such bays.

2. SAME—PUBLIC GRANTS—EXTENT—BURDEN OF PROOF.
   A claimant of land under a gratuitous grant from the sovereign is bound to show that the land in question is clearly within the language of his grant.

3. SAME.
   History and public grants of land to the town of North Hempstead, Long Island, construed, and *held* insufficient to convey to the town land under water situated south of Saddle Rock in the east part of Matthew Garretson's Bay on the north shore of Long Island.

Appeal from Special Term, Kings County.

Action by the town of North Hempstead against Louise U. Eldridge. From a judgment dismissing the complaint, plaintiff appeals. Affirmed on the opinion of Stephen H. Olin, referee.

The following is the opinion of the referee:

This is an action of ejectment. The plaintiff seeks to recover about 9.81 acres of land under water now in possession of the defendant, who is owner of the adjoining upland. This land is situated south of Saddle Rock in the east part of Little Neck Bay (formerly Matthew Garretson's Bay) in the town of North Hempstead, county of Nassau. Little Neck Bay is on the north shore of Long Island opening from Long Island Sound, and is divided at its head by a small peninsula now called "Little Neck." The plaintiff bases its claim upon patents from the Dutch governor, Kieft, and the English governors, Nicolls and Dongan. Until 1785 the town of Hempstead ran from north to south across the island. By chapter 21, Laws 1785, the town of North Hempstead was set off by an east and west line and became vested with the right and title of the old town of Hempstead to the lands within its boundaries including those adjacent to the sound. North Hempstead v. Hempstead, 2 Wend. 112. It is not disputed that the town of Hempstead acquired the legal title to land under water within the bounds of its patents (Roe v. Strong, 107 N. Y. 358, 14 N. E. 294), and the question is whether the disputed land falls within the boundaries of the

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grants to the town. The plaintiff contends that substantially one-half of the land under water in Little Neck Bay was granted to the town of Hempstead; that the plaintiff's westerly boundary line, under its patents, begins at the head or middle of Matthew Garretson's Bay (Little Neck Bay) at a point in the middle or furthest projection of the small peninsula known as Little Neck and runs thence on a direct north line to the sound or east river.

The defendant claims that the lands under water in this bay were never granted to the town, and that the title thereto remained in the sovereign and is now in the state or its grantees. The defendant contends that the point of departure for the west boundary of the town lands is not to be found on the peninsula of Little Neck, but at the head of the bay to the east of the peninsula and that the line runs northward along high-water mark to the sound, excluding all lands under water. On November 16, 1644, Gov. Kieft issued for the town of Hempstead a patent to certain named persons by which he granted to them: "A certaine quantity of land, with all the havens, harbors, rivers, creekes, woodland, marshes, and all other appurtenances thereunto belonging, lying and being upon and about a certaine place called the Great Plaines on Long Island, from the East River to the South Sea, and from a certain harbor now commonly called and knowne by ye name of Hempstead Bay, and so westward as far as Matthew Garretson's Bay, to begin at the head of the said two bayes, and so to run in direct lines, that there may be the same latitude in breadth on the south side as on the north, for them, the said patentees, actually, really and perpetually to enjoy in as large and ample manner as their owne free lands of inheritance, and as farr eastward." Pamphlet Contsining Colonial Grants Published by Geo. L. Rives, Corporation Counsel, p. 84. On March 16, 1666, a patent of Gov. Nicolls recited as follows: "Whereas, there is a certaine towne in the north riding of Yorkshire, upon Long Island, commonly called and knowne by the name of Hempstead, situate lying and being on the south side of the grate plaines, having a certaine tract of land thereunto belonging, bounds whereof on the northeast side begin at the northwest part of the land commonly called Robert Williams purchase, so running on a direct south line to the southermost part of the said lands (which by computacon is to the middle of the Great Plaines); it extends thence east to the utmost limitts of the said Plaines, and so stretcheth againe south to the sea from the northeast bounds aforementioned, a west line being rune to the head or middle of Mathew Garretson's Bay, it makes theire north bounds; from whence running southward to the sea; they are bounded to west by the east limitts of the townes of Flushing and Jamaica, and south by the sea or maine ocean." Id. p. 47. This patent was given as a "confirmacon" of the Kieft patent, and it conveys "all the aforementioned tract and neck of land, set forth and bounded as aforesaid, together with all havens, harbors, creekes, quarryes * * * waters, lakes, rivers, fishing, hawking, hunting and fowling, * * * to the said towne, tract of land and premises within the limits and bounds aforementioned described, belonging or in any wise appertaining." In the following year, 6th March, 1667, Gov. Nicolls signed a new patent modifying the former one by including in the north bounds of the town certain lands at Matinicock on the east side of Hempstead Harbor. This patent was recalled and is important only as an aid to interpreting its predecessor. Id. p. 50. On April 16, 1685, Gov. Dongan gave a patent reciting: "Whereas, there is a certaine town in Queens County, called and known by the name of Hempstead upon Long Island, situate lying and being on the south side of the Great Plaines, having a certain tract of land thereunto belonging, the bounds whereof begin at a marked tree standing at the head of Mattegarretts Bay, and so running and thence upon a direct south line due south to the main sea, and from the said tree a direct north line to the south or east River, and so around the points of the necks until it comes to Hempstead Harbour, and so up the Harbour to a certaine barr or sandy beach; and from thence up a direct line until it comes to the marked tree on the east side of Contiagge Point; and from thence a southerly line to the utmost extent of the Great Plaines, and from thence upon a straight line to a certaine tree marked in the neck called Maskachoung; and so from thence upon a due south line to the South Sea, and the said South Sea is to be the south bounds from the east line to the west line, and the Sound or East River to be the northerly bounds as according to the

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several deeds or purchases from the Indian owners and the patent from the Dutch Governor William Kieft, relacon thereto being had doth more more fully and at large appear." Id. p. 52.

The plaintiff contends that the point described by Dongan as the "head of Mattegarretts Bay," by Nicolls as "ye head or ye middle of Mathew Garretson's Bay," and by Kieft as "the head" of Matthew Garretson's Bay, can only be found at the middle or furthest projection of the peninsula now known as Little Neck. The defendant insists that, ex vi termini, the point so described must be sought at the head of one of the smaller bays into which Little Neck Bay divides and that the head of the small bay on the east side of Little Neck appears to a person standing there to be the middle of Little Neck Bay—an appearance which in the absence of actual survey might have been taken as fact by the draftsmen of the patents. The arguments on this point, however ingenious, appear to me inconclusive, and the location of the westerly boundary of Hempstead must be ascertained, not from these patents alone, but by reference to a series of acts, declarations, and patents relating to all the boundaries of the town. The Kieft grant in 1664 of "a certain quantity of land, with all the havens, harbours, Rivers, Creekes, woodland, marshes and all other appurtenances from the East River to the South Sea" from Hempstead Bay "westward as far as Matthew Garretson's Bay" to begin at the head of the said two bays, and so to run in direct lines, that there may be the same latitude in breadth on the south side as on the north," according to settled rules of interpretation, conveyed a body of land stretching across the island partly bounded by high-water mark in Hempstead Bay and Matthew Garretson's Bay, and did not include land under water in either of these bays. People ex rel. Underhill v. Saxton, 15 App. Div. 263, 269, 44 N. Y. Supp. 211, affirmed 154 N. Y. 748, 49 N. E. 1102; Gerard's Title to Real Estate (3d Ed.) 57; Gould v. H. R. R. R. Co., 6 N. Y. 522.

It should be noted that the words "and as farr Eastward" at the end of the description in Kieft's patent were taken as granting a tract of land running across the island equal in width to the tract already described. The northeast boundary of this tract was undetermined and became the subject of further action. On October 10th of the year 1645, Gov. Kieft gave a patent to the town of Flushing of lands "to run Eastward as farr as Matthew Garretson's Bay * * * being bounded * * * on the eastward part thereof with the land granted to ye plantations and towne of Hempstead, and so to runn in two direct lines into the south side of ye said Island, that there may be the same latitude in breadth on the south side as on the north side," etc. Law Department Pamphlet, p. 81. Before the ensealing of this patent it was ordered that the "land should runne north and south but as farr as the hills." Taking these two patents together title to the land under Little Neck Bay remained in the sovereign. On the 23d of January, 1657, the inhabitants of Flushing protested to the governor against "the intrusion of the men of Hempstead on the east part of our bounded." "Some overture has been made for redress to the late Gouvernour Kiffet" but nothing was done in the business. Documents Relating to the Colonial History of New York, vol 14, p. 384. On May 11, 1658, an Indian deed was made to the "magistrate and inhabitants of Hempstead" for a tract of land with a western boundary "beginning at a place called Mattagarretts Bay and soe running upon a direct line north and south from sea to sea," etc. Thompson's History of Long Island, p. 10.

At a "General Towne Meeting of the Town of Hempstead, December ye 14th, 1663," it was voted that: "Mr. Seamans, Mr. Jackson and Henry Persall shall forthwith lay out the lands at Matthew Garrison's Bay and eastward at Matinacock in perticuler alotments." 1 North & South Hempstead Town Records, 147, 148. In January, 1664, Gov. Nicolls addressed a letter to the towns of Hempstead, Flushing and Jamaica. That written to "ye Constable and Overseers of the Town of Hempstead" was as follows: "Genl.: The time within wch yor respective Pattents are to be renewed and confirmed, drawing on, to pr vent misinformacon concerning the Limitts and Bounds of yor several towns, and to take away all occasions of future cavills and contests, wch otherwise might arise, I have thought fitt to direct you, to appoint one or more from yor Towne, to Meete * * * at Jamaica, to whom you are to give full instructions concerning yor certaine Bounds and Limitts. * * *" Thirty-

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four delegates attended this meeting, which took place at Hempstead on February 28th. Documents relating to the Colonial History of New York, vol. 14, p. 592; Lamb's History of New York, vol. 1, pt. 1, p. 227. On March 2, 1664, at this "general meeting of the deputyes of Long Island held before the Governour at Hempstead" it was ordered "that a lyne shall be drawne to run through the middle of the hills * * * between the towns of Flushing and Jamaica east and west, parallel with the lyne of Flushing, which shall be the bounds of each town." Law Department Pamphlet, p. 88. At the same general meeting, but on March 3, 1664, the record recites: "Whereas the towne of Jamacia doth lay claim to the Little Plaines, which towne the of Hempstead alleadge to be within their pattent: Now, in regard the said towne of Jamaica have for nine years past enjoyed the said Plaines without molestation, and can not subsist without them, neither is it knowne whether they are within the bounds of Hempstead Patent, it is this day ordered that the lyne of Hempstead bounds being drawn from the head of Mathew Garretsons Bay (which is to say the middle of the said Bay) to run directly to the South Sea, what part of the said Little Plaines the said lyne doth not comprehend to be within the bounds of Hempstead shall be and remain to the towne of Jamaica, and if any part thereof shall be within the bounds of Hempstead in regard they are sufficiently provided, and Jamaica hath great necessity thereof, upon neighborly and moderate townes (terms?), the towne of Jamaica shall likewise be possessed thereof by sale or assignmt from the towne of Hempstead." Id. p. 89. At the same "generall Meeting" in March, 1664, the line between Flushing and Hempstead was fixed, and the land of Flushing was declared "to run eastward as far as Matthew Garretson's Bay, from the head or middle whereof a line is to be run southeast in length, about three miles, and two miles, in breadth," etc. This appears from a recital in the Dongan charter to Flushing to be hereafter referred to. On May 1, 1665, in pursuance of the order made at the "Generall Meeting" in March, 1664, a Hempstead town meeting "condescended" that their "Loving ffriends, The inhabitants of Jamaica" should have "all the little Plaines which our Line doth comprehend, and all the Meadow that lyes below the little Plaines that is to say the Meadow which lyes on the west side of the Great River which comes out of the Great Swamp." 1 North & South Hempstead Town Records, 178.

Thus, in 1664, the boundaries of Flushing, Jamaica, and Hempstead, left uncertain by the Kieft patents, had been defined and established by the English governor at Hempstead in the presence of the Long Island deputies, and he could now proceed to issue patents accordingly. On February 15, 1666, Gov. Nicolls granted a patent to Flushing of land "to runne eastward as farr as Matthew Garretson's Bay from the head or middle whereof a line is to be runne southeast in length about three miles, and about two miles in breadthe, as the line hath been surveyed and laid out by vertue of an order made at the Genall. Meeting held at ye town of Hempstead in the moneth of March, 1664; thence (that there may bee the same latitude in breadth on the south side as on the north) to runne in two direct lines southward as is directed by another order made at the generall meeting aforesaid wh passing east and west as the trees are now markt is the bounds between ye said towne of Flushing and Jamaica." Law Department Pamphlet, p. 30. The town of Hempstead had conferred upon Thomas Hicks certain lands lying on Little Neck (then called Mad Nance's Neck) which neck had been "heretofore reputed to bee within the limitts of the Towne of Hempstead." Gov. Nicolls on February 20, 1666, gave Hicks a patent confirming his title and granting him all the neck, "Provided that the lotts and Plantations which shall be settled upon the said neck have relacon to the Towns of Flushing," according to the order made at the general meeting at Hempstead in March, 1664. In March, 1666, therefore, when Gov. Nicolls issued his patent to the town of Hempstead, the western boundary of Hempstead had been laid down, partly by orders of the governor in general assembly of the deputies of Long Island, and partly by acts of the town of Hempstead. It no longer ran from the head of Matthew Garretson's Bay on a direct line southward, but ran southeast for three miles from Matthew Garretson's Bay, where it bordered on the grant to Flushing, and further south it ran along the eastern boundary of the Little Plains, which belonged to Jamaica. Gov. Nicolls, at least, recognized the whole of

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Little Neck as having relation to the "Towne of Flushing." The eastern boundary of Hempstead had also ceased to be a direct line drawn north and south. The Nicolls patent follows the new east line as settled. It then says: "A west line being rune to the head or middle of Mathew Garretson's Bay, it makes their north bounds."

It cannot be supposed that this line, although called a "west line," was drawn due east and west, so as to exclude the lands of Great Neck. A line running in a general westerly direction, but following the northern limits of the town along the sound, must have been intended. As to these northern limits no controversy had arisen or seemed likely to arise. The western line is given as running from the head or middle of Matthew Garretson's Bay "southward to the sea; they are bounded to the west by the townes of Flushing and Jamaica, and South by the sea or Maine Ocean." On November 23, 1675, Gov. Andros made an order reciting that, whereas, in Gov. Nicolls' time Cornsbury, or Little Madnan's Neck (now Little Neck) where Capt. Thomas Hicks resides, "was adjudged to be within the limitts of Flushing, since the which the line having been runn. It hath been found that part of the land on the said Neck, belonging to Capt. Thomas Hicks, is within the bounds of Hempstead * * * These are to declare that from and after the date hereof, the farm and land upon Cornbury belonging to the said Capt. Hicks, shall be deemed and held to be within the Bounds and Limitts of Hempstead and not longer of Flushing." Vol. 14 of Documents Relating to the Colonial History of New York, p. 707. On March 23, 1685, Gov. Dongan gave to the town of Flushing a "patent and confirmation" of the Nicolls patent, using substantially the same words of description therein found. He recited an agreement between Flushing and Jamaica, dated March 6, 1679/80, whereby the boundary between those towns had been ascertained and continued as follows: "And whereas by another certaine writing or agreement, dated the last day of June, one thousand six hundred and eighty-fouer, made by Elias Doughty, John Seaman, Thomas Willett and John Jackson, with the bounds between the towne of Flushing and Hempstead, are to begin at the middle of the Bay where Capt. Jacques runne the line, and to hold the same until it comes to the land called by the name of the Governor's land, and then from the South side of the Governor's land towards the end of the Plaine to former marked tree which stands in the hollow, and to runne from thence upon a direct line until the Rocky Hill, westerly where carts usually goe to Flushing * * * And, whereas, applicacon has been made to me * * * for confirmation of the aforesaid tract or parcel of land and premises contained in the aforesaid patent, as it has since been limited, butted and bounded by the aforementioned agreements of the town of Flushing with the towns of Jamaica and Hempstead." And the patent confirms and grants "all the before recited tract or parcell or neck of land set forth, limited and bounded as aforesaid by the aforementioned patent. Indian deed of sale and agreements." Law Department Pamphlet, p. 35. When in the following month and on April 17, 1685, Gov. Dongan gave a patent to Hempstead of land bounded on the west beginning "at a marked tree standing at the head of Mattegarretts Bay, and so running and thence upon a direct south line due south to the main sea." he was, if these words are taken literally, infringing upon the "established rights and bounds of the Towne of Flushing." On June 2, 1686, at a town meeting in Hempstead, the patentees and others were directed to "use their best endever to maintayn the Jenerall bounds of our townd both of Purchis and Pattin and as for the west bounds of our townd which is beginning at mathagarats bay hed and from thence a south line to the See and a North Line to the Sound there being formerly a contrevarsy which was the hed of the bay and at the Jenerall Metting that was held at our townd by Governor Nicols and the Cuntrys debtys the thing desided and ordered by the athority afforesaid that the Middill of the said bay that is Nere the bottum of the little Neck should be a Counted for the Hed of the said bay where then was a tree marked fer our west bounds betwen flushing and us from which tree or Please Wee dwo Order and impower our agents afferesaid to use their best indevour to maintayn a south Line to the see and a North Line to the Sound." 2 Hempstead Town Records, 8.

By chapter 4 of the Laws of 1797 (amendatory of chapter 69, tit. 9, Laws



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1797), the town supervisors in the different counties were directed to cause surveys of their respective towns to be made and filed in the surveyor general's office. Pursuant to this act and in the year 1797 maps, respectively, of North Hempstead, Flushing, and Hempstead by Wm. M. Stewart, surveyor, were filed. The boundary between these towns runs southeast from Little Neck Bay about three miles, passes the end of the plains (now Floral Park) and goes to the "Rocky Hill," which was a point of departure for the boundary between Flushing and Jamaica. The line was thus drawn, as it had been settled in the general meeting of March, 1664, and as it now exists between the borough of Queens and the county of Nassau. The boundaries shown by these maps seem to correspond with the bounds of the Nicolls patents as modified and established by the agreements between Flushing, Hempstead, and Jamaica recited in the Dongan patent to Flushing. It follows that the point "at the middle of the Bay where Capt. Jacques runne the line" is the point where the present boundary between Queens and Nassau reaches Little Neck Bay, at the head of the small bay to the east of Little Neck. Is this the point which the town meeting in 1686 called "the middle of the said Bay, that is nere the bottum of the littell Neck"? This language is not perfectly clear, but it is certain that neither the town nor Gov. Andros or Gov. Dongan could, in 1676 or 1686, move this boundary westward into territory already belonging to Flushing by patent and agreement. In 1691 August Graham filed a survey of a due south line by the compass (allowing no variation) from a certain "Burch tree marked with the letter "H" near Hicks' Mill. This line seems to have been run with reference to some controversy as to land in Rockaway. Graham's line fell to the eastward of one previously run by a Mr. Wells. On May 8 and 9, 1727, Justice John Treadwell and other citizens "pursuant to voat made by the mager voat of the freeholders of Hempstead did aid and assist Dr. Colding ye Jeneral Survaior of the province of Neu York. In Running of our West Line which is our west bonds according to our purches and patians which is a derect South line due South from the head of mattheugarison's bay to the South Sea, beginning at a burch tree at ye sd bay head." 3 Town Records, 88. Apparently, from the account of the line as drawn, this survey agreed with that of Mr. Wells, and not with that of Graham, who had allowed for no variation of the compass.

The map filed by Graham shows that the tree marked "H" used by him was on Little Neck. It does not appear by whom or when the tree was marked. To settle questions arising on the south side of the island regarding lands not affected by the agreements made as to the boundary between Hempstead and Flushing, it was apparently deemed unnecessary to take into account the line which "Capt. Jacques runne" and which had been adopted by agreement in June 30, 1684, and I do not think that the evidence furnished by the Graham map can be taken to modify the conclusions already reached. It may be said, further, that Graham's north line (and still more Mr. Wells' north line) drawn from the marked tree on Graham's map passes eastward of high-water mark of the upland on Great Neck adjacent to the defendant's land under water, so that a north line, drawn from the tree marked by Graham, would not give the disputed premises to the plaintiff. The Dongan patent to Hempstead, as had been said, runs "from the said tree a direct north line to the South or East River, and so around the points of the Necks until it comes to Hempstead Harbour," etc. The Kieft patent had given to Hempstead the lands from Hempstead Bay "westward as far as Mathew Garretson's Bay"—that is to say, the whole of Great Neck; but it appears that a straight line due north from either of the points claimed to be the head of the bay would cut off portions of Great Neck. Hence the line could not be literally a "direct north line," and must be either a line following the shore or else a line drawn out into the bay to the west of north. Taking the point of departure as at the head of the bay east of Little Neck, where the boundary had been established by the patent to Flushing, it would be necessary to run the line almost northwest to inclose within the Hempstead boundary any considerable part of the surface of the bay. Why should such a line be described as a "direct north line"? How far into the waters of the sound should such a line be protracted before turning "around the points of the necks until it comes to Hempstead Harbor"?

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A claimant under a gratuitous grant from the sovereign must bring himself within clear and unequivocal language, and the uncertainty of this line drawn to the sound seems to me fatal to the plaintiff's claim. Langdon v. Mayor, 93 N. Y. 145. I think, therefore, that the direct "north line" is to be taken as starting directly north and following the shore of the land belonging to Hempstead in a general northerly direction, just as the "direct south line due south to the main sea" must, without doubt, be taken as running first southeast, then south, southwest, and south again along the established boundary of the town of Flushing and the line which "Capt. Jacques runne." It is to be noticed that the boundaries of the town of Hempstead, as shown on Stewart's map, filed in 1797, include no land under water, nor is there evidence showing claim of title by the town before the year 1889 to any lands covered by the waters of Little Neck Bay. By chapter 231, p. 276, Laws 1835, Richard Udall was authorized to build a dock on the west side of Great Neck, extending into Little Neck Bay not more than 400 feet beyond high-water mark. This dock was built near the lands under water occupied by the defendant, and existed for years, so far as appears, without protest from the town of North Hempstead.

My conclusion is that the land under water described in the complaint is not included within the boundaries of either of the colonial patents to the town of Hempstead, and is not shown to be the property of the plaintiff, and for this reason the complaint should be dismissed.

Argued before HIRSCHBERG, P. J., and WOODWARD, JENKS, and RICH, JJ.

Henry Warren Beebe, for appellant.
George W. Davison, for respondent.

PER CURIAM. Judgment affirmed, with costs, upon the opinion of Stephen H. Olin, Esq., referee.

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## PEOPLE v. WICKES.

(Supreme Court, Appellate Division, First Department. March 23, 1906.)

1. THREATS—ELEMENTS OF OFFENSE—EVIDENCE—SUFFICIENCY.

An attorney employed to prosecute an action for a contingent fee, wrote, under an assumed name, to defendant several letters, urging a settlement, and stating that a certified copy of the answers had been obtained, that they might be laid before a magistrate and an application made for a warrant for perjury, or the trial judge might send the answers to the district attorney, and inquiring whether he desired to have it known in the community that he had resorted to perjury, and averring that there was only one chance to escape conviction and that was to settle the case. *Held* to warrant the attorney's conviction of blackmail, it appearing that he attempted to obtain a settlement by threats of a prosecution for perjury and thereby obtain a fee.

2. SAME—DEFENSE.

It is no defense to a charge of blackmail that the crime threatened to be charged has been perpetrated, nor that accused has cause to believe that the crime has been committed or does believe it.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Threats, § 5.]

3. SAME.

An attorney employed to prosecute an unliquidated claim on a contingent fee wrote under an assumed name to defendant urging a settlement and threatening him with a prosecution for perjury. *Held*, that the privilege of an attorney did not constitute a defense to the attorney's prosecution for blackmail.

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Appeal from Trial Term, New York County.

Thomas P. Wickes was convicted of blackmail, and he appeals. Affirmed.

Argued before O'BRIEN, P. J., and PATTERSON, INGRAHAM, LAUGHLIN, and CLARKE, JJ.

Delos McCurdy (Job E. Hedges, on the brief), for appellant.

William Travers Jerome, Dist. Atty. (Robert C. Taylor, of counsel), for the People.

CLARKE, J. In March, 1901, Dr. Ashbel P. Grinnell of Burlington, Vt., was arrested at the Grand Central Station in the city of New York as, with his wife, he was about to take a train for his home. The arrest was made because one Edward Weston had identified Dr. Grinnell as one Raymor, who had theretofore obtained certain sums of money from Weston by false representations. Dr. Grinnell's identity was soon established, and, after a short detention, he was released from custody. Thereafter Grinnell brought a civil action in the Supreme Court in this county against Weston for $50,000 for damages for said arrest. In the verified answer interposed in said action Weston alleged:

"That on or about March 23d, 1901, at the Grand Central Station in New York City, the defendant, being misled and deceived by said great resemblance and similarity, acting in the honest though mistaken belief that the plaintiff was the person who had committed the felony hereinbefore described, and without any malice whatsoever, caused the arrest of the plaintiff in order that said plaintiff might be carried and conveyed before the proper magistrate, to be there dealt with according to law."

The said action came on for trial, and resulted in a verdict for the plaintiff for $12,500. The defendant in the case at bar, an attorney at law, represented the plaintiff, Grinnell, in said action as counsel and actually conducted the trial. He was to receive for his services as counsel 25 per cent. of the verdict and one-half of the costs and allowances. On appeal, this court reversed the judgment entered on said verdict, and ordered a new trial. Grinnell v. Weston, 95 App. Div. 454, 88 N. Y. Supp. 781. The second trial was had in February, 1905, and a verdict for $10,000 was rendered for the plaintiff. The court reduced the amount to $5,000 and, the plaintiff, not consenting thereto, the verdict was set aside, and a new trial ordered. Weston at that time was in Florida. The defendant at bar had theretofore procured a lock box in the New York post office and had caused stationery to be engraved with the heading "Lewis Jarvis, Lock Box 1604, New York," and on said letter paper and over the signature, written by himself, of "Lewis Jarvis," he sent to Weston in Florida a letter, dated February 18, 1905. That letter stated, inter alia:

"My dear Commodore: Please pardon me for intruding upon your holiday. You have entertained me very handsomely in the past, and I would be glad to do you some service. May I write that many of your friends think you have pursued this lawsuit with Dr. Grinnell long enough? You must know you never can win the case. You admit that you caused the arrest. (at least that is the statement made in the answer, sworn to by you, which Mr. Mitchell prepared for you); * * *. The other jury gave $12,500. This jury gives $10,000. Would it do any good to appeal? Suppose you should succeed in setting this verdict aside also, would Dr. Grinnell be thereby prevented from

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getting another verdict? Commodore, as long as your answer remains what it is, the case cannot be changed, and you could not alter your answer, so as to make it really different, effectively, and legally different, without running the risk of a prosecution for perjury. Then why not make an end of the case, Commodore? You have put up a splendid fight. No one could have done better for you than Mr. Osborne. I heard nine-tenths of this last trial, and I could not but admire his wonderful management of the defense, in spite of your absence. You were favored by good fortune too. Dr. Grinnell was very kind and generous toward you in his testimony, and then Senator O'Sullivan summed the case up on the plaintiff's side; if Mr. Wickes had made the final address to the jury I believe that the verdict would have been at least $20,000 against you. But the publicity given to the matter hurts your good name; all your friends here are saying so. The newspapers were full of it * * * Pray think of these suggestions, my dear Commodore, for your own sake, and consider them. Talk them over with your good wife, or any other disinterested friend. * * * But I rather imagine that I need only to give you the hint. Your own good sound sense and excellent judgment will do the rest."

Weston did not reply to this letter. On February 21, 1905, the defendant, upon paper with the same engraved heading, and over the same name of Lewis Jarvis, wrote again to Weston. Having first stated the motions which had been made, the letter proceeds:

"Do you want a new trial? Do you want to have all this dragged out again in March. Believe me, Commodore, it would be very bad for you. The only way you could avoid it would be to wire Osborne to withdraw his motion. Then, if the judge should deny Wickes' motion (and, between you and me, the judge will, for he told me that he would), the case could go up on appeal on a simple appeal from the judgment. But do you want to appeal again? The result, the final result, would be against you. It is bound to be while that awful answer, which Mr. Mitchell allowed you to swear to, remains in the case, and, as I wrote you before, you cannot now amend it; for any amendment, that is any amendment which would do you any good at all, as an answer, would really in the end, only involve you in more trouble, because you would have to swear to circumstances so diametrically opposite to what you have already sworn to, that you would run the risk of a prosecution for perjury. * * * Now, Commodore, why don't you settle the case? * * * Settle the case now, Commodore, for the sake of your own good name. You will never have a better opportunity than this."

This letter was not answered. On February 25, 1905, the defendant again wrote on the same paper and over the name of Lewis Jarvis: "I was in court Friday morning." Then followed an account of the court proceedings, and the letter continued:

"There, you see, Mr. Wickes gets the new trial he wanted. So, in March or April it will have to be gone into all over again, with a very good prospect of a verdict against you then of $20,000 or more. Commodore, your interests have not been very well looked after in this case, now have they? * * * Really, Commodore, you ought to have settled the case long ago. It is not too late now, but of course you would have to pay very much more now. Why don't you send Mr. Dorrian or some other man in whom you have confidence, to see Mr. Wickes, and try to come to terms with Dr. Grinnell at once; and then, when you come north, you can close the matter up for good and all."

Prior to the third trial in May, 1905, Weston verified and had served an amended answer in the suit of Grinnell v. Weston. Paragraph twenty-second thereof was as follows:

"That on or about the 22d day of March, 1901, this defendant, acting in the honest, though mistaken belief that the plaintiff was the person who had committed the felony hereinbefore described in the state of New York as

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aforesaid, and without any malice whatsoever, pursuant to the aforesaid instructions from the said police department of the city of New York, notified the said police department of the whereabouts of the said Raymor, as this defendant in good faith supposed and believed, and on or about the 22d day of March, 1901, at the Grand Central Station in New York City, this defendant being misled and deceived by such great resemblance and similarity and acting in the honest though mistaken belief that the plaintiff was the person who had committed the felony hereinbefore described, and without any malice whatsoever, at the request of the said police department of the city of New York and its officers, identified the plaintiff herein as and being the said Raymor hereinbefore referred to, and this defendant alleges that the plaintiff was thereupon arrested, but not by this defendant but by the police department of the city of New York."

The defendant Wickes procured the filing of the original of this amended answer in the county clerk's office and obtained therefrom a certified copy. On the day before the third trial began Weston received from the defendant a letter dated May 15, 1905, on the same engraved letter paper as before described, as follows:

"Dear Commodore: I wrote you two or three friendly letters in February, but you appear to have paid no attention to them at all. Look what a spectacle you make of yourself with your two answers, both of which you swore to, on file in the court, because I see that they are both on file; and some one has obtained from the county clerk a certified copy of each. Maybe they are to be laid before a police magistrate, and an application made for a warrant for your arrest upon the charge of perjury. I do not know that any such thing is in contemplation, but a pretty good criminal complaint could be made against you—now, couldn't it?—rather better than the complaint which you got McConville to swear to four years ago when you had Grinnell arrested. In your answer filed March 28, 1903, you say in paragraph 18, 'that on or about March 23d, 1901, at the Grand Central Station in New York City, the defendant * * * caused the arrest of the plaintiff, in order that said plaintiff might be carried and conveyed before the proper magistrate, to be there dealt with according to law," and you swore to this on the 17th day of May, 1901. In your amended answer, filed May 2, 1905, you say in paragraph fifteenth, 'that on or about the 22d day of March, 1901, this defendant * * * at the Grand Central Station in New York City * * * at the request of the said police department of the city of New York, and its officers, identified the plaintiff herein as and being the said Raymor, hereinbefore referred to, and this defendant alleges that the plaintiff was thereupon arrested but not by this defendant, but by the police department of the city of New York.' And you say it again in paragraph thirtieth, and you swore to all this on the 7th day of April, 1905. To each answer is attached a Schedule A, the letter in which you apologize to Grinnell and his wife, and ask an opportunity to explain to them the exceedingly peculiar circumstances which led to their 'arrest' (changed by Mitchell to 'detention'). What did you want to apologize for, if you had not had them arrested? In your sworn testimony at the first trial, as appears by the printed appeal book on file in the county clerk's office, you made oath that you pointed Grinnell out to Kennedy, and that thereupon Kennedy laid his hand on his shoulder, and that you thereupon told Kennedy, your hired servant, to take him along, and later you swore that you went into the inclosure where the passengers were, and caused him (Grinnell) to be arrested. Say, Commodore, are you getting desperate? Do you want to have to go out in the community, after you have been licked to the tune of $12,500 by one jury, and $10,000 by another, that in order to escape, if you possibly can, a third verdict against you have resorted to perjury? Both answers can't be true, Commodore, yet you have sworn to both. In one you swear that you did cause Grinnell's arrest; in the other you swear that you did not have him arrested. Do you want it to get out in your patent suits that you are not to be believed under oath, or that you will swear to papers according to your convenience instead of according to the truth? I have very little idea that Grinnell will take the matter to a police

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magistrate. He is too much of a gentleman; but what if the judge, who will try the case this week, should take the notion into his head to send the two answers to the district attorney. It would be amusing, wouldn't it, to have an indictment found against you in New York, where the crime is committed, by our grand jury, and then to have proceedings taken to extradite you from New Jersey? I tried to tell you all this in February, but you wouldn't listen to me. What you have done, you seem to have done deliberately. There is only one chance for you to get out. Will you be man enough to take it, and be quick about it; or will you continue to be led like a blind man, upon advice, which I still believe must be against your own good judgment, but which, just as surely as you live, will take you to Sing Sing.

"Sincerely yours, Lewis Jarvis."

It was upon this letter that the indictment was found, accusing the defendant of the crime of blackmail in that he "did feloniously send and cause to be forwarded to and received by one Edward Weston, and make for the purpose that the same might be sent to the said Edward Weston, a certain letter and writing, threatening to accuse the said Edward Weston of the crime of perjury and to publish and connive at publishing a libel of and concerning the said Edward Weston accusing him of having then lately before committed the crime of perjury, and thereby exposing him to and imputing to him disgrace, which said letter and writing is as follows: [Setting it out in full]—he the said Thomas P. Wickes, otherwise called Lewis Jarvis, then and there well knowing the contents of the said letter and writing and with intent by means thereof to extort and gain money from the said Edward Weston, against the form of the statute in such case made and provided. * * *" For a second count, the indictment accused the defendant of the crime of knowingly sending said letter with intent thereby to cause annoyance to said Weston. The jury found the defendant guilty as charged in the indictment, and he was sentenced to imprisonment in the penitentiary for the term of one year.

Condensed, this case may be thus stated: An attorney at law, employed as counsel in an action for false arrest upon a fee contingent upon success after two trials and one appeal, under an assumed name, upon stationery engraved with and from a locked post office box hired under the assumed name, in the guise of friendship, with suggestions of perjury, certainly of ultimate defeat, continued unpleasant notoriety and increased expense, repeatedly urges the defendant against whom he is conducting the litigation to make a settlement—a settlement which will ensure him one-fourth of the amount paid. On the very eve of the third trial, he writes that some one (that "some one" being himself) has obtained from the county clerk's office a certified copy of each of the defendant's answers:

"Maybe they are to be laid before a police magistrate and an application made for a warrant for your arrest upon the charge of perjury. * * * Do you want to have it go out in the community * * * that in order to escape, if you possibly can, a third verdict against you, you have resorted to perjury? * * * what if the judge, who will try the case this week, should take the notion into his head to send the two answers to the district attorney. It would be amusing, wouldn't it, to have an indictment found against you in New York. * * * There is only one chance for you to get out; will you be man enough to take it, and be quick about; or will you continue to be led like a blind man, upon advice, which I still believe must be against your own good judgment, but which, just as surely as you live, will take you to Sing Sing."

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The bare statement of those facts makes it clear that the jury were warranted in finding that the defendant, knowing the contents of the letter, which threatened to accuse Weston of the crime of perjury, sent it to him with intent by means thereof to extort or gain money.

The appellant claims that there was no proof of guilt, that the letters have no hidden meaning, that unless crime is written in them there is no crime. Carried to its logical conclusion, this is to assert that defendant must have written, "Unless you pay me a certain sum of money I will accuse you of the crime of perjury," or no offense was committed. That is not the law of this state. In People v. Thompson, 97 N. Y. 313, Judge Earl said:

"The statute cannot be evaded under the guise of friendship. No precise words are needed to convey a threat. It may be done by innuendo or suggestion. To ascertain whether a letter conveys a threat, all its language, together with the circumstances under which it was written, and the relations between the parties may be considered, and if it can be found that the purport and natural effect of the letter is to convey a threat, then the mere form of words is unimportant. * * * The crime may be committed by one who sends a letter conveying a threat of some other person to do the forbidden acts. * * * Taking the whole letter, the inference is quite strong, if not irresistible, that either he or some one else, had some intention of renewing the prosecution against the son by appearing before the grand jury. Unless the letters mean that they have no purpose whatever."

So, in the case at bar, if the letter does not mean that unless a settlement were quickly made before the third trial, some one who had obtained the certified copies of the answer would apply to a magistrate for a warrant for Weston's arrest for perjury, or that the judge might do it, and that if he did not so settle he would be sent to Sing Sing as surely as he lived, then the letter means nothing. If the defendant was not trying to obtain a settlement of the civil suit by practicing on the fears of Weston by innuendo, suggestion and threat of a prosecution for perjury, what was he trying to do? In People v. Gillian, 50 Hun, 35, 2 N. Y. Supp. 476, affirmed 115 N. Y. 643, 21 N. E. 1117, the indictment charged that the letters threatened to accuse the complainant of having had sexual intercourse with a woman not his wife. The letters were anonymous and made no such statement. After asking for a loan, the words were:

"You will not refuse me this loan, you know that you cannot afford to refuse me.

"P. S. Neither old John, nor any of the family knows anything about this: this is straight goods and your money will be returned in the fall with interest."

Mr. Justice Barker said:

"The rule undoubtedly is that a threat of the character mentioned in the statute must be made in the letter or writing delivered to the complainant, and if this is not made to the satisfaction of the jury the prosecution must fail. But as we understand the rule, parol proof may be introduced by the people for the purpose of showing that by the use of the language, figures and phrases employed by the writer he threatened to make the charge as set forth in the indictment, and that the person to whom it was addressed so understood its meaning. If such is not the rule, much of the wrong and mischief intended to be reached by the statute would escape punishment. * * * The threat, as made, need not contain a full description of the offense as charged in the indictment, it is sufficient if the language used in the

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writing, in connection with what preceded and what follows between the parties imported a threat to charge the crime alleged and was so understood by the parties. Commonwealth v. Bacon, 135 Mass. 521; Commonwealth v. O'Connell, 12 Allen (Mass.) 451. * * * The surrounding circumstances may be such that the jury would readily believe that the purport and natural effect of the letter was to convey a threat of the nature and character set out in the indictment. That the letter was intended to convey a threat of some kind is manifest on the face of it and the nature and character of the same is evidently disclosed in the postscript."

In People v. Eichler, 75 Hun, 26, 26 N. Y. Supp. 998, appeal dismissed, 142 N. Y. 642, 37 N. E. 567, the defendant was an attorney. He wrote:

"Please call at my office at 7 o'clock this evening in reference to the Meyer matter, without fail, otherwise I will be obliged to proceed against you criminally."

The court said:

"We think that the threat 'to proceed against you criminally' is equivalent to a threat to accuse the person of a crime."

The appellant claims that "nowhere in these letters is there a demand for anything." It seems to me that there is a very forcible demand that the civil suit be settled and "quickly," with the alternative of Sing Sing "as surely as you live." Settlement meant 25 per cent. of the amount thereof to the defendant; a demand for one included the other. There was no demand in the Wightman Case. 104 N. Y. 598, 11 N. E. 135. The language was:

"Are you willing to make suitable provision for such liability and thereby avoid publicity, or will it be necessary to take legal steps in the matter?"

There was no "demand for anything" in the Eichler Case, supra. There was no demand in the Thompson Case, 97 N. Y. 313. So long as there is an intent by threat to extort or gain money, the mere form of words is of no consequence. The only possible purpose of these letters was to extort or gain money. "Nor is it needful to constitute the crime that the threat should inspire fear, or as claimed by the learned counsel for the defendant, that it should be calculated to produce terror." People v. Thompson, 97 N. Y. 313, 318. "The instruction that if the threats were maliciously made with intent thereby to extort the property from Lyon, it was immaterial whether they did or did not produce any effect upon the mind of Lyon, were correct." State v. Bruce, 24 Me. 71.

It is no defense that the crime threatened to be charged has been perpetrated, nor that the defendant had cause to believe it had been or did believe it. In the Eichler Case, 75 Hun, 26, 26 N. Y. Supp. 998, the defendant was the attorney of the father of a child upon whom it was claimed the complainant had perpetrated horrible crimes. Mr. Justice Follett said:

"The moral turpitude of threatening, for the purpose of obtaining money, to accuse a guilty person of the crime which he has committed, is as great as it is to threaten, for a like purpose, an innocent person of having committed a crime. The intent is the same in both cases, to acquire money without legal right by threatening a legal prosecution. But threatening a guilty person for such a purpose is a greater injury to the public that to threaten an innocent

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one, for the reason that the object is likely to be attained, and the result is the concealment and compounding of felonies to the injury of the state. The fact that the defendant believed in the complainant's guilt is no defense, and not even a mitigating fact."

To the same effect, State v. Bruce, 24 Me. 71, decided in 1844:

"A person whose property has been stolen cannot claim the right to punish the thief himself without process of law, and to make him compensate him for the loss of his property, by maliciously threatening to accuse him of the offense, or to do an injury to his person or property with intent to extort property from him."

On the same point, Kessler v. State, 50 Ind. 229; Motsinger v. State, 123 Ind. 498, 24 N. E. 342; State v. Debolt, 104 Iowa, 105, 73 N. W. 499; Elliott v. State, 36 Ohio St. 318; People v. Choynski, 95 Cal. 640, 30 Pac. 791; Com. v. Buckley, 148 Mass. 27, 18 N. E. 577, 1 L. R A. 624.

In People v. Whittemore, 102 Mich. 519, 61 N. W. 13, as in the case at bar, an attorney was indicted for threatening to prosecute for perjury unless the complainant would deed the land in controversy in a suit in which the complainant had been examined as a witness, to respondent's client for a named consideration. Subsequently the respondent did make a complaint against the complainant for perjury and caused his arrest. The court said:

"The circuit court charged the jury in effect that if the threats were made with the wrongful intent charged and were made maliciously, the offense was complete whether Lucas was or was not guilty of the offense of perjury. The respondent complains of this holding and contends that if respondent, having an interest in the matter, believed that Lucas was guilty of perjury he had the right to threaten to prosecute Lucas unless he should place the title where it belonged. But we think the law is settled otherwise. 2 Wharton Crim. Law, §§ 60, 64; Rosc. Crim. Ev. 979; Rex v. Gardner, 1 Car. & P. 479; Regina v. Cracknell, 10 Cox, C. C. 408; Com. v. Buckley, 148 Mass. 27, 18 N. E. 577, 1 L. R. A. 624; Com. v. Coolidge, 128 Mass. 55; State v. Goodwin, 37 La. Ann. 713."

The appellant pleads the privilege of an attorney in attempting to collect a just debt. But "the law does not authorize the collection of just debts by the malicious threatening to accuse the debtor of a crime." Com. v. Coolidge, 128 Mass. 55; People v. Eichler, supra. "Lewis Jarvis" was not the attorney of Grinnell. Nor would it have altered the case if the defendant had signed his own name to the letters. The privilege of an attorney does not extend so far as to sanction such letters as are in evidence in this case to be written to a defendant to force the settlement of an unliquidated claim of the attorney's client, in which he has a monetary interest, by threats. The blackmail denounced by the statute was made out; knowledge, threat, and intent, were all sufficiently proved to warrant the verdict.

No errors to the prejudice of the defendant were committed upon the trial, and the judgment should be affirmed. All concur.

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## CONWAY v. COONEY.

(Supreme Court, Appellate Division, Third Department. March 7, 1906.)

1. EXECUTORS AND ADMINISTRATORS—CLAIMS AGAINST ESTATE—FAMILY RELATION—SUPPORT.

A father furnished a furnished house to a married daughter and family, including rooms in which she conducted a dressmaking business, and she furnished him with board and nursing. There was nothing to show that he promised to pay for the board or that she promised to pay for the use of the house. The arrangement continued for several years, and she never complained of his failure to pay board. *Held*, that the daughter could not recover against his estate on a quantum meruit for the board furnished.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 733.]

2. SAME—EXPRESS CONTRACT—EVIDENCE—SUFFICIENCY.

In proceedings by a daughter to establish a claim against the estate of her deceased father for board furnished him, evidence examined, and held insufficient to show an express contract on his part to pay therefor.

3. SAME—PROOF NECESSARY TO ESTABLISH EXPRESS CONTRACT.

Where a father and daughter lived in the same house for several years, he furnishing the house and she furnishing the board, room, care, etc., an express contract on his part to pay for the board must be proved by clear and convincing proof.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 903½.]

Appeal from Judgment of Referee.

Proceedings for the allowance of the claim of Jennie M. Conway against the estate of Luke Cooney, deceased. From a judgment allowing the claim, Lawrence Cooney, administrator of the estate, appeals. Reversed.

This is an appeal from a judgment entered upon the report of a referee appointed under section 2718 of the Code of Civil Procedure. In 1884 the plaintiff, Jennie Conway, who is a married daughter of the deceased, Luke Cooney, left her husband's home, and, with her two children, went to live with and to work for her father at an agreed price, as claimed, of $3 per week. Her father was then an old man, and was living in his own house without a wife or other member of his family to keep house for him, except a young daughter about 11 years of age. In December, 1888, that daughter died, and from and after the next summer this plaintiff, instead of working for her father, seems to have taken charge of the house, furnished all the means necessary to run the same, and the father thenceforth boarded and lodged with her continuously up to the time of his death, which occurred in February, 1902. It appears that in 1901, and while the father was still living, the plaintiff made out a bill against him for work and labor rendered to him from 1884 up to that time, but it appears that such bill was never presented to him. In September, 1903, a bill was presented to the administrator, in which the plaintiff seeks to recover from his estate for board and lodging furnished to him from 1889, at the rate of $15 per month, up to December 8, 1901, and from and after that date, at the rate of $10 per week, until his death. Such bill, so presented, was rejected by the administrator, and was referred under the statute and tried before the referee to whom so referred. Such referee reported in favor of the plaintiff in the sum of $1,524.71, and from the judgment entered thereon this appeal is taken.

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Argued before PARKER, P. J., and SMITH, CHESTER, KELLOGG, and COCHRANE, JJ.

Abner Robertson (P. C. Dugan, of counsel), for appellant.

J. B. McCormick, for respondent.

PARKER, P. J. It seems that from 1884 to 1889 the plaintiff worked for her father, the deceased Luke Cooney, in his family, under such circumstances as indicated that the services so rendered were not for him, but for the mutual benefit of her own family and that of her said father, and no claim is made by her in this proceeding for any service rendered during that period. In December, 1888, however, it appears that the young daughter of her said father, who had previously lived with him, died, and a young son left him and went away to earn his own living. That left the father the only member of his family, and the plaintiff and her two daughters still living in the house with him. Her family consisted of three, while his had become reduced to one. The referee in his "eighth" finding of fact finds that at that time a new contract was made between the plaintiff and her said father, which went into effect August 1, 1889. What the terms of that contract were he does not find; but he finds that they did thereafter substantially as follows: That from that date the father furnished a furnished house to the plaintiff, her family, and her guests, including rooms to conduct dressmaking in, and a supply of garden truck, reserving a store on the ground floor of the cottage and certain outbuildings in the rear thereof, and that the plaintiff furnished to her said father necessary table board, room care, including cleaning and heating, necessary washing, mending, and nursing, and that this condition continued up to the time of her father's death, which occurred February 18, 1902, at the age of 82 years. There is a finding that the board, etc., so furnished was worth $5 per week, and that the house, etc., so furnished by the father to the plaintiff, was worth the sum of $125 per year; but there is no fact found indicating that the father ever promised to pay to the plaintiff any sum whatever for the board, etc., so furnished him, nor that the plaintiff ever promised to pay anything whatever for the use of the house, etc., so furnished to her. I discover no finding of any fact in the report, other than as above stated, showing that the father ever became liable to pay for the board, etc., so furnished him.

From the facts so bound I am of the opinion that no inference can be drawn that either party promised to pay to the other any money whatever. What they did do we may assume they agreed to do; but what is there in such facts indicating that the father agreed to pay to his daughter what such board, etc., was fairly worth, or what to indicate that the daughter then agreed to pay or allow to him what the use of the property she so occupied and received was reasonably worth in the market? In my judgment, from such facts it is rather to be inferred that what the daughter received from the father was deemed satisfaction for what she furnished to him, and particularly should this be inferred when we consider that at no time during the 12½ years that this condition continued did the daughter complain against the father for more payment for his board, or never at any time did either of them make any attempt to adjust what such board, etc., was reasonably worth, or what fairly

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ought to be charged against the daughter for her use of the house and garden truck that she occupied and enjoyed. So far as the facts found by the referee are concerned, it would seem that after the year 1889, as before, the arrangement with the father was that thy should still live as one family, both contributing as best they could to the general expense of their living. Concededly the daughter was a dressmaker by trade, and could earn more or less that way. Concededly the father was an old man, without work and unable to longer carry on his store, which was then rented for $100 per year, and which seems to have been his sole and only income, save what he could raise in his garden. Each put in all they had. The father, from time to time, paid such money as he could spare towards the common support, and from time to time the daughter wrote to her brothers for assistance, and usually seems to have received it, and never complained that her father did not pay what he had agreed to. I conclude that from the facts found in the referee's report no cause of action arises against the father to pay upon "a quantum meruit" for the board, etc., that he so received, and evidently no direct promise to so pay is to be found therein.

It is claimed by the plaintiff, however, that there is evidence in the case from which a direct promise to pay what the board was fairly worth might have been found by the referee. Such evidence is claimed to have been given by John Conway, the husband of the plaintiff, and by her two daughters, Mamie and Hattie. That of the husband is to the effect that the father told him, soon after the daughter Katie's death, that he thought it would be cheaper for him to board with the plaintiff, and that he would pay her $3 or $3.50 per week. If this is to be of any force, it repels the idea of an agreement to pay what the board was worth, and fixes the price at not more than $3.50 per week. But it falls far short of proving that any agreement for any price was ever made. The daughter Mamie is substantially to the same effect, except that he would pay what the board was worth. The daughter Hattie goes a step farther, and says that she heard the father tell the plaintiff that now Katie was dead it would be cheaper for him to board with her, and that the mother replied that she would run the house and he could board with her. She heard nothing said as to price, nor does she state that anything was said as to how she was to be paid. She heard them say, however, that he would fix up a room for her to carry on the dressmaking business and she could carry it on. I have carefully read the evidence of these witnesses, and I can understand why the referee has not attempted to state the terms of the contract then and there made between the parties. Neither of these witnesses state enough to show any definite agreement made, and from all their evidence we cannot conclude, with any certainty, that the deceased then assumed any obligation to pay any sum for his board, nor to in any way compensate the plaintiff therefor, other than such as she would derive from the use of his house and property in the manner above described.

It must be borne in mind that the conduct of the plaintiff during all these years is utterly inconsistent with the contract sought to be deduced from this evidence. She did not keep any account against her father for the board, etc., now claimed, nor does she seem to have

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credited him with anything whatever for the use of the house, etc., received from him. As late as 1901, and while he was still living, she made up a bill against him. But, instead of then claiming that he had been boarding with her since 1889 and charging for that, she claims that all the time from 1884 down she had been keeping house for him at the rate of $3 per week; thus utterly ignoring any change in the relations made in 1889. So in the bill that she presented to the administrator after her father's death, and which was referred in this proceeding, she claims the contract made in 1889 was for board at the price of $15 per month, thus squarely contradicting the conclusion of the referee that the deceased was to pay what it was reasonably worth, viz., $5 per week. And in such last bill she does not give any credit whatever for the use by her of the house, etc., which concededly she has had, thus again contradicting the supposed contract made in 1889, and upon which the conclusion of the referee seems to be based. Certainly there is not sufficient evidence to warrant the finding of a contract that adds anything to the obligations which may fairly be implied from the conduct of the parties merely, and that, as we have already seen, is not sufficient to sustain the claim now made by the plaintiff. As between father and daughter living in the same family, we should not conclude that such a direct contract existed, except upon clear and convincing proof. Matter of Hart v. Tuite, 75 App. Div. 323, 324, 78 N. Y. Supp. 154; Robinson v. Carpenter, 77 App. Div. 520, 79 N. Y. Supp. 283; Van Slooten v. Wheeler, 140 N. Y. 624, 35 N. E. 583.

My conclusion is that the judgment should be reversed on the law and the facts, and a new trial granted, with costs to appellant to abide the event. All concur.

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## DECKER v. HUNT.

(Supreme Court, Appellate Division, Third Department. March 7, 1906.)

1. DEEDS—RESERVATIONS—CONSTRUCTION—STANDING TIMBER—RIGHT OF REMOVAL.

Under a deed whereby the grantor excepted and reserved certain standing timber on the property, and the right of way to and from the same, the grantor and his assigns were entitled to a reasonable time only in which to remove the timber.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, §§ 462, 465, 468.]

2. ADVERSE POSSESSION.

Where a grantor in a deed of a farm excepted and reserved the standing timber on a part of the farm, and a right of way to and from the same, the fact that his grantee of an adjoining farm, going into possession under a deed assuming to convey the right to take the wood and timber from the first-mentioned farm, resided on his own land for 26 years, testifying that during all that time he took wood and timber from the "reservation," so-called, on the first farm whenever he desired, with the knowledge of the owners thereof, was not sufficient to vest in him title to either the land or timber thereon.

3. DEEDS—RESERVATIONS—CONSTRUCTION.

Where a grantor and his assigns had a reasonable time within which to remove from the property certain standing timber, acquiescence on the part of the grantee and his successors, that those claiming under such

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**grantor should take a tree or so each year from the reservation, even though enduring for 20 years after the expiration of the time for taking the timber, would not bar the grantee and his successors from thereafter objecting to such taking, as long as no right to take the timber was claimed, except through the reservation in the grantee's deed.**

Appeal from Judgment on Report of Referee.

Action by Emma Decker against Abram Hunt. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before PARKER, P. J., and SMITH, CHESTER, KELLOGG, and COCHRANE, JJ.

O'Connor & O'Connor, for appellant.

F. M. Andrus, for respondent.

PARKER, P. J. The plaintiff, upon this appeal, may claim that the following facts have been established: In 1856 Charles More was the owner of two farms; the dividing line between them running nearly north and south. On April 10, 1856, he contracted to sell the westerly of such farms, describing it by metes and bounds, to one Bloomburgh. Such contract contained a reservation of the timber on the south end of the farm. Just what its phraseology was is not certain, as it has been lost; but it is not very material, as, that contract having been assigned from Bloomburgh to one Powell, More, on December 1, 1860, in pursuance and satisfaction thereof, conveyed the farm to Powell by a warranty deed dated on that day, in which is contained an exception in these words: "Excepting and reserving the standing timber on the south end of farm adjoining Rufus W. Baker and the right of way to and therefrom." Powell resided on the farm for several years, and then conveyed it to one Lawrence Conaro by a warranty deed, containing an exception of the said timber in the same language as above. Lawrence, the next year, viz., on May 1, 1866, conveyed to Isaac Conaro by a warranty deed containing the same exception, and in the same language as above stated. Thus in May, 1866, the title and possession of the westerly farm had passed to Isaac Conaro, but evidently he had not acquired any title to the "standing timber on the south end" thereof. On September 27, 1856, the said More contracted to sell and convey to one Hiram Conaro the easterly farm above mentioned, describing the same by metes and bounds, and such contract also contained the following clause:

**"The said More hereby conveys to said Conaro all his right to the wood on the south end of the farm, by reason of a reservation of the same in a contract of sale of land made on or about the 10th day of April, 1856, to Wilson Bloomburgh."**

This contract was signed by More, was witnessed, and was under seal. Conaro went into possession of such easterly farm, and on December 1, 1860, More executed to him a conveyance of the same by a warranty deed of that date. There was no mention, however, in such deed of the wood mentioned in such contract. Hiram Conaro resided on such easterly farm until April 10, 1876, and then conveyed the same to one Stephen Peckham, and in such conveyance was included the following provision:

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"Also all the wood on the south end of a farm now owned by Isaac Conaro by reason of a reservation of the same in a deed of the farm Isaac Conaro now owns from Charles C. More to Wilson Bloomburgh and by virtue of a contract between the party of the first part [Hiram Conaro] and Charles C. More, dated September 27, 1856, which I have this day assigned to the party of the second part [Stephen Peckham]. The party of the second part has at all times the right to enter upon the said wood lots for the purpose to cut, get, or draw, timber or wood off from said lot."

Thus it appears that, when Isaac Conaro became the owner of the westerly farm in 1866, Hiram Conaro, who was his father, owned and occupied the easterly farm, and claimed to own, and did own, under the provision in his contract from More, whatever wood or timber More had excepted in his conveyance to Powell; and it is plain that up to this time he had taken off from such south end of the westerly farm both timber and wood whenever he desired. After Isaac became the owner, he stated to his father that he wanted a stated time fixed when the timber was to be taken off, and it was then agreed that it should all be removed in four years. Isaac Conaro testified that after the expiration of four years his father took no more wood or timber from there while he owned the place, and that it was substantially all taken off during that four years. He, however, testifies further that he thinks his father left on the place about 25 first growth trees that he did not take off. Isaac's evidence that his father took no timber off of the place after the expiration of the four years is contradicted by several other witnesses; but the referee has found that, by mutual agreement between Isaac and his father, Hiram Conaro, the rights of Hiram under the reservation were terminated. As bearing upon this question, it also appears that subsequent owners of the east farm have actually taken off timber and wood from the south end of the west farm to the knowledge of its owners.

Isaac Conaro resided on such westerly farm from May 1, 1866, until April, 1879. The farm was then sold by a referee on the foreclosure of a mortgage given by said Isaac, and a referee's deed thereof given to Hannah E. Martin, dated April 24, 1879. Such deed described the westerly farm by metes and bounds, but made no reservation of, and no reference to, the timber on the south end. Such lot was subsequently conveyed by several mesne conveyances, and on April 23, 1896, became vested in one Agnes Cronk, and in none of such conveyances was there any mention made of the timber on its south end. On March 1, 1897, said Agnes Cronk conveyed the said westerly lot by a warranty deed dated on that date to Emma Decker, this plaintiff, who took possession of the same and has since resided thereon. Her conveyance contained the following reservation:

"Also subject to a reservation of certain timber on a portion of said premises by Charles More, according to the terms of reservation."

It is for the cutting of some 20 trees, which the defendant claims under such reservation, that the plaintiff has brought this action.

When Hiram Conaro conveyed the easterly farm and the wood on the south end of the westerly farm to Stephen Peckham by deed dated April 10, 1876, John Peckham, such grantor's son, moved onto such premises and continued to reside there until he conveyed them to this

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defendant, being a period of 26 years. During all that time he and his father took wood and timber off of the "reservation," so-called, whenever they wanted to, and, when he conveyed to this defendant on April 1, 1902, he pointed out to the defendant the "reservation" and explained it to him. Each of the deeds from Stephen to John Peckham and from John Peckham to Abram Hunt, this defendant, contained the grant of the wood, etc., in the same language specified in the deed to Stephen Peckham, as above quoted. And thus the defendant claims the right to take the trees in question, by virtue of the exception thereof which Charles More made in his deed to Powell dated December 1, 1860, and by virtue of the ownership thereof, which through the several above-mentioned mesne conveyances has been transferred from said More to him.

The trees in question grew upon lands owned by the plaintiff, and they were in her possession when cut and taken therefrom. Prima facie, therefore, the defendant is liable to the plaintiff for their value, and this judgment against him must be sustained, unless he has shown a justification for such taking. The substance of the justification set up in his answer is that he had purchased the right to take the same by the deed from John Peckham, given him April 1, 1902, and above referred to, and that the plaintiff never had any title to such trees.

Did the defendant acquire the right to take such trees by the deed through which he claims?

We must, I think, assume that the reservation made by More, when he contracted to Bloomburgh, was of the "standing timber" only, for that is all that he excepted and reserved in his conveyance to Powell, which was given in performance of such contract; and, conceding that all which he so excepted and reserved was transferred and conveyed to Hiram Conaro by the contract executed on September 26, 1856, we can only assume that by the phrase "wood," therein used, only "standing timber" was intended. Assume, then, that Hiram Conaro by such contract became the owner of the "standing timber" then on the south end of the farm that is now owned by the plaintiff, and that he then also acquired "the right of way to and therefrom," the question is presented whether he thereby acquired the right to forever keep and maintain such standing timber on the premises, with the continuing right to take it, or any part of it, off whenever he or his grantees might desire, or whether he or his grantees were not required, under such a title, to remove such "timber," within a reasonable time thereafter; no definite and particular time having been specified. I cannot agree with the referee that the reservation was operative to More only. The title to the timber was "excepted" from the operation of the deed to Powell and remained in him (More); but I think that the plain intent of the parties was that such timber should be removed within a reasonable time, and so such exception should be construed. If More and his grantees might for all time neglect to remove such timber, and still hold and own the same, it would practically prevent Powell and his grantees from clearing up and using that part of the farm on which it was standing, and would, in effect, be an exception of all that part of the farm itself, a purpose which clearly is in direct contradiction of the whole conveyance.



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It has been frequently held that when the owner of a tract of land has conveyed to another all the timber on such tract, with the right to enter thereon and remove the same, and no time is specified in which to remove it, a reasonable time only is intended, and that the conveyance must be so construed. Am. & Eng. Ency. of Law, vol. 28, p. 542, and cases cited. And that, when a definite time is expressed in the conveyance, as, for instance, 10 years, and the grantee does not take it off within such time, the timber remaining shall be considered as belonging to the owner of the land, and the conveyance must be construed as a grant only of so much of the timber which the grantee shall take off within that period. Boisaubin v. Reed, 1 Abb. Dec. 161; Id., *41 N. Y. 323; Kellam v. McKenstry, 6 Hun, 381; Id., 69 N. Y. 264.

Construing the exception and reservation contained in the Powell deed by the above rules, we must conclude that More and his grantees acquired thereunder the right to cut and take away so much of the "standing timber" on the south end of the plaintiff's farm as they should cut and take within a reasonable time after such conveyance, and that at the expiration of such time so much thereof as remained became the property of Powell and his grantees. If, then, More's right to take off such timber did not extend beyond a reasonable time after the Powell deed was given, it is plain that Hiram Conaro, his grantee, could not extend such right by any conveyance he could give to the Peckhams, and the arrangement which Isaac Conaro testified he made with his father, Hiram, that such timber should all be taken off in four years—and which evidence the referee seems to have believed—seems to be very satisfactory evidence that a reasonable time to remove such timber had passed before Hiram Conaro had left the place, or conveyed anything whatever to Stephen Peckham. Such deed was given on April 10, 1876, more than 16 years after the Powell deed, and the timber in question was located on about five acres of land. It would appear that a reasonable time to take off such timber had long expired, and that the above-mentioned conveyance from Conaro to Peckham in fact conveyed nothing whatever from the south end of the westerly farm, since Conaro's rights therein had then fully terminated.

The defendant, however, claims that, even if John Peckham did not acquire the right to take such lumber by a paper title, he acquired title to the wood and timber in question by prescription. John Peckham went into possession of the easterly farm in April, 1876, under a conveyance from Hiram Conaro, which deed also assumed to convey the right to take the wood and timber from the south end of the westerly farm. He resided there for 26 years before he conveyed to the defendant, and he testifies that during all that time he took wood and timber from the "reservation," so-called, whenever he desired, with the knowledge of the owners thereof. Such evidence as to what he and his father did in taking such wood and timber is very indefinite, but it seems clear that such user was not sufficient, within the authorities, to vest in them title to either the land or the wood and timber thereon. Mission of the I. V. v. Cronin, 145 N. Y. 524, 38 N. E. 964.

Nor do I think that such user on the part of More's successor, and acquiescence on the part of Powell's successors, as appears from the evidence in this case, has operated as an extension of the reasonable

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time which More and his successors acquired by the exception and reservation, in which to cut and remove the timber in question. Acquiescence on the part of Powell's successors that Conaro, or the Peckhams, take a tree or so each year from the reservation, would not bar the owner of the land from insisting that they must cease taking such timber after the time permitted by the exception and reservation had expired, and, even though such acquiescence had endured for 20 years, it would not operate as such a bar, so long as neither Conaro nor the Peckhams claimed any right to take such timber, except through the exception and reservation which More made when he conveyed to Powell. Either one of the owners of such westerly farm might consent, if he chose, to let Peckham take more time than the exception gave; but, in case he granted to another such farm without reservation, that grantee might insist that Peckham had acquired no rights by such permission, other than he took by the paper title through which he claimed. Under such paper title, as shown above, he acquired no rights, and therefore, in my opinion, the plaintiff's judgment was right, and should be affirmed.

**Judgment affirmed, with costs. All concur.**

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## FREEMONT v. BOSTON & M. R. R. et al.

(Supreme Court, Appellate Division, Third Department. March 7, 1906.)

1. MASTER AND SERVANT—DEATH OF BRAKEMAN—WORK IN RAILROAD YARD—RULES—PROPRIETY.

   In an action against a railway company for the death of a brakeman while coupling cars in a yard, the jury is authorized to find that a rule regulating the manner of doing the work in the yard was necessary and proper, where the proof showed that a similar rule was in force in other yards, or where it was practicable to provide against such accidents, or where the necessity of the particular rule was so obvious as to make it a question of common experience.

   [Ed. Note.—For cases in point, see vol. 84, Cent. Dig. Master and Servant, §§ 283, 1037.]

2. SAME—FAILURE TO PRESCRIBE RULES—NEGLIGENCE.

   In an action against a railway company for the death of a brakeman in a railroad yard, an expert testified that a rule would have been a reasonable and practicable rule under which to have conducted the work in the yard, and that such work was conducted by employés in different yards after the method suggested in the rule, though no such rule had actually been promulgated. The evidence did not show wherein such a rule would have been useless or unreasonable. *Held* to justify a finding that there was a reasonable rule which the company should have promulgated, and that the omission so to do was negligence which contributed to the brakeman's death.

   [Ed. Note.—For cases in point, see vol. 84, Cent. Dig. Master and Servant, §§ 283, 1037.]

3. EVIDENCE—COMPETENCY OF EXPERT WITNESS.

   A person who has worked for years in different railroad yards which had switches connecting with each other at one end is competent as an expert to testify with respect to the reasonableness of a rule governing the manner of working in a yard having switches connecting with each other at both ends; the work of coupling cars being in all essential features the same in all the yards.

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4. SAME—CONDUCT OF BUSINESS.

An expert, in answer to a question whether a rule regulating the work in a railroad yard was a practicable one, answered, "I suppose it would be a practicable rule," and the court refused to strike out the answer, which was objected to on the ground that it was not a statement of fact. *Held*, that the court treated the language of the witness as his opinion, and properly overruled the motion to strike it out.

5. MASTER AND SERVANT—INJURY TO BRAKEMAN—ASSUMPTION OF RISK—QUESTION FOR JURY.

In an action under the employer's liability act for the death of a brakeman while coupling a defective car, the question whether decedent assumed the risk is for the jury.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 1068–1072.]

6. SAME—BURDEN OF PROOF.

In an action under the employer's liability act for the death of a brakeman while coupling cars in a yard, defendant has the burden of proving that the risk was obvious to decedent, so that he assumed it.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 892, 907.]

Appeal from Trial Term.

Action by Anna Freemont, as administratrix of Joseph Freemont, deceased, against the Boston & Maine Railroad and another. From a judgment for plaintiff, and from an order denying a motion for a new trial on the minutes, and from an order granting a motion for an extra allowance of costs under Code Civ. Proc. § 3253, defendants appeal. Judgment affirmed, and order granting extra allowance of costs reversed.

The defending railroad companies jointly own and operate a freightyard at Mechanicsville. On the west side are some 12 tracks, known as the "Boston & Maine" tracks, and on the east side are about 18 tracks, known as the "Delaware & Hudson" tracks. Plaintiff's intestate, Freemont, had been employed by the defendants in said yard as a brakeman for about six months prior to November 10, 1904, upon which date he received injuries from which he died on November 18th. The accident causing such injuries occurred on track No. 8 of the Boston & Maine tracks. Track No. 8 was used to temporarily store cars awaiting final assignment to a fast freight then in process of being made up. One crew at the south end would haul cars from different tracks and shunt them on to track No. 8, while another crew at the north end would haul these same cars to whatever fast freight their destination might be. Between 4 and 5 o'clock on the morning of November 10th Freemont's crew had taken off about 15 cars from the north end of track No. 8, when they came to a defective car, which could only be removed by means of a chain hitch. Such a coupling must be made by going between the cars and inserting a link of the chain into the drawhead of each of the cars to be coupled and dropping a pin through the link. While engaged in doing that work cars were shunted upon the south end of said track No. 8, and ran against the one which the deceased was endeavoring to couple with the engine, and he was thereby caught between the car and engine and received the injuries from which he died. The plaintiff, as administratrix of said deceased, claiming that such death was occasioned by the negligence of the defendants, brought this action to recover for the same. The jury rendered a verdict in her favor in the sum of $5,000, and from the judgment entered thereon, and from an order denying the defendants' motion for a new trial on the minutes, this appeal is taken. A motion was also made by plaintiff for an extra allowance of costs, under section 3253 of the Code of Civil Procedure, which was granted; and from this order the defendants also appeal.

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Argued before PARKER, P. J., and SMITH, CHESTER, KELLOGG, and COCHRANE, JJ.

Lewis E. Carr, Jarvis P. O'Brien, and Martin L. Murray, for appellants.

G. B. Wellington, for respondent.

PARKER, P. J. The trial judge, at the request of the defendants' counsel, substantially charged the jury that they were authorized to find the rule suggested by the plaintiff a necessary and proper one for this case, if the proof showed that such rule was in force on some other road, or if it showed that it was practicable and reasonable to provide against such an accident, or if the propriety and necessity of such particular rule was so obvious as to make it a question of common experience and knowledge. Such charge must be deemed to furnish the law of this case, and also seems to be in harmony with the decisions upon that subject. Larow v. N. Y. L. E. & W. R. Co., 61 Hun, 11, 15 N. Y. Supp. 384; Koszlowski v. American Locomotive Co., 96 App. Div. 40, 44, 89 N. Y. Supp. 55; Berringan v. N. Y. L. E. & W. R. R. Co., 131 N. Y. 582, 585, 30 N. E. 57.

Applying such law to the facts of this case, and it seems clear that the jury were authorized to find that there was a reasonable and practicable rule which the defendants could and should have furnished for use in this Mechanicsville yard, and that their omission to promulgate such a rule was negligence which contributed to the death of the plaintiff's intestate. Drake, an expert witness sworn on the part of the plaintiff, testified that the rule suggested by the plaintiff's counsel would have been a reasonable and practicable one under which to have conducted such work in the yard as the deceased was engaged in when he met his death. He also stated that such work was, in actual practice, conducted by the employés in different yards where he had worked after the method suggested in the rule, although no such rule was actually promulgated by any of the companies for which they worked; thus indicating that such method was not only a practicable one, but was also a reasonable and necessary method. This witness had worked for years in many different yards where similar work was carried on, and for some time as a manager of such yards, and was evidently competent to judge whether the rule which the plaintiff claimed should have been adopted was a reasonable and practicable one for the protection of the men engaged in such work; and, if the jury correctly reached the conclusion that such witness was correct in that respect, it was for it to further determine whether the defendants had perfomed their full duty to the deceased in neglecting to provide any rule whatever upon that subject. I am of the opinion that, under the proofs in this case, the jury were authorized to find the defendants negligent in not providing such a rule as was suggested on the part of the plaintiff upon the trial of this case.

It is urged by the defendants' counsel that the evidence of the plaintiff's witness Drake does not really furnish the information which I have above claimed for it. From a careful examination of such evidence as it appears on this record, I am satisfied that such is its fair

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import and meaning; and it must also be borne in mind that no contradiction of such evidence is given, and that no skilled evidence has been offered by the defendants to show wherein such a rule would have been either impracticable, unreasonable, or useless.

It is urged, however, that this witness was not competent as an expert, because the yards in which he had worked did not have switches connecting at both ends with each other. But the work of going in between the ends of cars and coupling with a link or chain and pin on such switches was usual in their yards, and in all essential features the work was the same, except, perhaps, the danger was greater and a stringent rule more needed in the yard in question than in one where an entrance could be made at only one end.

It is also urged that error was made on the trial by the judge refusing to strike out, on the defendants' motion, the answer of such witness. On the trial the plaintiff's counsel put to such witness a supposed rule, and asked him whether it would be a practicable rule for use in a freight yard. He answered, "Yes; I suppose it would be a practicable rule, but understood by railroad men." The plaintiff's counsel asked to strike out the latter part of this answer, "but understood by railroad men," as not responsive, and that the rest remain. The court replied, "I strike out all, except the answer stating that it would be a practicable rule." By this the court meant that he retained what the plaintiffs counsel asked to have retained, and struck out what he asked to have stricken out. To this the defendants' counsel excepted, and then asked to strike out so much of such answer, viz., "I suppose it would be a practicable rule," on the ground that it is not a statement of fact. This motion was denied, and defendants excepted. He strenuously urges that that was reversible error. I think not. The most that was asked from this witness was his opinion. He was testifying as an expert, and hence his opinion was properly received. The trial judge did not "transform a supposition into a fact," but merely treated the phrase used by the witness as an expression of his opinion.

The defendants' counsel further urges that the injury which the deceased received in this case resulted from a risk that was plain and obvious, and hence it was one for which no negligence can be predicated against the defendants.

By the employer's liability act, under which this action is brought, the question of whether or not the deceased assumed the risk, under circumstances similar to these, is no longer one of law. It must be left to the jury, and the trial judge in this case left that question to this jury. The only question, therefore, left to this court, in this connection, is whether we should reverse the finding of the jury upon that question. If the risk of the accident which killed the deceased was an obvious one, and was in fact assumed by him, he cannot recover. If it was not assumed by him, he is not thereby barred from recovering. I am of the opinion that we should not disturb the verdict upon this point. An analysis of the evidence is not needed in an opinion. Suffice it to say that it is not entirely certain that the deceased had such a knowledge of every detail of the method of carrying on that work, and of the situation under which they were working, to make the risk ob-

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vious to him. The burden was upon the defendants to prove it; and so I conclude that we should not now disturb it.

I discover no errors that call for a reversal of this judgment. I recommend therefore that it be affirmed with costs.

As to the order granting to the plaintiff an extra allowance of costs, I am of the opinion that it should be reversed. There is nothing extraordinary or unusually difficult in this case, nothing to bring it within the provisions of section 3253 of the Code of Civil Procedure.

**Order granting extra allowance reversed. Judgment and order denying motion for new trial modified by striking from the judgment the amount of the extra allowance, and, as so modified, affirmed, with costs. All concur.**

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## PAIGE v. NEW YORK CENT. & H. R. R. CO.

**(Supreme Court, Appellate Division, Third Department. March 7, 1906.)**

1. NEGLIGENCE—WRONGFUL DEATH—INFANTS—CONTRIBUTORY NEGLIGENCE OF PERSON IN CHARGE—LIABILITY.

   Defendant railroad was not liable for negligently causing the death of plaintiff's intestate, an infant 19 months old, where the negligence of intestate's grandmother, in charge of and at the time of the accident carrying intestate in her arms, was a contributing cause of such death.

   [Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, §§ 151–161.]

2. SAME—EVIDENCE.

   In an action against a railroad for negligently causing the death of plaintiff's intestate, an infant, being carried at the time in its grandmother's arms, evidence that the grandmother, before crossing defendant's tracks, stopped at a point from four to six feet north of the first rail of one track, from which point she could see a train approaching from the west at a distance of from 1,200 to 1,400 feet, and from the east on a parallel track seven feet beyond the first track a distance of about 2,400 feet, there being no artificial obstruction to her view; that, after safely crossing the first track and into the seven-foot space between the same and the next track, she attempted to step onto the north rail thereof, when the engine of a train thereon was about 10 feet from her, and was hit by the engine, both she and intestate being killed—showed contributory negligence on her part, precluding plaintiff's recovery.

   [Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, § 276.]

Appeal from Trial Term.

Action by Charles J. Paige, as administrator, etc., against the New York Central & Hudson River Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed.

The action is brought by the administrator and father of the infant, Theodore J. Paige, to recover for loss occasioned by the death of such infant, through the alleged negligence of the defendant railroad company. The death occurred on the 22d day of December, 1902. The infant at that time was 19 months of age, and was then in the care of his grandmother, Theresa Hatch, who was about 48 years of age. On that day, at about 3 o'clock in the afternoon, she, with the deceased in her arms, attempted to cross from the northerly to the southerly side of the defending railroad company's tracks, at a crossing where Congress street intersects such tracks in the city of Schenectady. There was at that time a freight train coming from the west on track 4, which was the one nearest to her. It was a dark, wet, muggy day, and the wind was blowing from the west. As she approached the tracks she

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stopped and looked to the east and to the west; the train on track 4 being then, as the plaintiff claims, about 400 feet west of the crossing. She then proceeded across track 4, and was just about to step on track 3, when she was struck by a freight train coming from the east on that track, and both she and the infant were killed. It is claimed that no whistle was blown on the train which struck her as it approached the crossing, nor when it passed the whistling post, which was about 1,000 feet east thereof. There is also evidence that no bell was rung as the train approached the crossing, although the engineer testified that the bell at that time was ringing automatically. The train which struck the deceased consisted of a heavy freight train going down grade at the rate of about 18 miles an hour. The freight train on track 4 was going east at the rate of about 4 miles an hour. An action was brought by the administrator of Theresa Hatch, the grandmother of the infant, against the said defendant, for negligently causing her death, which was tried before Mr. Justice John M. Kellogg and a jury, and resulted in a verdict for the plaintiff. The defendant moved upon the minutes of the court for a new trial, which was granted. The plaintiff appealed from such order to this court, which on January 3, 1905, affirmed the same, but without any opinion. Upon the trial of this action the jury rendered a verdict in favor of the plaintiff for $1,200, and from the judgment entered thereon, and from an order denying a motion for a new trial thereof, this appeal is taken. Further facts appear in the opinion of the court.

Argued before PARKER, P. J., and SMITH, CHESTER, KELLOGG, and COCHRANE, JJ.

S. W. Jackson, for appellant.
John D. Miller, for respondent.

PARKER, P. J. It may be conceded in this case that the negligence of the defendant is established, and yet the serious question remains whether the negligence of the grandmother, Theresa Hatch, was not a contributing cause of her own death and that of the infant in question. If it was, as was charged by the trial judge in this case, this action for the death of his intestate cannot be maintained by this plaintiff.

It appears from the evidence that, at the place where she stopped to look for an approaching train, viz., from four to six feet north of the first rail of track No. 4, Mrs. Hatch could see a train approaching from the east on track No. 3, a distance of about 2,400 feet. She could, from that point, also see a train coming from the west on track No. 4, a distance of from 1,200 to 1,400 feet. It seems, then, that when she stopped to make that observation she was not prevented from seeing by any artificial obstruction. Undoubtedly, if she looked carefully, she would have seen both trains. It is suggested that smoke from the train coming from the west obstructed her view and confused her action, but I do not discover any satisfactory evidence in this case that any such smoke did in fact so interfere with her. The clear weight of evidence is that the engine from the west was much too far away, when the deceased was hit, to permit its smoke to have any such effect. As soon as she had taken this observation she starts to cross the tracks. She goes safely across track No. 4 and into the space of about seven feet between such track and the north rail of track No. 3. Then, when the engine of the train coming from the east was about 10 feet from her, she attempts to step onto such north rail. She is hit by the buffer or beam of such engine, thrown ahead between the rails of the two tracks Nos. 3 and 4, and both she and the infant in her arms are killed.

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A mere statement of these facts demonstrates very clearly that the negligence of Mrs. Hatch contributed to her own and the infant's death. We must believe that, when she looked east, she saw a train coming upon track No. 3. It could not then have been very far off, clearly not so far but that it was in plain sight, and no reason appears why she did not see it. And it would seem that, from that moment, she started to cross both of such tracks ahead of both the coming trains, and was so intent in getting ahead of the one coming from the east that she never stopped to see how near it had got to the crossing. She misjudged her time, did not take time to give a second look, and hence stepped in front of the engine when it was in plain sight and almost within reach of her. When the appeal in the action against this same defendant, for the death of Mrs. Hatch, was before this court, we sustained the order of the trial judge which granted a new trial upon his minutes, on the ground that the verdict was against the weight of the evidence. The facts, as they appear in this record, are not substantially different from those that we then acted upon. We are still of the opinion that Mrs. Hatch's own negligence was the cause of this accident.

This judgment must be reversed on the law and the facts, and a new trial granted, with costs to the appellant to abide the event. All concur.

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## PEOPLE ex rel. UVALDE ASPHALT CO. v. GROUT, Comptroller.

(Supreme Court, Appellate Division, First Department. February 9, 1906.)

MANDAMUS—GROUNDS—ENFORCEMENT OF ILLEGAL CONTRACT.

Where paving work to be done on a street was divided up into several detached pieces, and under several separate orders, without competitive bidding, each order being under $1,000, but aggregating over $1,000, mandamus would not lie to compel the payment of the orders; the contract being apparently illegal, under Greater New York Charter, Laws 1901, p. 186, c. 466, § 419, declaring that, when the several parts of a work shall involve more than $1,000, the work shall be done by contract founded on competitive bidding.

Mandamus by the people, on the relation of the Uvalde Asphalt Company, to compel Edward M. Grout, as comptroller of the city of New York, to pay an order. Motion for the writ denied.

The following is the opinion of the court at Special Term:

The writ of mandamus should only issue to compel the payment of money by the city, when the petitioner's right to the payment is clear and unmistakable, and when there is absolutely no defense against payment. It should not issue where it appears that the contract is illegal upon which payment is sought, or where there is grave reason to question its legality. There the petitioner should be relegated to his ordinary remedy by action. Here there sufficiently appears a clear attempt to evade section 419, of the Greater New York Charter. (Laws 1901, p. 186, c. 466.) The original contract was for the improvement of Surf avenue, from Fifth street to Nineteenth street. Thereafter it was sought to modify the contract by extending the work to be done, so as to include up to Twentieth street. This the law officer of the city advised could not be done, as embracing territory beyond that covered by the original contract and requiring a reletting. A second application met with the same reply. Thereafter, knowing the additional work could not be done without a new contract, the work from Nineteenth to Twentieth streets was divided up into four detached pieces, and under four separate orders, each under

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$1,000, but aggregating in all $2,349.68. For the payment of one of these orders amounting to $985.50, this writ is sought. If the method followed in the awarding of this work is to be approved as a legal one, section 419 of the charter becomes of no avail, and competitive bidding practically disappears. Motion for a writ denied, with costs.

Argued before O'BRIEN, P. J., and PATTERSON, INGRAHAM, LAUGHLIN, and CLARKE, JJ.

J. C. Wait, for appellant.
T. Connoly, for respondent.

PER CURIAM. Order affirmed, with $10 costs and disbursements.

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## POTTER v. VILLAGE OF HAMMONDSPORT.

(Supreme Court, Appellate Division, Fourth Department. March 28, 1906.)

1. DISCOVERY—PHYSICAL EXAMINATION OF PLAINTIFF.
   Code Civ. Proc. § 873, providing that, in an action for personal injuries, the court in granting an order for examination of plaintiff before trial may, on application of defendant, direct that plaintiff submit to a physical examination by physicians to be designated by the court, and that, if plaintiff be a female, she shall be entitled to have such examination "before" physicians of her own sex, means the examination of a female plaintiff shall be by, and not merely in the presence of, physicians of her own sex.

2. SALE—EXAMINATION OF PHYSICIANS.
   Under Code Civ. Proc. § 873, providing that, in an action for personal injuries, the court in granting an order for examination of plaintiff before trial may, on application of defendant, direct that plaintiff submit to a physical examination by physicians to be designated by the court, the order may not provide for examination of the physicians before the referee.

3. SAME—LIMITING EXAMINATION.
   An order under Code Civ. Proc. § 873, for examination before trial of plaintiff in a personal injury case, she to submit to a physical examination by physicians, should limit the examination of plaintiff under oath to injuries as to the nature and extent of the injuries complained of, and the place where and the peculiar manner in which the injuries were received, so far as necessary to enable the defendant to ascertain the nature and extent of the injuries.

   [Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Discovery, §§ 96, 97.]

   Williams and Nash, JJ., dissenting.

Appeal from Special Term, Steuben County.

Action by Rose Potter against the village of Hammondsport. From an order modifying an order therefor made for examination of plaintiff before trial, defendant appeals. Modified.

Argued before McLENNAN, P. J., and SPRING, WILLIAMS, NASH, and KRUSE, JJ.

Walter S. Drew, for appellant.
Leverne Thomas, for respondent.

KRUSE, J. We all agree that the order appealed from should be modified. There is, however, a division among us respecting the ex-

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amining physicians and surgeons. The county judge in his original order named three physicians, one of whom was a woman. Subsequently he modified the order by striking out these names and naming two women physicians. It is now proposed that this court shall strike out the names of these two physicians last appointed and restore the names of the three physicians originally appointed. We think this modification ought not to be made.

1. No good reason exists, so far as the record discloses, for interfering with the judgment and discretion of the county judge in that regard, and we might well rest our decision upon that ground.

2. It is, however, contended that the county judge made this change because he thought the plaintiff had a legal right to have the examination made by physicians of her own sex. Assuming that to be true, which seems quite probable, we are still of the opinion that the county judge was right. We think the provisions of section 873 of the Code of Civil Procedure, which provides for the physical examination of a plaintiff at the instance of the adverse party, entitles a female to have the examination by physicians of her own sex, and that the phrase, "before physicians or surgeons of her own sex," means that the examination shall be made by them, and not merely in their presence. We cannot assent to the view that it was ever intended that a woman should be compelled to expose her person to a physical examination by physicians and surgeons not of her own sex or selection. We are not called upon to give a construction to this provision so literal as to permit this to be done. The information so acquired by the examining physician is not gained under the ban of secrecy, for she does not stand in the confidential relation of patient to the examining physician. Judge O'Brien, in the case of Lyon v. Manhattan R. Co., 142 N. Y. 298, 37 N. E. 113, 25 L. R. A. 402, quotes from the opinion of Mr. Justice Gray delivered in the Supreme Court of the United States in the case of Union Pacific Ry. Co. v. Botsford, 141 U. S. 250, 11 Sup. Ct. 1000, 35 L. Ed. 734, the following:

> "The inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow. To compel any one, especially a woman, to lay bare the body, or to submit it to the touch of a stranger, without lawful authority, is an indignity, an assault, and a trespass."

While section 873 of the Code of Civil Procedure has changed this rule of the common law, this change should not be extended beyond a fair and reasonable interpretation of the statute which makes this innovation. Where a woman is compelled to submit to a physical examination under the provisions of this section, we think she has the right to require such examination to be made by physicians of her own sex. This view to us seems reasonable, and does no violence to the language of the statute.

The order appealed from should be modified by (1) striking out the provision for the oral examination of the physicians and surgeons, and (2) by striking out the entire provision limiting the examination of the plaintiff under oath and inserting in place thereof the following: "Ordered, that the examination of the plaintiff under oath be limited to inquiries as to the nature and extent of the injuries complained of and the place where the peculiar manner in which the injuries were re-

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ceived, so far as necessary to enable the defendant to ascertain the nature and extent of such injuries"—and, as so modified, the order is affirmed, without costs of this appeal to either party. All concur, except WILLIAMS and NASH, JJ., who dissent.

WILLIAMS, J. (dissenting). The order appealed from should be modified by (1) striking out the provision for taking the examination of the physicians and surgeons; (2) striking out the names of the examining physicians and surgeons, Emma Stevens Jamison and W. B. Proctor, and inserting in place thereof the names of those in the order originally made, George C. McNett, Philo L. Alden, and Jennie Lee Kellogg; (3) by striking out the whole provision limiting the examination of the plaintiff under oath, and inserting in place thereof the following: Ordered, that the examination of the plaintiff under oath be limited to inquiries as to the nature and extent of the injuries complained of, and the place where and the peculiar manner in which the injuries were received"—and, as so modified, the order should be affirmed, without costs.

1. As to the first amendment, there is apparently no controversy. The physicians and surgeons would not be examined before, or their evidence taken by, the referee. Apparently this provision was put in the order through inadvertence or a misapprehension of the provisions of section 873 of the Code of Civil Procedure.

2. As to the second amendment, the change of physicians and surgeons appointed to make the physical examination of the plaintiff was evidently made upon the ground that the plaintiff was entitled to have the examination made solely by physicians or surgeons of her own sex. Two of the persons originally appointed were men and one a woman. The county judge erroneously construed the section in this respect. She was entitled merely to have the examination before, not by, physicians or surgeons of her own sex. In addition to appointing one woman as an examiner, the original order provided that the plaintiff might have such women present as she chose, and in the order appealed from it was further provided that the plaintiff might have two physicians and surgeons present of her own selection. The plaintiff's rights in this respect were fully protected, without changing the examining physicians and surgeons entirely, so that all should be women. No personal objection was made to the three named in the original order, except as to their sex. That order was made ex parte, and we assume the persons named were suggested by the defendant as such physicians and surgeons as it desired to use as witnesses on the trial, and to better qualify them as such witnesses. While the county judge had a discretion as to the persons to be appointed, he should have treated the defendant fairly, and not put it at a disadvantage. The plaintiff could have examinations made whenever she saw fit and by any physician or surgeon she might select. The order appealed from provides that she may have two physicians or surgeons of her own selection present at the examination. It seems to us the defendant should be permitted to have its own physicians or surgeons, the persons it would rely upon to aid it in the trial, make the examination, providing they are reputable, and not personally objectionable to the plaintiff. A defendant in a

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negligence action should be enabled, within reasonable limits, to protect itself against any unfounded claim as to the extent of the injuries received in an accident. It may turn out that the claim at to such injuries is well founded, and, if so, the defendant will be entirely satisfied; but, if it is discovered through the medium of the examination and the assistance of the physicians and surgeons of the defendant that the claim as to injuries is unfounded or greatly exaggerated, then justice will result from the exercise of the power afforded by the provision of the Code in question. The physicians and surgeons, if selected by the judge at the suggestion of the plaintiff, might from sympathy or otherwise refuse to disclose to the defendant minutely the results of their examination and elect to make such full disclosure only when called as witnesses on the trial, and thus put the defendant at great disadvantage in preparing its case for trial and taking the advice of its own physicians and surgeons. We see no reason why the examining physicians and surgeons should have been changed by the order appealed from. It seems to us this change should not have been made. In this respect the order should be restored to its original condition. If, for any reason, the physicians and surgeons named there cannot serve, others should be substituted who are satisfactory to the defendant, providing always there are no objections to their personal character and standing in the profession.

3. As to the third amendment, there can be no doubt that the provisions inserted in the order should be stricken out. They are all wrong in form and substance. The original order was unlimited as to the matters about which the plaintiff might be examined under oath within the issues raised by the pleadings or the allegations in the complaint. The county judge had power to leave the scope of the examination unrestricted, but we are inclined in this particular case to think there should be some limitation, and that the examination should not extend to the issues of negligence and contributory negligence, but should only relate to the question of the extent of the injuries received by the plaintiff in the accident. The language used by us should accomplish this purpose, and in order that no technical objection may be raised before the referee we have said the plaintiff might be inquired of as to the place where the accident occurred and the peculiar manner in which the injuries were received. The place should be reasonably identified and the inquiry made as to what caused the fall, how plaintiff came to fall, the peculiar manner of it. It is said that the claim and the plaintiff's complaint cover these details, and therefore her evidence in connection with her proposed examination is not necessary. While she may be bound, perhaps, by her claim and complaint, the defendant is not bound or foreclosed thereby; and so far as these things bear upon the extent of the injuries in the judgment of the physicians and surgeons the defendant should have the right thereto in connection with the physical examination. Our intention is not to permit an examination of the plaintiff, under oath, as to matters relating purely and only to the issues of negligence and contributory negligence. The real, ultimate object is to acquire information as to such personal injuries as were caused by, and resulted from, the accident; and to this end the limitation is as specific as we could safely make it. Merely

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permitting the physicians and surgeons to make a physical examination of the plaintiff, long after the accident, would be inadequate as a protection to the defendant. Even if this were supplemented by an examination under oath as to her symptoms and feelings since the accident, it would be unsatisfactory. It is necessary that it shall appear what the nature of the accident was—whether a fall, and, if so, what kind of a fall, how produced, how it came about. The physicians and surgeons would be likely to desire information as to this subject, and such information should be under oath, taken by the referee, and preserved for future use in the case and on the trial.

We conclude, therefore, the order should be amended as suggested, and then affirmed.

NASH, J., concurs.

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## SAKOLSKI v. SCHENKEL.

(Supreme Court, Appellate Term. March 29, 1906.)

1. WITNESSES—CROSS-EXAMINATION TO SHOW INTEREST.

In summary proceedings by a landlord, there being a sharp conflict in his testimony and that of the tenant and a witness in his behalf as to whether there was a lease for a year or a monthly hiring, the landlord may, by cross-examination of the tenant and his witness, attempt to show improper relations between them, as bearing on their interest and consequent credibility.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 1192–1198.]

2. APPEAL—HARMLESS ERROR.

Allowing cross-examination for the purpose of affecting credibility is harmless; no damaging evidence being developed, and the testimony being stricken out on motion, and the jury instructed to disregard it.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4178–4184.]

3. CONSTITUTIONAL LAW—EQUAL PROTECTION OF THE LAWS.

Municipal Court Act of the City of New York, Laws 1902, p. 1494, c. 580, § 12 (7), as amended by Laws 1904, p. 1429, c. 598, providing that there shall be such a rotation of the justices of such court that each justice, after holding court in his own district for one month, shall sit in at least five of the other districts of the court before returning to the district for which he was elected or appointed, "provided that the justices elected or appointed for any borough shall hold court in such borough," does not deny any one the equal protection of the law, in contravention of the Constitution of the United States, though when the act was passed there was but one borough of the city that had as many as six districts of the court.

4. JUDGES—HOLDING COURT IN DIFFERENT DISTRICTS.

The Municipal Court of the City of New York being in effect a district court, Municipal Court Act, Laws 1902, p. 1494, c. 580, § 12 (7), as amended by Laws 1904, p. 1429, c. 598, providing for justices of the court holding court in districts other than that in which they are elected, is authorized by Const. art. 6, § 17, providing that district court justices may be elected in cities in such manner and with such powers as shall be prescribed by law.

Appeal from Municipal Court, Borough of Manhattan, Fourth District.

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Summary proceedings by Dora Sakolski, landlord, against Jacob Schenkel, tenant. From a final order in favor of the landlord, the tenant appeals. Affirmed.

Argued before SCOTT, P. J., and GIEGERICH and GREENBAUM, JJ.

Schleimer & Schleimer, for appellant.
Johnston & Johnston, for respondent.

GREENBAUM, J. This is an appeal by a tenant in summary proceedings brought to dispossess him for an alleged holding over; the tenant asserting a yearly lease, and the landlord a monthly hiring. Upon the issue of fact thus raised, the jury to whose determination the matter was submitted found a verdict in favor of the landlord.

Two questions of law are presented upon this appeal: First, against the tenant's objections, certain testimony was permitted to be introduced upon the cross-examination of the tenant and of a witness called in his behalf, which he claims tended to prejudice the jury to his detriment; secondly, that the justice before whom the proceeding was tried was without jurisdiction.

As to the first point, it is sufficient to say that, while at first blush it might seem that the cross-examination was incompetent and irrelevant, because it attempted to elicit improper relations between the tenant and his witness, yet, inasmuch as there was a sharp conflict between the parties as to the question of fact relating to the term of hiring, concerning which both these witnesses testified, it became important to inquire into the relations existing between them, as bearing upon their interest and consequent credibility. Besides, no damaging evidence was developed, and the testimony was all stricken out upon the tenant's motion, and the jury instructed to disregard it. We cannot say that this testimony prejudiced the tenant's case, and, indeed, it would be reasonable to infer that the unsuccessful effort of the landlord would ordinarily re-act upon him, and it is not probable that the rights of the tenant were thereby adversely affected.

The second point involves the constitutionality of subdivision 7 of section 12 of the Municipal Court act (Laws 1902, p. 1494, c. 580, as amended by Laws 1904, p. 1429, c. 598), which provides for a rotation of the justices in holding court in districts other than those in which they were elected. The proceeding was tried in the Fourth district, and it is claimed that the justice who presided at the trial was elected for the Thirteenth district. There is no proof submitted as to the fact that the justice in question was not elected for the Fourth district, but we shall assume to take judicial cognizance of the fact that he was elected for the Thirteenth district. The circumstances under which the justice presided in the Fourth district court were not disclosed, and, for aught we know, he may have held court by reason of the exigencies of the illness or disability of another justice, as provided in section 13 of the Municipal Court act (Laws 1902, p. 1494, c. 580). As both parties to the controversy have, however, assumed the fact to be that said justice held court in obedience to the rules adopted by the board of justices, as required by section 12 of the Municipal Court act,

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and pursuant to the rotation feature embodied in subdivision 7 of said section, we have deemed it proper to dispose of the question upon the conceded facts.

The alleged unconstitutionality of the act is asserted to rest upon the grounds that it is "class legislation," that it confers upon the Municipal Court "greater jurisdiction" than upon the County Courts, and that it invades the rights of the citizens of the district in which the justice was elected, by depriving them of the justice elected by them, and permitting a justice elected in another district to exercise jurisdiction in their district. The argument that the act is discriminatory and operates as class legislation is based upon the provision that there shall be "such a rotation of the justices * * * as that each justice after holding court in his own district for one month shall sit in at least five of such other districts, at least once for a period of one month at a time previous to his return to the district for which he shall have been elected or appointed, provided that the justices elected or appointed for any borough shall hold court in such borough."

It is contended that, when this act was passed, there were 25 courts in the greater city, as follows: Two in the borough of the Bronx; two in Richmond; three in Queens; five in Brooklyn; and thirteen in Manhattan—and that by the terms of the act it would therefore be applicable only to the borough of Manhattan. To uphold this argument, we must find that the statute offends that provision of the Constitution of the United States, which declares that no state shall deny to any one within its jurisdiction the equal protection of the laws. In adopting this act, the Legislature must be presumed to have determined that a departure from the system theretofore in force would tend to correct some assumed abuses or deficiencies in the administration of justice in the Municipal Court, and to so safeguard the rights of the citizens so that the equal protection of the law would be extended to all who have occasion to resort to this court. With the reasons which influenced the Legislature, or the wisdom of its action, we have nothing to do. Our only concern is with the question of its power. Because the principle involved was not extended to all boroughs, it does not follow that the residents of the borough of Manhattan had greater rights than those of the other boroughs, or that the latter were denied an equal protection of the laws. Indeed, the residents of the other boroughs come directly within the benefits designed by the act, because it enabled them to secure, when brought into any court of the borough of Manhattan, opportunities equal to all other suitors. And that no discrimination, in any event, was intended, is furthur evident from the fact that, since the adoption of the act under consideration, two additional courts have been established by the Legislature in the borough of Brooklyn, which now has seven courts, and which now comes directly within the provisions of the act.

The second ground urged, that greater jurisdiction is conferred by the act upon the Municipal Court than those upon the County Court, needs but scant attention. This contention has been passed upon by the Court of Appeals adversely to the appellant. Worthington v. London G. & A. Co., 164 N. Y. 81, 91, 58 N. E. 102, 105. It was there held that "the Municipal Court is not a new inferior local court, but

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old local tribunals, consolidated and reorganized under a new name and adapted to the needs of the greater city," and that it is a court created by the Legislature, under the provisions of section 17 of article 6 of the state Constitution, and not section 18 of said article.

The only portion of section 17, art. 6, of the Constitution applicable to the Municipal Court reads as follows:

"Justices of the peace and District Court justices may be elected in the different cities of this state in such manner and with such powers and for such terms, respectively, as are or shall be prescribed by law."

By virtue of the constitutional power thus conferred upon the Legislature, the Municipal Court was established in the form in which it now exists, having a jurisdiction coextensive with the territory of the present city of New York, and limited as to subject-matters, as provided in the Municipal Court act, and as was stated in the Worthington Case, supra, this did not in any way give the inferior court "greater powers, importance and dignity than a county court."

The final point, that the election of a justice in a given district limits his jurisdiction to said district, will be next considered. The authority of the Legislature, under the Constitution, is such that it may determine the manner of the election of the justices of the Municipal Court, their terms of holding office, and their powers. In the exercise of its prerogative, the Legislature saw fit to create a Municipal Court in the city of New York, composed of numerous trial courts distributed throughout the various districts of the city, and to provide for the election of one justice in each of said districts by the voters of said district, with jurisdiction, nevertheless, in each court extending territorially over the city of New York, and with power in each justice to hold court in another district, under rules and restrictions provided for in said act. This is no novelty in our judicial system. The Constitution provides for the election of Supreme Court justices by the electors of the several existing judicial districts, and confers upon them the power of holding court in any county of the state. The constitutional delegation to the Legislature of the right of establishing the Municipal Court, and of determining the manner of the election of the justices of said court and their powers, clearly confers the right to determine the manner and extent within the constitutional limitation that said justices shall exercise their judicial functions.

It seems unnecessary here to criticise the infelicitous way in which the legislative intent has been effectuated, or to refer to the apparently inconsistent provision of section 13 of the Municipal Court act (Laws 1902, p. 1494, c. 580), which declares that:

"A justice of the Municipal Court of the city of New York shall hold court in the district in which he was elected or appointed to fill a vacancy," etc.

Such criticisms, however, do not affect the constitutional right of the Legislature in respect of the matters discussed, but simply bear upon the construction to be given to the various enactments touching the manner in which the justices were to exercise their judicial functions.

We are of the opinion that the act requiring a rotation of the justices is constitutional, and the judgment is affirmed, with costs. All concur.



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## CONFORTI v. ROMANO et al.

(Supreme Court, Appellate Term. March 26, 1906.)

LANDLORD AND TENANT—SUMMARY REMOVAL—USING PREMISES FOR ILLEGAL TRADE.

**Under Code Civ. Proc. § 2231 (5), authorizing summary proceeding against a tenant and his subtenants where any part of the demised premises are used for any illegal trade, the sale of liquor on the premises without a license, six months before, by a subtenant, of which he was convicted a month before the removal proceedings, is ground for removal; the subtenant being still in possession.**

Appeal from Municipal Court, Borough of Manhattan, Second District.

Summary proceedings by Concordio Conforti, landlord, against Raffaele Romano, tenant, and another, subtenant. From a final order in favor of the landlord, the tenant appeals. Affirmed.

Argued before SCOTT, P. J., and O'GORMAN and NEWBURGER, JJ.

Palmieri & Wechsler, for appellant.

Gerard J. Cuoco, for respondent.

SCOTT, P. J. The principal tenant appeals from a final order in favor of his landlord in summary proceedings. The proceeding was brought under subdivision 5, § 2231, Code Civ. Proc., which authorizes a summary removal "where the demised premises or any part thereof are used or occupied as a bawdy house, or house of assignation for lewd persons, or for any illegal trade or manufacture or other illegal business." The specific ground upon which the proceeding was instituted was that the premises had been used for the illegal business of selling liquor without a license, and the evidence relied upon was that the subtenant, one Gionannucci, had been arrested and convicted on November 6, 1905, of having violated the excise law, on June 18, 1905, by selling liquor upon the premises without a license. This proceeding was instituted on December 26, 1905. The subtenant thus convicted remained as subtenant, and was such at the time of the trial.

The appellant relies upon Shaw v. McCarty, 2 Civ. Proc. R. 23, decided by the General Term of the Court of Common Pleas in June, 1882. The illegal trade complained of in that case was the selling of policy slips, which had been carried on by a subtenant, who had, however, removed from the premises about a month and a half before the proceeding had been instituted. In that case it was considered and held that the tenant could not be removed under section 2231 of the Code, because the violation of the law had ceased prior to the institution of the proceeding. Six years later, in May, 1888, the General Term of the same court had occasion to consider a case much resembling the present. Stearns v. Hemmens (Com. Pl.) 1 N. Y. Supp. 52. In that case the proceeding was founded upon an allegation that an illegal business was carried on upon the premises. It appeared that the business had been discontinued before the trial. It further appeared that the business had been carried on by a subtenant, and that, although it had been discontinued, such discontinuance had resulted from appre-

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hension of a criminal prosecution, and there had been no termination of the sublease, the subtenant remaining at least constructively in possession. The court pointed out and relied upon the distinguishing fact present in the case of Shaw v. McCarty, but absent in Stearns v. Hemmens, as well as in the case at bar, that the violator, the subtenant had not only discontinued the unlawful business, but that he had also ceased to be a subtenant or to retain any interest in the premises, the possession of which had been resumed by the original lessee. This distinction appears to me to be a very substantial one, and to be decisive of the present appeal. That the selling of liquor without a license is a criminal offense, and an illegal trade is quite clear, and it therefore constitutes a sufficient ground for the removal of the tenant under the fifth subdivision of section 2231. That section would, however, become an absolute dead letter, so far as this particular offense is concerned if the doctrine of Shaw v. McCarty were to be so far extended as to forbid a proceeding based upon an illegal act which had been completed before the proceeding was instituted. The principal lessee might have moved immediately upon his subtenant's conviction to dispossess him and to resume possession of the demised premises. If he had done so he might, with much show of justice, have relied upon Shaw v. McCarty. He has not seen fit to do this, and by this omission has brought himself directly within the rule of Stearns v. Hemmens.

The final order should be affirmed, with costs. All concur.

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## REICHARDT v. PLAUT et al.

(Supreme Court, Appellate Term. March 26, 1906.)

1. PLEADING—BILL OF PARTICULARS.

In an action for alleged wrongful discharge of a servant, defendants *held* not bound to file a bill of particulars stating wherein plaintiff had been inattentive and negligent; such matters being particularly alleged in their answer.

[Ed. Note.—For cases in point, see vol. 89, Cent. Dig. Pleading, §§ 963-971.]

2. SAME—PRIOR BILL.

Where defendants had served one bill of particulars, they should only be required in a further bill to set out matter not sufficiently alleged in the bill furnished.

3. SAME—QUALIFICATION.

Where, in an action for a servant's wrongful discharge, defendants claimed that, because of plaintiff's negligence and improper attention to his duties, goods manufactured for customers were returned, an order requiring defendants to furnish a bill of particulars, stating in detail the names and addresses of such patrons to whom merchandise was shipped which had not been properly manufactured or examined by plaintiff, should be so qualified as only to require such statement in case there were any of defendants' patrons within such class.

4. SAME—DEFENDANTS' LOSS—AMOUNT.

In an action for a servant's wrongful discharge, the amount of defendants' loss because of plaintiff's alleged negligence, on account of which he was discharged, being immaterial, it was error for the court to require defendants to set out the same in a bill of particulars.

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5. SAME—PERSONS EMPLOYED.

Where, in an action for a servant's wrongful discharge, defendants claimed that plaintiff improperly and improvidently employed persons who were unsuited for the work required, defendants were not required to file a bill of particulars giving the addresses of persons alleged to have been improvidently employed.

6. SAME—OTHER EMPLOYMENT.

Where, in an action for a servant's alleged wrongful discharge, the answer merely alleged that plaintiff was not diligent in searching for other employment, and did not allege any employment or salary that plaintiff might have secured, it was error for the court to require defendants to furnish a bill of particulars stating in detail the names and addresses of persons from whom plaintiff could have secured employment, the nature thereof, and the salary plaintiff could have earned.

7. SAME—FAILURE TO FURNISH BILL—PENALTY.

Under Code Civ. Proc. § 531, providing that, in case of failure to furnish a bill of particulars, the party may be precluded from giving evidence of the part or parts of the "affirmative allegations" of which particulars have not been delivered, it was error for the court, in an order requiring defendants to furnish a bill of particulars, to direct that in case of defendants' default they should be precluded from giving evidence of their "defenses."

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 995.]

Appeal from City Court of New York, Special Term.

Action by Joseph Reichardt against Isaac S. Plaut and another.

From an order of the City Court of New York, requiring defendants to furnish a further bill of particulars, they appeal. Modified.

The complaint was for alleged wrongful discharge of plaintiff from defendants' employ. The answer alleged that on or about the 3d day of October, 1904, defendants were engaged in manufacturing ladies' cloaks and suits in the city of New York, and selling and shipping the same to divers patrons and customers; that they hired plaintiff to supervise the manufacturing of the merchandise, and that by virtue of his employment he agreed to attend to the hiring of the help required for the purpose of such manufacturing and to supervise the work, and to carefully examine all goods manufactured and, when finished, before being shipped to patrons; that plaintiff failed to perform such duty and was negligent therein; that goods were shipped out by him in an improper condition, many of which shipments were returned; that plaintiff also failed to exercise proper and reasonable care in hiring proper help, but instead hired the same to suit his preferences, without regard to protection of defendants' interests, and that for such reasons he was discharged; that plaintiff, after discharge, failed to use due and proper diligence or make due effort to obtain other suitable employment. On plaintiff's motion, the court required defendants to file a bill of particulars setting forth in detail the following matters: "(1) Stating in detail in what respects the defendants claim the plaintiff was inattentive, careless, and negligent in the rendering of his work, as alleged in paragraph 4 of the defendants' amended answer herein. (2) Stating in detail in what respects the defendants claim the plaintiff failed to properly supervise the manufacture of merchandise in the defendants' business, referred to in paragraph 4 of the defendants' amended answer herein. (3) Describing the merchandise, the manufacture of which the defendants claim was improperly supervised by the plaintiff, as alleged in paragraph 4 of the defendants' amended answer herein. (4) Stating in detail in what respects the defendants claim the plaintiff did not properly examine the merchandise when finished, as alleged in said paragraph 4 of the defendants' amended answer herein. (5) Describing the merchandise the defendants claim the plaintiff improperly examined when finished, as alleged in paragraph 4 of the defendants' amended answer herein. (6) Describing in detail the merchandise the defendants claim the plaintiff permitted to be shipped to the patrons of the defendants, which the defendants claim had not

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been properly manufactured nor properly examined by the plaintiff, and was not in a state warranting shipment and which the defendants claim have not been manufactured in accordance with their orders given the plaintiff, as alleged in paragraph 4 of the defendants' amended answer herein. (7) Stating in detail the names and addresses of such patrons of the defendants to whom the defendants claim the plaintiff permitted merchandise to be shipped to them which had not been properly manufactured nor properly examined by the plaintiff and was not in a state warranting shipment and had not been manufactured in accordance with the defendants' orders, as alleged in paragraph 4 of the defendants' amended answer herein, other than the names and addresses of those specified in the said bill of particulars served herein. (8) Describing in detail such merchandise which the defendants claim had not been properly manufactured nor properly examined by the plaintiff and was not in a state warranting shipment and had not been manufactured in accordance with the defendants' orders, as alleged in paragraph 4 of the defendants' amended answer herein. (9) Stating what orders the defendants claim were given to the plaintiff with regard to the manufacture of such merchandise which the defendants claim the plaintiff did not manufacture in accordance with such orders, as alleged in paragraph 4 of the defendants' amended answer herein. (10) Describing in detail in what respects the same had not been manufactured in accordance with the orders alleged to have been given to the plaintiff and in what respects the defendants claim the merchandise was not in a state warranting shipment, as alleged in paragraph 4 of the defendants' amended answer herein. (11) Stating in detail which of said shipments were returned to the defendants, and which of said shipments were not in a state warranting shipment, and in what respects they were not in such state, together with a statement of the loss defendants claim they have suffered thereby, as alleged in paragraph 4 of the defendants' amended answer herein. (12) Stating in detail in what respects the plaintiff failed to exercise proper and reasonable care in the hiring of help, and failed to hire the same in accordance with his best judgment, etc., as alleged in paragraph 4 of the defendants' amended answer herein. (13) Stating in detail the names and addresses of such help, in the hiring of which the defendants claim the plaintiff failed to exercise reasonable care and his best judgment, and who it is claimed were hired by the plaintiff to suit his own preference and not solely with due regard to the defendants' interest, as alleged in paragraph 4 of the defendants' amended answer herein. (14) Stating in detail the names and addresses of persons from whom the defendants claim the plaintiff could have secured such employment, and the nature of such employment, and the salary thereat which the defendants claim the plaintiff could have secured, as alleged in paragraph 8 of the defendants' amended answer herein. And it is further ordered that as to the other particulars sought for by said motion, numbered in said notice of motion as Nos. 14 and 15, the motion is denied. And it is further ordered that, in default of the service of such bill of particulars setting forth the foregoing matters, the defendants be precluded from giving evidence of such alleged defenses on the trial of this action."

Argued before SCOTT, P. J., and O'GORMAN and NEWBURGER, JJ.

Alfred & Charles Steckler, for appellants.
Herman I. Lurie, for respondent.

SCOTT, P. J. The order for the bill of particulars went much too far. It is unnecessary to require defendants to state wherein the defendants claim that plaintiff was careless and inattentive, and failed to properly supervise the manufacture of goods, and failed to properly examine the merchandise when finished, because all those matters are already stated with sufficient particularity in the fourth paragraph of the answer. The first, second, and fourth items required by the order

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should therefore be stricken out. The sixth item should be limited to merchandise other than that specified in the bill of particulars already served. The seventh item should be qualified by inserting the words "if any" after the words "stating in details the names and addresses of such patrons of the defendants," in order that the defendants may not be precluded from proving the items contained in their voluntary bill of particulars. The eighth item should be limited to merchandise not shipped to patrons, since that which was shipped is covered by the voluntary bill of particulars. It is not necessary to repeat the statement of the shipments which were returned by patrons, as these are covered by the voluntary bill, and their requirement should be stricken out of the eleventh item, and that item limited to merchandise returned, if any, not included in the bill of particulars already served. The amount of defendants' loss is immaterial, and the requirement respecting it should be stricken out of the eleventh item. The defendants should not be required to furnish the addresses of persons alleged to have been improperly or improvidently employed, and item 13 should be amended in this regard. Item 14 should be stricken out altogether. The answer does not allege any employment or salary that plaintiff might have secured. It only says that he was not diligent in searching for employment. There is no authority for precluding the defendants, in case of default in serving the bill of particulars, from giving evidence of their "defenses." The Code provision is that they may be precluded from giving evidence of the part or parts of the affirmative allegations of which particulars have not been delivered. Section 531, Code Civ. Proc.

The order appealed from should be modified in the respects herein pointed out, and, as modified, affirmed, without costs to either party. All concur.

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## ROBBINS v. NEW YORK CITY RY. CO.

(Supreme Court, Appellate Term. March 26, 1906.)

NEGLIGENCE—ACTION—QUESTION FOR JURY.

Where there is any evidence from which defendant's negligence or plaintiff's freedom from contributory negligence can be inferred, the questions are for the jury.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, §§ 279–353.]

Appeal from Municipal Court, Borough of Manhattan, Eighth District.

Action by David Robbins against the New York City Railway Company. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Argued before SCOTT, P. J., and O'GORMAN and NEWBURGER, JJ.

Watts & Merrill, for appellant.

William E. Weaver, for respondent.

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PER CURIAM. Under the rule laid down in McDonald v. Met. St. Ry. Co., 167 N. Y. 66, 60 N. E. 282, if there be any evidence at all from which defendant's negligence or the plaintiff's freedom from contributory negligence can be inferred, the question becomes one of fact; and must in the first instance be submitted to the jury, leaving to the court, if it finds the verdict unsupported by the evidence, only the power to set aside the verdict and order another trial. There was some evidence in this case from which inferences as to the respective negligence of plaintiff and defendant might have been drawn in plaintiff's favor, and it was therefore error to have dismissed the complaint. Whether upon the evidence a verdict in favor of plaintiff would have been sustained is another question, with which we are not concerned on this appeal.

Judgment reversed and new trial granted, with costs to appellant to abide the event.

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## ALCOLM CO. v. BRENACK.

(Supreme Court, Appellate Term. March 26, 1906.)

EVIDENCE—CONCLUSIVENESS ON PARTY INTRODUCING IT.

In an action on a contract made by plaintiff with defendant's husband as her agent, the issue being whether he had authority, plaintiff is not concluded by the testimony of the husband as its witness that he had no authority, and therefore it may prove the agency by any competent evidence; a party being concluded by the testimony of its own witness only where the matter brought out is collateral to the issue.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 2440–2443.]

On reargument of appeal. Reversed.

For former opinion, see 96 N. Y. Supp. 1055.

Argued before SCOTT, P. J., and BISCHOFF and MacLEAN, JJ.

Harry J. Sondheim, for appellant.

Straley & Hasbrouck (D. W. Steele, of counsel), for respondent.

PER CURIAM. Closer examination of the record discloses an infirmity not noted in the opinion heretofore handed down, and we conclude that a new trial should be had. The cause of action arose out of dealings by the plaintiff with the defendants' husband, her assumed agent, and the issue was whether he had authority. The justice, however, excluded every inquiry into the facts from which an actual agency could be inferred, sustaining objections to a line of obviously proper questions to the husband, when called as a witness, to show the nature of his connection with the business, and rendered judgment for the defendant upon the theory that the issue was concluded by the witness' statement that he had no authority.

That this statement was elicited by the plaintiff's counsel, gave it no conclusive effect as against other evidence to the contrary. A party is concluded by adverse testimony of his own witness only where the matter brought out is collateral to the issue. Here the testimony went to the vital issue in the case, and the plaintiff was entitled to prove the facts by any competent evidence at its command. The error in the ex-

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clusion of testimony to facts from which an agency could be inferred was not, therefore, cured by the statement of the witness to the effect that he had no authority, and the affirmance of the judgment is properly questioned upon this motion.

Judgment reversed, and new trial granted, with costs to abide the event.

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## GOLDBERG v. WOOD.

(Supreme Court, Appellate Term. March 26, 1906.)

1. COSTS—REMEDIES FOR COLLECTION—STAY OF PROCEEDINGS.
   Code Civ. Proc. § 779, provides that all proceedings on the part of a party required to pay the costs of a motion are stayed until the payment thereof. *Held*, that the stay is to prevent a party in default from taking affirmative proceedings, and does not stay a defendant from making his defense.
   [Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Costs, §§ 1045, 1046.]
2. JUDGMENT—DEFAULT—OPENING.
   Where the trial justice determined that defendant would not be heard unless he paid the costs of a certain motion, and that in default an inquest would be taken, it was not necessary for defendant to appear on the day that the inquest was taken; but his remedy was to permit the inquest and then move to set it aside.
3. SAME—GROUNDS FOR DEFAULT.
   An inquest because of defendant's failure to pay the costs of a motion could not be justified by the absence of an affidavit of merits, where the answer was verified.

Appeal from City Court of New York, Special Term.

Action by Henry Goldberg against Fernando Wood. From an order denying a motion to set aside an inquest, defendant appeals. Reversed.

See 90 N. Y. Supp. 427.

Argued before SCOTT, P. J., and O'GORMAN and NEWBURGER, JJ.

Joseph A. Flannery, for appellant.
Maurice J. Katz, for respondent.

PER CURIAM. In our view the motion to set aside the inquest and the judgment entered thereon should have been granted. The stay of proceedings arising from the failure to pay costs provided for by section 779, Code Civ. Proc., is intended to prevent the party in default from taking any affirmative proceeding in the action, but was not intended and may not be used to prevent him from defending himself from attack. Randell v. Abrisqueta, 20 Abb. N. C. 292. The defendant, therefore, notwithstanding he was in default, was entitled to defend the action upon the issues raised by his general denial. It was not necessary for him, in order to preserve his rights, to have appeared on the day that the inquest was taken. The justice in a carefully considered memorandum decision had determined that defendant would not be heard unless he paid the costs, and that in default of such payment by the following Monday an inquest would be taken. Under such circumstances it would have been idle to have appeared and at-

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tempted to reargue the question, and might have subjected counsel to rebuke. The only way in which the defendant could review the decision of the justice was to permit the inquest to be taken and then move to set it aside. The inquest cannot be justified by the absence of an affidavit of merits, because the answer was verified.

The order appealed from must be reversed, with $10 costs and disbursements, and the motion granted, with $10 costs.

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## LIEBERMAN v. MANDEL.

(Supreme Court, Appellate Term. March 26, 1906.)

CHAMPERTY AND MAINTENANCE—NOTES—PURCHASE BY ATTORNEY.

Code Civ. Proc. § 73, forbids an attorney to buy any promissory note or other chose in action with an intent and for the purpose of bringing an action thereon; and section 76 exempts from such prohibition a case where an attorney receives such chose in action in payment for property sold, for services actually rendered, or for a debt antecedently contracted. *Held* that, where an attorney sues on a note bought by him, the burden was on him to show that he took it under circumstances within the exception, in order to entitle him to recover thereon.

Appeal from Municipal Court, Borough of Manhattan, Fourth District.

Action by Jere Lieberman against Moses Mandel. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Argued before SCOTT, P. J., and O'GORMAN and NEWBURGER, JJ.

Maurice J. Katz, for appellant.

Henry Goldstein, for respondent.

PER CURIAM. Section 73, Code Civ. Proc., forbids an attorney to buy, directly or indirectly, or to be in any manner interested in buying, any promissory note or other chose in action with the intent and for the purpose of bringing an action upon it. Section 76 exempts from the prohibition a case wherein an attorney receives such a chose in action in payment for property sold, or for services actually rendered, or for a debt antecedently contracted. The evidence showed very clearly that plaintiff took the note in suit with the intent and for the purpose of bringing suit upon it. The burden thus rested upon him to show that he took it under circumstances bringing the case within the exception contained in section 76. This he did not satisfactorily do. The evidence as to the original consideration for the note was also far from satisfactory.

We consider that justice will be best done if the judgment be reversed, and a new trial granted, with costs to abide the event; and it is so ordered.

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## DIECHMANN et al. v. BOYD et al.

(Supreme Court, Appellate Term. March 26, 1906.)

SALES—BREACH OF WARRANTY—WAIVER—EVIDENCE.

Where the vendees of logs, after discovering that the same were not of the size alleged to have been represented by the vendors, continued without objection to receive the logs and to saw them into planks, they waived defendants' breach of warranty, if any, as to the size.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 818.]

Appeal from Municipal Court, Borough of Manhattan, Seventh District.

Action by Otto Diechmann and another against John Boyd, Jr., and another. Judgment for plaintiffs, and defendants appeal. Reversed.

Argued before SCOTT, P. J., and O'GORMAN and NEWBURGER, JJ.

Heyn & Covington (Edward J. Pierce, of counsel), for appellants.

Norwood & Marsden (Carlisle Norwood, of counsel), for respondents.

SCOTT, P. J. The pleadings are oral. The plaintiffs sued originally, as shown by their bill of particulars, for a breach of contract arising out of defendants' refusal to deliver 31 logs of mahogany, part of a much larger purchase, and for the storage expenses. On the trial, after defendants had rested and plaintiffs had offered testimony in rebuttal, the plaintiffs were allowed to amend their demand by adding a claim for damages for breach of warranty as to 157 logs, part of the same purchase, which had been accepted and cut up into planks by plaintiffs. The judgment in plaintiffs' favor does not correspond in amount either with the original claim for breach of contract or the added claim for breach of warranty, and it is therefore impossible to determine upon which cause of action the justice went in rendering judgment. The defendants counterclaimed for the price of the 31 logs.

In November, 1904, the defendants received upon consignment a lot of 1,169 mahogany logs, which were stored in the yard of Nesmith & Constantine, a well-known firm, whose inspections and certificates of measurement are generally accepted in the trade. Of these logs it is conceded that 917 measured 12 inches and over in diameter, 157 appear to have been from 10 or 11 inches, and the remainder were of less diameter. Under instructions from defendants' agent the 917 logs were piled into what is known as a "crib," and the 157 logs were piled on top of them. The remaining smaller logs do not figure in the case. The crib was built up in the manner described, in November, 1904, and remained in this condition until February, 1905, during which time dickerings about a sale went on between one Volkenning, who was plaintiffs' buyer, and one Andojar, who was defendants' broker. Volkenning was constantly around the yard, and saw the lumber before and after it was piled. Finally about February 7, 1905, a price was agreed upon and a sale made at 8⅛ cents per foot for the crib of 1,074 logs, less 2 per cent. discount for cash payment, to be paid one-half immediately against delivery order, the balance of the

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bill within 30 days. Brokers' bought and sold notes embodying these terms were exchanged. Upon the completion of the sale the inspection returns were handed to Volkenning. He says that this is the first that he saw of them, but there is evidence that he had frequently seen them before. However this may be, his testimony is that he found that Nesmith & Constantine had made separate inspection returns, one for 917 logs, and the other for 157 logs. His suspicions seem to have been aroused by this circumstance, and he says that, after going to the yard again and looking at the lumber, he went to defendants' office and returned to one Alten, representing defendants, the inspection return, the delivery order, and the bill for the lumber, saying that the matter looked like crooked business and that plaintiffs would have nothing to do with it. Then was made, as he says, the guaranty which forms the basis of this action. He testifies that Alten said:

"We will guaranty that all the measurements was done by Constantine under the same inspection, and all at one time, and that the 12 inches, the logs being not under 12 inches, would apply to the whole lot."

Alten positively denied that he ever gave any such guaranty. He says that Volgenning said that he did not like the three upper tiers of logs on the crib, whereupon Alten told him that he could take the lot or leave it. Thereupon plaintiffs accepted the sale, paid one-half the price, and took all the logs away, except the 31 logs which were on the bottom layer, and which concededly were of the diameter of 12 inches or upwards. The disputed 157 logs, being piled on top of the crib, were taken first, and were cut into planks by plaintiffs. After some of them had been cut Volkenning objected to the size, but plaintiffs retained them and cut them up, and never offered to return them. The second payment became due on March 7th, but plaintiffs refused to pay until defendants notified the owners of the yard not to deliver any further logs until payment had been made. On March 28th plaintiffs wrote asserting the claim that the logs had been sold as all of the diameter of 12 inches, and insisted on deducting from the amount due the difference between the sale price and a lower price at which they estimated the value of the 157 logs. Some correspondence ensued, resulting in the payment by plaintiffs of $3,525.15 on account, leaving in dispute the balance of $267 unpaid on the bill and $77.39 for one-half of the discount, which was to have been allowed only upon payment in cash, in accordance with the sales note.

The judgment is sought to be sustained upon two theories. One is that defendants sold the crib with a representation that all the logs were 12 inches in diameter or more. Just how it is claimed that such a representation was made is not quite clear. At one time plaintiffs' agent seems to have claimed that the smaller logs were put on top of the pile after the sale had been made, but this is clearly not sustained. It is expressly testified to by Volkenning, plaintiffs' buyer, that nothing was said about sizes when the sale was made. The purchase was of the crib as it stood. It had been piled up for months. The plaintiffs' buyer had seen the logs constantly, both before and after they were piled up. He had every opportunity to examine the crib, and should

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have known what he was buying. We can find no support for the claim that the sale was induced by any deceit or false representation. Nor is the claim of an express guaranty much better sustained. It is true that Volkenning testifies to a conversation which might be construed as a guaranty, but he may easily be mistaken as to the precise language used, and it is significant that no claim of a specific guaranty was made in the correspondence between the parties prior to the suit, nor in the action itself until the issues tendered by the complaint had been thoroughly tried out, and the plaintiffs had apparently failed to establish their original cause of action.

But, even if a specific guaranty was made, it must be deemed to have been waived. Its breach, if breach there was, had reference to the three upper layers of logs, the first taken from the pile and sawed up. Concededly the plaintiffs had notice of an apparent discrepancy in measurement before they accepted any of the logs. The deficiency in size must have been apparent when the first logs were taken to the sawmill, and defendants' attention was called to them when only a part had been sawn up. Notwithstanding all this, the plaintiffs went on receiving and cutting up the logs as they came off the pile, and never claimed that their size was a breach of any express warranty. Whether there was a representation or a warranty, if there was either, the plaintiffs clearly waived it by going on with the contract and accepting the logs with full knowledge of the alleged breach. Upon the evidence as it stands, giving plaintiffs the benefit of every disputed question of fact, there is no basis for the judgment appealed from.

Judgment reversed, and new trial ordered, with costs to appellants to abide the event. All concur.

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## OPPENHEIMER v. KNEPPER REALTY CO.

(Supreme Court, Appellate Term. March 26, 1906.)

1. VENDOR AND PURCHASER—RESCISSION OF CONTRACT—DEFECT IN TITLE—INCUMBRANCES.

The existence of a party wall on a lot, together with a covenant, running with the land, providing for the rebuilding of the wall at the joint expense of the owners of the lots, is an incumbrance, within a contract for the conveyance of the lot free from incumbrances, and the purchaser is not obliged to carry out the contract.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, §§ 250, 257.]

2. SAME—REMEDIES OF PURCHASER—TENDER OF PERFORMANCE—FAILURE—EFFECT.

A purchaser contracted for the purchase of a lot free from incumbrances. The lot was incumbered by a party wall, together with a covenant, running with the land, providing for the rebuilding of the wall at the joint expense of the owners thereof. There was nothing to show that the vendor could have removed the incumbrance. *Held*, that the purchaser was entitled to recover the money paid on the contract and damages for the vendor's inability to convey, without first tendering performance on his part.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, § 1031.]

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Appeal from Municipal Court, Borough of Manhattan, Seventh District.

Action by Anna Oppenheimer against the Knepper Realty Company. From a judgment for defendant, plaintiff appeals. Reversed.

Argued before SCOTT, P. J., and O'GORMAN and NEWBURGER, JJ.

Louis H. Levin, for appellant.

Joseph Rosenzweig, for respondent.

SCOTT, P. J. Action to recover deposit on a contract for the sale of real estate and damages for nonfulfillment. The property involved consisted of a lot of land and building on Second avenue. The description in the contract indicated that the northerly wall of the building was a party wall, but was silent as to the southerly wall. The defendant agreed to convey the property free from all incumbrances except as stated in the contract. In fact the southerly wall was a party wall, existing under two agreements between former owners of the lot in question and the owners of the lot adjoining on the south. These agreements are declared to be perpetual and to constitute covenants running with the land. Both agreements provided that in case of destruction the wall was to be rebuilt at the joint expense of the owners of both lots. There can be no doubt that these part-wall agreements constituted an incumbrance upon the property, which prevented compliance by defendant with the terms of its contract and relieved plaintiff's assignor from the obligation of accepting a deed. O'Neil v. Van Tassel, 137 N. Y. 297, 33 N. E. 314.

It is urged, however, and the justice apparently considered, that this particular objection was not raised at the time the parties met to conclude the sale, and that it must therefore be deemed to have been waived, and there is much question whether plaintiff's assignor made any effectual tender of performance on his part. The existence of the party-wall agreements made it impossible for the defendant to fulfill its contract according to its tenor on the law day. The rule is that tender of performance on the part of the vendee is dispensed with in a case where it appears that the vendor is disabled from performance on the day fixed therefor. In such a case tender of performance on the part of the vendee would be a mere idle ceremony, and the vendee may, without tender or demand, sue for the money paid on the contract and for damages. Ziehen v. Smith, 148 N. Y. 558, 42 N. E. 1080. This rule, however, does not apply when it appears that the incumbrance constituting an objection to the title is one which is within the power of the vendor to remove. In such a case the vendee may not maintain an action unless he tenders performance and makes his objection at the time fixed for performance; for he will then be deemed to have waived the objection. But, if the incumbrance be one not within the power of the vendor to remove, the vendee, in order to maintain an action, need not make tender or raise the particular objection at the time fixed for closing the title. Higgins v. Eagleton, 155 N. Y. 466, 50 N. E. 287.

There are certain incumbrances as to which it may be presumed that the vendor, if his attention were called thereto, could and would re-

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move, such as an overdue mortgage or taxes, or a servitude in favor of other property owned by him. Where, however, the incumbrance consists, as in the present case, of a servitude in favor of the property of a stranger, there is no presumption that it lay within the vendor's power to remove or extinguish the incumbrance. In fact, the presumption, if any there be, is quite the other way. Such an incumbrance, therefore, is not waived, because not raised at the time fixed for performance on the contract, when other objections, untenable in their nature were raised, and its existence excuses any lack or deficiency there may have been in the vendee's tender and demand of performance. No evidence whatever was offered to show that the vendor could, if the objection had been made at the time, have caused the removal of the incumbrance. In the absence of such evidence, the plaintiff was entitled to recover the money paid on account of the contract and the reasonable damages due to defendant's inability to perform.

Judgment reversed, and new trial granted, with costs to appellant to abide the event. All concur.

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## JONES v. LEVY.

**(Supreme Court, Appellate Term. March 26, 1906.)**

NEGLIGENCE—ACTS CONSTITUTING—EVIDENCE.

**Where it was customary to serve drinks in a room where there was a swimming pool, and for the waiters to collect the glasses from time to time, evidence of injury to plaintiff by a sliver of glass did not show negligence of the proprietor, in the absence of a showing who left the glass there, or how long it had been there.**

**[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, § 271.]**

Appeal from Municipal Court, Borough of Manhattan, Sixth District.

Action by Martin P. Jones against Charles S. Levy. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Argued before SCOTT, P. J., and O'GORMAN and NEWBURGER, JJ.

Weschler & Myers, for appellant.

George E. Fleming, for respondent.

SCOTT, P. J. The defendant is the proprietor of a bath, having hot rooms, massage rooms, and a swimming pool. It appears to be customary to serve drinks in all parts of the bath, including the room in which the plunge is, and the waiters from time to time collect the empty glasses. There are steps leading into the pool at either end, and along the sides are marble slabs or shelves, under which are brass hand rails. The plaintiff and some friends went to the bath rather late at night. Plaintiff was sitting on the marble slab, and, wishing to turn around in order to slide into the water backwards, so that he might not hit the brass rail, put his hand on a bar glass that had been left on the marble slab, with the result that a sliver of glass ran into his thumb.

I do not think that the facts showed any negligence on the part of defendant or his employés. There is nothing to show who placed the glass where it was, or how long it had been there. The place was

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brilliantly lighted, and the glass should have been at least as clearly visible to the plaintiff as to defendant's waiters. If it had been shown that the glass had been allowed to remain where it was for any considerable time, it might be said that the servants were negligent; but there is no such evidence in the case. Plaintiff's injuries were trifling, and the damages given were at least ample. On the whole, we think that the judgment should be reversed.

Judgment reversed, and a new trial granted, with costs to appellant to abide the event. All concur.

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## MAILLEFERT v. INTERBOROUGH RAPID TRANSIT CO.

(Supreme Court, Appellate Term. March 26, 1906.)

1. CARRIERS—INJURY TO PASSENGER—PROXIMATE CAUSE.

   Opening for only two-thirds its width of the sliding door of a subway car when it stopped at a station to take on passengers, the door being operated by the guard by means of a lever, if negligence, was not the proximate cause of injury to a passenger, who, while following others into the car, being crowded, put his hand against the casing of the door to prevent his falling, whereupon the door was opened wide and crushed his finger.

2. SAME—NEGLIGENCE.

   For the guard of a subway car, into which passengers were coming through a door opened only two-thirds its width, to open it its full width, whereby a passenger, who, being crowded, had just put his hand on the casing of the door, had his finger crushed, was not negligence; it not appearing that the guard knew or could have seen where the passenger's hand was, and there being nothing to show that it was common for passengers to place their hands on the door for support.

Appeal from Municipal Court, Borough of Manhattan, Twelfth District.

Action by Arthur E. Maillefert against the Interborough Rapid Transit Company. From a judgment for plaintiff, defendant appeals. Reversed.

Argued before SCOTT, P. J., and O'GORMAN and NEWBURGER, JJ.

Charles A. Gardiner (Theodore L. Waugh, of counsel), for appellant.
Hurry & Dutton (John A. Dutton, of counsel), for respondent.

SCOTT, P. J. Plaintiff became a passenger on one of defendant's cars at the 103rd Street subway station. It was early in the morning, and quite a crowd of people were on the platform awaiting the train when it arrived. It stopped so that the door of one of the cars was within two or three feet of where plaintiff was standing. Quite a crowd had collected on the platform. When the train stopped the door of the car in front of the plaintiff was opened by the guard only about two-thirds of the way, and left in that condition by him for the passengers to enter the car. A number of people who were ahead of plaintiff entered through the partly opened doorway, and as plaintiff moved up with the crowd, and in his turn, he was jostled or pushed by the crowd behind him, when he instinctively threw up his hand to save himself and

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prevent his falling, and in doing so placed it against the front casing of this door, which was partly open, and while his hand was in this position the door was opened to its full extent, and plaintiff's little finger was caught between the door casing and the casing into which the door slid, and he suffered serious and permanent injury to this finger.

The car in question was the usual subway car, and the door, in opening, did not swing, but slid back into the body of the car its full width when fully open, being operated by the guard by means of a lever. The door had a glass panel in the center, surrounded by a margin or casing of wood about 6 or 8 inches wide. It was against this casing or margin of wood that plaintiff placed his hand; his little finger extending over against the glass, which was of less thickness than the casing, and in this position it was caught by the edge of the casing of the car, which formed one side of the opening into which the door slid. Plaintiff could not recall whether the car was constructed of wood or steel. The opening of the doorway when the door was fully open was 3 feet, if it was an iron car, and 29 inches, if a wooden car; so that, if the door was only open in the first instance two-thirds of its distance, as testified to by plaintiff without contradiction, there was a space of only about 19 inches, if it was a wooden car, or 24 inches, if an iron car, through which those who were ahead of plaintiff passed by invitation of the guard, and through which plaintiff was already attempting to pass when he was injured. No question is made as to the fact of plaintiff's injuries, nor as to the reasonableness of the verdict. No material evidence was offered by defendant, so that the case rests entirely upon plaintiff's evidence. The plaintiff claims that defendant was negligent in two particulars: First, in opening the door only two-thirds of the way; and, secondly, in opening or permitting it to be moved while plaintiff's hand was on it.

It can scarcely be said that it was negligence to open the door only partially, or, if it was, that that act was the proximate cause of the injury to plaintiff. No prudent man, even seeing a crowd upon the platform and realizing that they would crowd to get on board of the train, would be called upon to anticipate that the crowding would be of such a nature as to cause plaintiff, or any other passenger, to put his hand on the door, and, even if he had done so, no danger would result so long as the door remained where it was. I can see no possible foundation for the claim that the partly opened door was the proximate cause of the accident, unless it can be so made by coupling it with the full opening of the door at the moment the plaintiff put his hand upon it. The most that can be said is that the partial opening of the door was an act without which this particular accident would not have occurred, but that is not sufficient to justify calling it the proximate cause. When we come to the sudden opening of the door, the plaintiff is confronted with another difficulty. Undoubtedly it was that act which did constitute the proximate cause of the accident; but then the question arises whether it can be attributed to the defendant as an act of negligence. In the first place there is no satisfactory evidence that the door was opened by the guard. It might equally well have been an incident of the attempt of the passenger to board the car. But, even assuming that the guard did, after a considerable number of people had got on the

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car, suddenly push it open to its full width by means of his lever, the plaintiff's testimony is that the door was moved just as soon as his hand touched it, so that the placing of his hand upon the door and its sliding back must have been nearly or quite simultaneous. It does not appear that the guard knew, or could have seen if he had looked, that plaintiff had placed his hand upon the door, and there is nothing in the case to show, and nothing in the common experience of mankind to indicate, that it was such a common occurrence for passengers to place their hands upon the door of the car for support that the guard should have anticipated that some one would have his hand in such a position that the opening of the door would injure it. O'Rourke v. Interborough R. T. Co. (Sup.) 92 N. Y. Supp. 317.

The accident, while a regrettable one, was not, in my opinion, caused by any negligent act of the defendant's servant. All that can be said is that the defendant did certain acts, not negligent in themselves, which produced such a situation that the jostling of the plaintiff by other passengers, and his effort to preserve his equilibrium, resulted in the injury. The injury, however, was not caused by the situation thus presented, although made possible by it, and, while the defendant had reason to apprehend that there would be crowding to board the car, it had no reason to apprehend that as the result of that crowding any passenger would put his hand on the partly opened door.

The judgment should be reversed, and a new trial granted, with costs to appellant to abide the event. All concur.

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## SILVERMAN v. NATIONAL BUTCHERS' & DROVERS' BANK.

(Supreme Court, Appellate Term. March 26, 1906.)

1. BILLS AND NOTES—CHECKS—BONA FIDE PURCHASERS—NOTICE.
   Where a certified check was marked by the drawee bank with two stars, indicating that it had been paid, but the money was afterwards refunded, and the check returned to a member of the payee firm, who 14 months later transferred it to plaintiff, plaintiff was put on notice, and his position is no stronger than the transferror's.

2. SALES—ACTS CONSTITUTING RESCISSION.
   Where a certified check was given one partner for accounts due the firm, but after payment of the check the other partner asserted that the firm's indorsement was a forgery, whereupon the amount paid thereon was refunded and then returned to the partner who originally held it, and the accounts referred to were collected by the firm, this constituted a rescission of the contract, so that the partner holding the check, or his transferee with notice, could not collect it from the drawee bank.

Appeal from City Court of New York, Trial Term.

Action by Simon Silverman against the National Butchers' & Drovers' Bank. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Argued before SCOTT, P. J., and O'GORMAN and NEWBURGER, JJ.

Leventritt & Brennan (Alfred Holbrook, of counsel), for appellant.

Steuer & Hoffman (Max D. Steuer, of counsel), for respondent.



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SCOTT, P. J. The plaintiff sues upon a certified check. In February, 1903, there existed a firm known as Hayman & Co., the members of which were Julius Hayman and Frederick Heyman. On February 9, 1903, Frederick Heyman applied to one Charles Rosenberg for an advance of money, asking for it in the name of Hayman & Co. Certain contracts were entered into between Rosenberg and Hayman, acting for and in the name of Hayman & Co., which resulted in the assignment to Rosenberg of certain outstanding accounts due to Hayman & Co., and the delivery by Rosenberg to Hayman of a check on defendant for $875 to the order of Hayman & Co. Hayman had the check certified by defendant, and then passed it to one Gernsheimer, who paid the amount in cash. Gernsheimer deposited the check in the Mechanics' & Traders' Bank, receiving credit for it upon his account. It passed through the clearing house and came back to defendant, and was stamped with two stars; the mark commonly used by defendant to indicate that a check had been paid. At some time (the record does not clearly show when), upon a statement by Julius Hayman that Frederick Heyman was not a member of the firm, and that his indorsement of the firm's name upon the check was a forgery, the defendant bank recredited Rosenberg, the drawer, with the amount of the check, and made demand upon the Mechanics' and Traders' Bank for a refund. The latter bank did refund the money, and received back the check. In turn Gernsheimer reimbursed his bank, and received back the check, and later Frederick Heyman repaid Gernsheimer, and became repossessed of the check. After holding it about 14 months, Frederick Heyman transferred the check to the plaintiff for value. Without going into all the particulars, we may say that, under the circumstances attending the transfer of the check to plaintiff, we think that he was put on his notice that there might be defenses, and that his position is no stronger than would be that of Frederick Heyman. Cowing v. Altman, 71 N. Y. 440, 27 Am. Rep. 70. Although Julius Hayman claimed that Frederick Heyman was not a member of the firm of Hayman & Co. at the time the check was given, it has since been conclusively established by a judgment of the Supreme Court that Frederick Heyman was in fact at that time a member of the firm. As between the firm and third parties, therefore, he had authority to transfer firm assets, to receive payment therefor, and to indorse the check drawn to the order of the firm. If, therefore, Rosenberg and the defendant bank had elected to stand and rely upon his assignment of the accounts and his indorsement of the check, their position would have been impregnable, as the event turned out; but in all that Heyman did in the matter he acted, not as an individual, but as a member of, and in the name and behalf of, the firm. Hayman, also, was a member of the firm, had at least the same right to act for it and represent it that Heyman had, and had precisely the same right to rescind contracts made by the firm that Heyman had to make them. He elected to rescind them. While no formal rescission of the assignment of the accounts to Rosenberg was shown, there was ample evidence of a practical rescission, under which Heyman collected the accounts. The certification of the check, after the Mechanics' & Traders' Bank and Gernsheimer had been eliminated by repayment, constituted, if it remained effective at all, an obligation on the part of the bank to

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Hayman & Co., and not to Frederick Heyman individually. Julius Hayman had been the effective cause of the return of the check by the defendant bank, and its recrediting the account of Rosenberg with the amount. This certainly estopped him and the firm of Hayman & Co., in whose behalf he acted, from asserting any claim against the bank upon its certification. Further than this, the check, and whatever right against the bank which it represented when it came back into Frederick Heyman's hands, remained, as it had been when he received it, the property of the firm of Hayman & Co. On February 19, 1904, Julius Hayman was appointed receiver pendente lite of the copartnership, and on April 4th the firm was judicially dissolved, and Julius Hayman appointed receiver of its assets. Both of these events long antedated the transfer of the check to the plaintiff, and after the dissolution Frederick Heyman had no right to deal with the firm assets, except to turn them over to the receiver, and had no authority to assert any claim based upon the check or the certification, or to invest any one else with such a claim. Since the circumstances surrounding the transaction were sufficient to put plaintiff on his inquiry, he can no more succeed than could Frederick Heyman.

Judgment affirmed, with costs. All concur.

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## MOLLOY v. NEW YORK CITY RY. CO.

(Supreme Court, Appellate Term. March 26, 1906.)

CARRIERS—INJURY TO PASSENGER—NEGLIGENCE—EVIDENCE.

Proof that a passenger on a street car, who had stepped onto the running board after the car had been signaled to stop at a crossing to permit him to alight, was thrown off in consequence of the car giving a jerk while it continued its course after passing the crossing without stopping, did not prove actionable negligence on the part of the company.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1205, 1286.]

Appeal from Municipal Court, Borough of Manhattan, Sixth District.

Action by Patrick Molloy against the New York City Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

Argued before SCOTT, P. J., and O'GORMAN and NEWBURGER, JJ.

William E. Weaver, for appellant

John McLaren, for respondent.

SCOTT, P. J. The plaintiff's testimony, upon which the recovery herein is based, is to the effect that, while a south-bound car upon which he was riding was crossing Twenty-Eighth street, he signaled the conductor, who rang the bell to stop the car. The plaintiff stepped upon the running board of the car, supposing that it would stop at the south side of Twenty-Eighth street. It continued on its course, however, at the usual rate of speed until about 100 feet from Twenty-Seventh street, where, as the plaintiff testifies, "the car gave a jerk, and I was pitched off." This is not sufficient proof of negligence on

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the part of the company to authorize a judgment in favor of the plaintiff. Black v. Third Ave. R. R. Co., 2 App. Div. 387, 37 N. Y. Supp. 830.

Judgment reversed, and new trial ordered, with costs to appellant to abide the event All concur.

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## LESSER v. KAHN.

(Supreme Court, Appellate Term. March 26, 1906.)

APPEAL—JUDGMENTS APPEALABLE—DEFAULT JUDGMENT.

Except where no service of summons is made, an appeal does not lie from a default judgment; but, if a motion to open the default is denied, an appeal will lie from the denial.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 766, 885–888.]

Appeal from Municipal Court, Borough of Manhattan, Seventh District.

Action by Fred Lesser against Isaac Kahn. From a judgment in favor of defendant, plaintiff appeals. Dismissed.

Argued before SCOTT, P. J., and O'GORMAN and NEWBURGER, JJ.

Nathaniel Levy, for appellant.

Sulzberger & Kringel, for respondent.

PER CURIAM. Except in cases where no service of the summons is made, an appeal does not lie from a judgment entered on default. The proper practice is to move to open the default. Brown v. Bouse, 43 Misc. Rep. 72, 86 N. Y. Supp. 240. If the motion be denied, an appeal will lie. Schrenkeinsin v. Kroll (Sup.) 85 N. Y. Supp. 1072. The affidavit presented to the justice as a ground for the adjournment of the trial was wholly insufficient. The affidavit on the motion to open the default did, however, present some excuse for the defendant's failure to appear. We incline to the view that the defendant should be allowed to present his defense, if he has one, although, as his answer stands at present, we cannot see that it raises any issue of fact. It certainly does not allege payment, which we infer from the affidavit is the defense intended to be relied upon.

The appeal from the judgment will be dismissed, with $10 costs. The order denying the motion to open the default will be reversed, and the cause directed to be tried, upon the payment by defendant to plaintiff's attorney within five days of the costs included in the judgment. No costs to either party upon appeal from the order, and the judgment already entered is to stand as security.

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## GETZELSOHN v. DONNELLY.

(Supreme Court, Appellate Term. March 26, 1906.)

1. BROKERS—COMPENSATION—EMPLOYMENT—STATUTORY PROVISIONS—WRITTEN AUTHORIZATION.

In an action by a broker to recover commissions for finding of a purchaser for defendant's real estate, a letter from defendant to plaintiff, stating that in reference to a conversation with plaintiff in regard to the purchase of the property in question defendant desired to have plaintiff call and discuss the matter, was a sufficient written authority to offer the property for sale, in connection with evidence that plaintiff had already undertaken to find a purchaser, since the statute requiring a broker to show a written authorization does not require that the authority be in any specified form.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Brokers, § 44.]

2. SAME—EVIDENCE—SUFFICIENCY.

Where the owner of property positively refused to make a sale on any terms, it was unnecessary for his broker, who, under contract with the owner, had found a purchaser on the owner's terms, to actually bring the purchaser into the owner's presence in order to entitle him to recover his commissions.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Brokers, §§ 81, 94.]

O'Gorman, J., dissenting.

Appeal from City Court of New York, Trial Term.

Action by Abraham Getzelsohn against Michael J. Donnelly. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Argued before SCOTT, P. J., and O'GORMAN and NEWBURGER, JJ.

Louis A. Jaffer (Bernard Edelhertz, of counsel), for appellant.

Carl Schurz Petrasch (Henry S. Mansfield, of counsel), for respondent.

SCOTT, P. J. In this action to recover a broker's commission upon the sale of real estate, the complaint was dismissed upon two grounds, viz., that the plaintiff had failed to show written authority to offer the property for sale, and that he had not produced a purchaser ready, willing, and able to comply with the terms demanded by defendant. It appears that plaintiff had approached defendant, saying that he had a possible purchaser, and asking the terms on which the property would be sold. He was given a price, and set about seeking a purchaser. He went back and forth between the parties, and the defendant finally gave as the lowest acceptable price the sum of $55,500. Up to this time no writing had passed between the parties, but on July 27, 1904, defendant wrote to plaintiff as follows:

"In reference to conversation had with you in regard to the purchase of the property 50 and 52 East 131st St., if you concede a few points which we did not then allude to, there may be a chance to close the deal; so, if you will call at my place between 6 and 7 o'clock tomorrow evening, will be pleased to hear of your best terms."

The plaintiff did call, and a conversation ensued, in which defendant said that he would not sell for less than $55,500 net, and that if he could get that price he would sell the houses. Plaintiff agreed to see what he could do, and then asked about his commission. Defendant

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then told plaintiff to "try to see your party," and that, if he could get 1 per cent. above the $55,500, he (the defendant) would pay the commission. The defendant then, at plaintiff's request, wrote down on a piece of paper the terms of the sale so far as concerns the manner in which payments were to be made.

The statute relied upon as a defense to plaintiff's claim does not require that authority to sell should be in any specified form. All that is necessary is that it should in some way clearly recognize the authority of the broker to offer the property for sale. It is true that the letter above quoted does not in terms describe plaintiff as a broker, but, on the contrary, seems rather to address him as a possible purchaser. It does, however, clearly show that the defendant knew that plaintiff was interesting himself in some capacity in bringing about a sale of the houses, and distinctly invites him to call and discuss terms. The letter certainly must be accepted as an authorization to plaintiff to continue to act with reference to the property with a view to a sale of it. That the defendant knew that plaintiff was acting as a broker, and not as a prospective purchaser, is made entirely clear by the conversation testified to by plaintiff, and which on the present record stands uncontradicted. Assuming, as we must do on this appeal, that the plaintiff's testimony is true, we cannot say that the letter of July 27th was not a written authorization to plaintiff to continue the negotiations for a sale which he had with defendant's knowledge already undertaken.

The positive evidence was that plaintiff did procure a purchaser ready, willing, and able to purchase the houses on defendant's terms, and that he communicated that fact, with the name of the proposed purchaser, to defendant. That he did not actually bring the purchaser into the physical presence of the defendant is unimportant; for the defendant's positive and unequivocal refusal to go on with the sale at any terms rendered it unnecessary to go through the idle ceremony of actually bringing the purchaser in person to defendant, even if, under any circumstances, that would be necessary. Upon a nonsuit the plaintiff is entitled to the benefit of the most favorable view of the testimony, and, giving him that, we are constrained to reverse the judgment and order a new trial, with costs to the appellant to abide the event.

Judgment reversed, and new trial ordered, with costs to appellant to abide the event.

NEWBURGER, J., concurs. O'GORMAN, J., dissents.

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## SCHROEDER v. HELMS.

(Supreme Court, Appellate Term. March 26, 1906.)

1. GUARANTY—CONDITIONAL PROMISE—LIABILITY OF GUARANTOR.

**Where defendant guarantied an indebtedness of a firm to plaintiff, provided defendant received a chattel mortgage on the debtors' fixtures, and no valid chattel mortgage was ever executed or delivered, but the debtors were discharged of their indebtedness by proceedings in bankruptcy, defendant was not liable on the guaranty.**

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2. FRAUDS, STATUTE OF—DEBT OF ANOTHER—PROMISE TO PAY.

**An oral promise that defendant would guaranty the indebtedness of his brothers to plaintiff, provided defendant received a chattel mortgage on his brothers' fixtures, was not an original promise, but was within the statute of frauds.**

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Frauds, Statute of, § 18.]

Appeal from Municipal Court, Borough of Manhattan, Eleventh District.

Action by August Schroeder against John Helms. From a Municipal Court judgment in favor of plaintiff, defendant appeals. Reversed.

Argued before SCOTT, P. J., and O'GORMAN and NEWBURGER, JJ.

John G. Snyder, for appellant.

Herman Elfers, for respondent.

NEWBURGER, J. Plaintiff was employed as a salesman by a tea house. In the course of business, plaintiff, in behalf of his employers, sold certain goods to two brothers of this defendant, who were in business under the firm name of Helms Bros. Subsequently, and after the account became due, the defendant in the course of a conversation stated to the plaintiff that he would guaranty the amount due from Helms Bros. to plaintiff, provided he (defendant) received a chattel mortgage on the fixtures of Helms Bros.' business. Plaintiff claims he had to pay his employers one-half of the indebtedness above referred to, and commenced this action to recover the amount.

It is conceded that no mortgage was ever given to defendant, or filed, or that he received any fixtures. There was offered in evidence a blank chattel mortgage, signed by Helms Bros. It was not properly executed or delivered. It also appeared that Helms Bros. filed a petition in bankruptcy and were discharged of all their debts and liabilities, and that plaintiff's employers' claim was referred to in the schedules in bankruptcy. Upon this evidence the trial justice found for plaintiff. The promise by defendant was not in writing. The contention of the plaintiff that no writing was required, as it was an original promise, is untenable.

Judgment reversed, and new trial ordered, with costs to appellant to abide event. All concur.

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## KOEPPEL v. KOEPPEL et al.

(Supreme Court, Appellate Term. March 26, 1906.)

COSTS—MOTION FOR NEW TRIAL—CASE MADE.

**A printed case, stating that a motion for a new trial was made on exceptions taken at the trial and containing a memorandum: "All amendments, except the twenty-fifth amendment, are allowed. The twenty-fifth amendment is disallowed. Case settled and filed April 8, 1905"—shows that the motion was made on the case made and settled, so that the successful party is entitled to full costs.**

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Appeal from City Court of New York, Special Term.

Action by Fishel Koeppel against Mendel Koeppel and another. From an order relating to costs, plaintiff appeals. Reversed.

See 95 N. Y. Supp. 812.

Argued before SCOTT, P. J., and O'GORMAN and NEWBURGER, JJ.

Max Schleimer, for appellant.

Steuer & Hoffman, for respondents.

NEWBURGER, J. An examination of the record upon the former appeal to this court shows that this was an appeal from an order granting a new trial upon a case made and settled. The printed case on page 4 shows that the motion for a new trial was made upon the exceptions taken at the trial, while on page 58 of the same case appears this memorandum:

"All amendments, except the twenty-fifth amendment, are allowed. The twenty-fifth amendment is disallowed. Case settled and filed April 8, 1905. J. H. McC., J. C. C."

It is apparent, therefore, that the motion was made upon the case, and it has been repeatedly held that upon such a motion the successful party is entitled to full costs. See Reid v. Gaedeke, 38 App. Div. 107, 57 N. Y. Supp. 414; Ireland v. Harlam (Sup.) 88 N. Y. Supp. 990. The judge below erred in holding that the plaintiff was only entitled to $10 costs.

The order appealed from, therefore, must be reversed, with costs and disbursements, and the bill of costs is hereby remitted for retaxation. All concur.

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## NORTON v. INTERURBAN ST. RY. CO.

(Supreme Court, Appellate Term. March 26, 1906.)

STREET RAILROADS—COLLISION WITH TEAM—CONTRIBUTORY NEGLIGENCE.

For the driver of a coach, which stood in the middle of a block 5 feet from a street car track, to attempt to cross in front of a rapidly approaching car, which he saw only 50 feet away, is negligence, barring recovery by him.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Street Railroads, § 214.]

Appeal from City Court of New York, Special Term.

Action by Patrick Norton against the Interurban Street Railway Company. From a judgment on a verdict for plaintiff, defendant appeals. Reversed.

Argued before SCOTT, P. J., and O'GORMAN and NEWBURGER, JJ.

Bayard H. Ames, for appellant.

Thomas J. O'Neill, for respondent.

NEWBURGER, J. On the afternoon of May 25, 1903, a southbound car, operated by defendant upon Hudson street, collided with a coach driven by plaintiff easterly across its track at a point in the mid-

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dle of the block, south of Christopher and West Tenth street. Plaintiff testified that his coach and horses stood on the west side of Hudson street in the middle of the block, 5 feet from the south-bound track; the horses' heads pointing south. He said he had a call, and was going from this point to Christopher street, which was north of where he was standing. When he got up on the box of his coach, he looked around, and the car was 50 feet away from him, and he put his hand up. The car was coming fast. Then he swung his horses around and started to drive across the track. When his horses' feet touched the rail, the car came right into him. This statement of plaintiff clearly points to his own imprudence. The short distance the car was away when plaintiff first saw it, and the rapid speed of the car, of which he knew, clearly shows that the plaintiff did not exercise that degree of care that devolved upon him.

Judgment reversed, and new trial ordered, with costs to appellant to abide the event. All concur.

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## In re UNITED STATES FIDELITY & GUARANTY CO.

(Supreme Court, Appellate Term. March 26, 1906.)

PRINCIPAL AND SURETY—RIGHT TO DISCHARGE—COMPENSATION.

**A surety on the bond of a fiduciary is, under Code Civ. Proc. § 812, providing that he "shall be entitled as a matter of right" to be discharged on application to the court, entitled to discharge during the year for which it has been paid a premium for being surety.**

Appeal from City Court of New York, Special Term.

In the matter of the application of the United States Fidelity & Guaranty Company to be released on the bond of Arthur S. Corby, receiver. From an order denying its application, the company appeals. Reversed.

Argued before SCOTT, P. J., and O'GORMAN and NEWBURGER, JJ.

Leonidas Dennis, for appellant.

NEWBURGER, J. Section 812 of the Code of Civil Procedure provides:

"The surety or sureties or the representatives of any surety or sureties upon the bond heretofore or hereafter executed, of any trustee, committee, guardian, assignee, receiver, executor, administrator or other fiduciary, shall be entitled as a matter of right to be, and shall be, discharged from liability as hereinafter provided, and to that end may on notice to the principal named in such bond apply to the court that accepted such bond or to the court of which the judge that accepted such bond was a member or to any judge thereof, praying to be relieved from liability as such surety or sureties for the act or omission of such principal occurring after the date of the order relieving such surety or sureties hereinafter provided for and that such principal be required to account and give new sureties. Such notice of such application may be served on said principal personally within or without the state, or, not less than five days prior to the date on which such application is to be made, unless it satisfactorily appears to the court, or a judge thereof, that personal notice cannot be given with due diligence within the state, in which case notice may be given in such a manner as the court or a judge thereof directs. Pending the hearing of such application the court or judge may restrain such principal from acting except to preserve the trust estate until further order."

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Notice was served upon the receiver, the principal on the undertaking. He appeared by attorney, who filed an affidavit stating that he had paid the premium to the surety company for the term of one year and that the year had not yet expired. The court below thereupon denied the motion of the surety company for a discharge from future liability. The motion should have been granted. The surety company was entitled to the discharge as a matter of right, and the mere fact that compensation was received by the company for a period beyond the date of the return of the motion is not a defense, as the unearned premium could be recovered by the receiver upon demand in writing made upon the surety company.

The order appealed from must therefore be reversed, with $10 costs and disbursements. All concur.

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## BARISH et al. v. KNEPPER REALTY CO. et al.

(Supreme Court, Appellate Term. March 26, 1906.)

TRIAL—DISMISSAL OF ACTION.

It is error for the court to dismiss the action of its own accord when plaintiffs have called but one witness, and ask to be allowed to put in their proof.

Appeal from Municipal Court, Borough of the Bronx, Second District.

Action by William Barish and another against the Knepper Realty Company and another. From a judgment for defendants, plaintiffs appeal. Reversed.

Argued before SCOTT, P. J., and O'GORMAN and NEWBURGER, JJ.

Michael H. Wolfe, for appellants.

Elias Rosenthal, for respondents.

NEWBURGER, J. An examination of the record in this case clearly shows that judgment herein must be reversed. The plaintiffs had called but one witness when the trial justice, upon his own motion, dismissed the complaint, although the attorney for the plaintiffs asked to put in his proof. Plaintiffs were entitled to their day in court. They had a right to present whatever evidence was at their command, and the ruling of the trial justice as to the law before the evidence had been submitted was clearly error.

Judgment reversed, and new trial ordered, with costs to appellants to abide the event.

O'GORMAN, J., concurs.

SCOTT, P. J. (concurring). I concur. The proceedings on the trial, so far as they went, seem to indicate that the plaintiffs, if allowed to proceed, would have made out a prima facie case at least.

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## AMERICAN ICE CO. v. NEW YORK CITY RY. CO.

(Supreme Court, Appellate Term. March 26, 1906.)

1. STREET RAILROADS—COLLISIONS WITH VEHICLES ON TRACK—RATE OF SPEED —NEGLIGENCE AS MATTER OF LAW.

The fact that a street car is running in a sparsely settled and little frequented locality at a speed of from 15 to 20 miles an hour is not, of itself, negligence as a matter of law with respect to a collision with a vehicle on the track.

2. SAME—ACTIONS—CONTRIBUTORY NEGLIGENCE—SUFFICIENCY OF EVIDENCE.

In an action against a street railway for injuries resulting from a collision between defendant's car and plaintiff's wagon, evidence examined, and *held* to show contributory negligence on the part of the driver of the wagon.

3. SAME—EVIDENCE—PRIOR ACCIDENTS—ERROR—REVERSIBLE ERROR.

In an action against a street railway for injuries resulting from a collision between defendant's car and plaintiff's wagon, the admission of evidence that defendant's motorman had previously been concerned with an accident was erroneous, although it may not have affected the result, and would not, of itself, call for a reversal.

O'Gorman, J., dissenting.

Appeal from Municipal Court, Borough of Manhattan, Sixth District.

Action by the American Ice Company against the New York City Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

Argued before SCOTT, P. J., and O'GORMAN and NEWBURGER, JJ.

William E. Weaver, for appellant.

Palmer & Adams (B. B. Gattell, of counsel), for respondent.

SCOTT, P. J. This is an action for damages resulting from a collision between one of plaintiff's carts and one of defendant's cars. The accident occurred in Amsterdam avenue near 174th street, at about 10 o'clock at night, but the street lights were lit, and there seems to have been no difficulty in seeing objects at a reasonable distance. Both vehicles were going down the avenue, and plaintiff's wagon was struck from the rear. The main dispute on the trial was as to how long the cart had been on the track before the collision. The driver of the cart died from his injuries. The plaintiff insists that the cart had been on the track in front of the car for a considerable time, quite long enough for the motorman to have seen it, and slowed up so as to avoid a collision. The defendant claims that the ice cart had been driving along the avenue by the side of the track, and that the driver started to drive onto the track about 25 or 30 feet ahead of the car, so near that a collision could not be avoided. The principal witness for the plaintiff was the man who was the conductor of the car when the accident happened, but who was afterwards discharged. He swears that he went to the front platform, and saw the ice wagon squarely on the track ahead of the car, and that it was then two blocks away; that he started back to collect fares, and that the collision occurred in two seconds afterwards. Of course this estimate of distance and time must be erroneous in one or

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both of its elements, for it is quite impossible that the car could have traveled at the rate of nearly 140 miles an hour, which would have been its approximate speed according to the estimate of the ex-conductor, and to which he persistently adhered. It is true that the witnesses generally testify that the car was proceeding very fast—from 15 to 20 miles an hour—but this alone was not negligent as matter of law in a sparsely settled and little frequented locality. The conclusion is irresistible that the witness underestimated the distance or overestimated the time, or both. In either event, his evidence is of but slight value. Another witness for plaintiff, who was a passenger on the car, did not see the accident or notice the ice wagon before the accident. A third witness, a messenger boy, had his attention attracted by hearing some one shout. He then looked, and saw the ice wagon about 25 feet ahead of the car. His testimony is as consistent with defendant's contention as it is with that of plaintiff. The defendant's witnesses, three in number, including the motorman, testify that the ice cart started across the track a very short distance in front of the car, some putting the distance as low as 25 feet. The plaintiff's contention in its length and breadth is thus supported only by the very unreliable evidence of the former conductor. The position of the car after the accident seems to accord rather with the defendant's theory than with that of plaintiff. The claim is that the ice wagon tried to cross from the middle of the avenue, where the tracks are wide apart, to the westerly side, and the motorman says that he hit the cart on the right side near the rear. The effect of such a blow would be to force the back of the cart down town, and turn it partially around, so that the front of the cart and the horses would be towards the car. All the evidence (the plaintiff's as well as the defendant's) is that after the collision the front wheels of the cart and one of the horses were under the front of the car, and one of plaintiff's witnesses says that the other horse was turned completely around, facing towards the rear of the car. If the cart had been traveling down the track, and had been hit squarely in the rear, the cart and the horses would hardly have been found in this position after the accident. On the whole, the evidence seems to preponderate so strongly in favor of the defendant's claim as to how the accident happened that I am unable to find any evidence whatever tending to acquit the driver of the ice wagon from contributory negligence. The admission of the evidence that the motorman had previously been concerned with an accident was clearly erroneous, although it may not have affected the result, and would not, of itself, call for reversal; but for the other reason stated the judgment should be reversed.

Judgment reversed, and new trial granted, with costs to appellant to abide the event.

NEWBURGER, J., concurs.

O'GORMAN, J. (dissenting). I dissent. As I view the evidence, this court would not be warranted in disturbing the judgment. It is amply supported by the testimony of several witnesses, including the defendant's conductor. The car was being operated at a dangerously high rate of speed, some of the defendant's witnesses estimating the

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speed at 20 miles an hour. It was the function of the trial court to weigh the evidence, and we are not at liberty to throw out of the case the evidence of unimpeached witnesses, like defendant's conductor, merely because a possible inaccuracy may be discovered in his computation as to the time occupied by defendant's car in traveling the two blocks which separated it from plaintiff's wagon immediately before the collision. It cannot be asserted on this record that the judgment is against the weight of evidence, and I advise an affirmance.

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## SELIGMAN v. ROSENZWEIG.

(Supreme Court, Appellate Term. March 26, 1906.)

TORTS—RECOVERY OF ATTORNEY'S FEES—LIABILITY OF UNSUCCESSFUL PARTY.

The successful plaintiff in an action may not maintain an action against the defendant in the former action for the fees plaintiff paid his attorney in such former action.

Appeal from Municipal Court, Borough of the Bronx, Second District.

Action by Sigmund Seligman against Charles S. Rosenzweig. From a judgment for plaintiff, defendant appeals. Reversed.

Argued before SCOTT, P. J., and O'GORMAN and NEWBURGER, JJ.

Moen & Kilbreth, for appellant.

D. W. Steele, Jr., for respondent.

NEWBURGER, J. A careful reading of the record fails to disclose upon what theory this action was brought or the judgment rendered. Plaintiff brought an action against this defendant for the recovery of certain insurance policies, which resulted in his favor for the return of the policies and costs of the action. Subsequently this action is brought to recover the sum of $50 for moneys paid out by the plaintiff to the lawyer who appeared for him in the action against this defendant, brought to recover the insurance policies.

A mere statement of plaintiff's claim should have resulted in the dismissal of the complaint.

Judgment reversed, and judgment of dismissal on the merits directed, with costs of appeal and of the court below. All concur.

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## FISHER v. NEW YORK CITY RY. CO.

(Supreme Court, Appellate Term. March 26, 1906.)

STREET RAILROADS—COLLISION WITH TEAM—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

Evidence in an action for collision of a street car with a team *held* insufficient to authorize a finding of freedom from contributory negligence.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Street Railroads, § 250.]

O'Gorman, J., dissenting.

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Appeal from Municipal Court, Borough of Manhattan, Twelfth District.

Action by John H. Fisher against the New York City Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

Argued before SCOTT, P. J., and O'GORMAN and NEWBURGER, JJ.

James L. Quackenbush, for appellant.

George Hahn, for respondent.

NEWBURGER, J. This action is brought to recover damages for injuries to property caused by the negligence of defendant in operating its railroad on Columbus avenue. The plaintiff's driver testified that on September 20, 1905, at about 8 o'clock at night, he was driving a one-horse covered wagon, unloaded, through 107th street, and, as the rear wheel was passing the east rail of the east track, it was struck by a north-bound car on Columbus avenue. He says he was coming out of 107th street, and looked around to see if he saw a car. He could not see any, and continued on driving across the west roadway, across the south-bound track, the intervening space, and on the north-bound track, and while crossing the north-bound track the car struck his vehicle. He further testified that he never saw the car, was not even aware of its approach, until it struck his wagon and upset him. He admitted on cross-examination that he had an unknown woman in the wagon with him. The wagon was caught between the front of the car and an elevated pillar. The only other witness called by the plaintiff was an officer, but who testified that he was not present when the accident happened. The defendant called three witnesses, including a police officer who was present and saw the accident. He it was who first brought out the fact that the driver of plaintiff's wagon was accompanied by an unknown woman. He further testified that the plaintiff's horse was moving at a slow jog, and that when the horse and wagon appeared on the north-bound track the car was perhaps 20 feet away. He heard the motorman shouting, and observed him putting on his brake.

The evidence wholly failed to show freedom from contributory negligence on the part of the plaintiff, and, as it has been said in this court (Hebron v. New York City Railway Co. [Sup.] 94 N. Y. Supp. 342), "unless the rule that there must be proof of freedom from contributory negligence on plaintiff's part is to be disregarded, this judgment cannot stand."

Judgment reversed, and new trial granted, with costs to appellant to abide event.

SCOTT, P. J., concurs. O'GORMAN, J., dissents.

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## KAYSER v. SILVERBERG.

(Supreme Court, Appellate Term. March 26, 1906.)

INDEMNITY—CONTRACT—ENFORCEMENT—PERSONS ENTITLED.

Land was conveyed to a wife. The husband guarantied to indemnify the vendor against any claim a broker might have against him for commissions on the sale of the property. *Held*, that the broker could not maintain an action against the wife on the guaranty, it being for the benefit of the vendor.

Appeal from Municipal Court, Borough of Manhattan, Eleventh District.

Action by Max Kayser against Bella Silverberg. From a judgment for plaintiff, defendant appeals. Reversed.

Argued before SCOTT, P. J., and O'GORMAN and NEWBURGER, JJ.

Lawrence Goldberg, for appellant.
M. A. Lesser, for respondent.

NEWBURGER, J. Plaintiff claims that he is a real estate broker, and that one Hargrave in April, 1904, was the owner of a certain apartment house in this city; that the husband of the defendant requested the plaintiff to procure suitable property for investment; that subsequently, Hargrave and Max Silverberg, the husband of the defendant, entered into a contract of sale for an apartment house in 118th street; that thereafter Hargrave conveyed the property to this defendant; that at the time of making the contract Max Silverberg agreed in writing, in consideration of the sum of $75, to hold the said Hargrave harmless, and indemnify said Hargrave against any claim which this plaintiff might claim for commissions on the sale of the property. On the trial the contract of sale from Hargrave to Max Silverberg, with the agreement between them as to the commissions, was offered and marked in evidence. The plaintiff then moved to amend his complaint by reducing his claim to $75.

It will appear from a reading of the contract and the agreement as to the commissions that this defendant was not a party to the proceedings, or privy to the contract or to the consideration. She nowhere agreed to pay any commission to this plaintiff. The agreement upon which the plaintiff seeks to recover was a mere guaranty on the part of Max Silverberg to indemnify Hargrave against any claim that this plaintiff might have as against Hargrave for commissions on the sale of the property. The agreement sought to be enforced was not for the benefit of this defendant, but for the benefit of Hargrave.

Judgment reversed, and new trial ordered, with costs to appellant to abide the event. All concur.

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## MADIN v. NORCROSS BROS. CO.

(Supreme Court, Appellate Term. March 26, 1906.)

MASTER AND SERVANT—INJURY TO SERVANT—NEGLIGENCE.

An employé while working for the contractor on a building in process of construction stood on a scaffold erected by the contractor. A co-employé working directly over employé on a stone shelf projecting from the wall lost his balance, and fell on the employé, and both fell to the pavement. The scaffold did not fall. *Held*, that the falling of the co-employé was the proximate cause of the employé's injuries, and the contractor was not guilty of actionable negligence.

Appeal from Municipal Court, Borough of Manhattan, Eleventh District.

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Action by George E. Madin against Norcross Bros. Co. From a judgment for defendant, plaintiff appeals. Affirmed.

Argued before SCOTT, P. J., and O'GORMAN and NEWBURGER, JJ.

Frank A. Acer, for appellant.

Frederick E. Fishel, for respondent.

NEWBURGER, J. This action is brought to recover damages for personal injuries received by plaintiff while in defendant's employ. It appears from plaintiff's testimony that on the 17th day of July, 1905, the plaintiff was employed by the defendants, and on that day was working upon the interior of a building known as the "Harvard Club," on Forty-Fifth street, between Fifth and Sixth avenues, for the construction of which building the defendant held a contract. It also appears that in the performance of the work to which he had been assigned it became necessary for him to go upon a scaffold that had been erected by defendant in said building at an elevation of about 16 feet above the stone floor, and that said scaffold was about 14 feet long and about 15 inches wide, and that the scaffold was reached by a ladder. It appears that one Dorward, a fellow servant, was working directly over and above plaintiff on a stone shelf or coping, projecting from the face of the wall, that was of the width of about 10 inches. Dorward while working on the shelf or coping lost his balance, fell therefrom down to and upon plaintiff, and both were precipitated to the floor or pavement. Dorward testified that he was using a bar to put the stone a little further; it was off joint; the point was too big, and the bar slipped, and it came backward, and "I fell right off the top, and I struck Madin [plaintiff], and he went right down." At the close of plaintiff's case, defendant moved to dismiss plaintiff's complaint, which motion was granted by the trial justice, and from the ruling this appeal is taken.

It is contended by appellant that the scaffold used by the plaintiff was not so constructed, placed, and operated as to give proper protection to plaintiff's life and limb. He, however, concedes that the scaffold used did not fall, and that the accident resulted from no structural weakness or defective material used in the construction of the scaffold. The case of Stewart v. Ferguson, 164 N. Y. 553, 58 N. E. 662, cited by appellant, has no application. In that case the scaffold fell, and the court held that under the labor law as well as upon the theory of negligence plaintiff could recover. In this case, however, the plaintiff testified that the scaffold remained. It is apparent that the falling of a co-servant was the proximate and direct cause of the accident. Defendant violated no statutory duty towards the plaintiff, and there was no evidence that there was any negligence of the defendant.

Judgment affirmed, with costs. All concur.

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## ELECTRICAL EQUIPMENT & INSPECTING CO. v. SCHEELENBERG.

(Supreme Court, Appellate Term. March 26, 1906.)

CONTRACTS—PERFORMANCE OF CONDITIONS—SUFFICIENCY.

Under an agreement providing that plaintiff should inspect the electric installation in defendant's place of business, defendant to pay plaintiff's inspector $50 on presenting certificate of inspection; that without additional charges plaintiffs were to check defendant's bills for one year and bills for the past year, and an accompanying letter to defendant from plaintiff, stating that the latter "would guaranty to furnish defendant with advice which would save defendant 10 per cent. of the lighting their premises"; if not, the amount of subscription is to be refunded—plaintiff need only prove the inspection and presentation of the certificate to entitle him to demand payment of the contract price.

Appeal from Municipal Court, Borough of Manhattan, Second District.

Action by the Electrical Equipment & Inspecting Company against Nathan Scheelenberg. Judgment for defendant, and plaintiff appeals. Reversed.

Argued before SCOTT, P. J., and O'GORMAN and NEWBURGER, JJ.

Goldsmith & Rosenthal, for appellant.
Cahn & Lazansky, for respondent.

NEWBURGER, J. The agreement sought to be enforced here "provided that the plaintiff should make an inspection of the electric installation in defendant's place of business, and defendant agrees to pay plaintiff's inspector $50 on presenting certificate of inspection." The agreement further provided that without any additional charges plaintiffs were to check defendant's bills for one year and bills for past year. Accompanying this agreement was a letter from the plaintiff to the defendant, in which it was stated that the plaintiff "would guaranty to furnish defendant with advice which would save defendant 10 per cent. of the lighting their premises"; if not, the amount of subscription is to be refunded. On the trial it was shown by plaintiff that the inspection was made and the certificate required by the contract furnished. The certificate was produced by defendant, and marked as an exhibit. No proof was offered by defendant. The trial justice rendered judgment for the defendant.

It has been held in this court in construing similar contracts that the plaintiff is only required to prove the inspection of the electrical installation and the presentation of the certificate to entitle him to demand payment of the contract price. See Electrical Equipment Co. v. Feuerlicht (Sup.) 90 N. Y. Supp. 467; Electrical Equipment Co. v. Archibald (Sup.) 92 N. Y. Supp. 1121.

Judgment must therefore be reversed, and new trial granted, with costs to appellant to abide event.

O'GORMAN, J., concurs.



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SCOTT, P. J. I agree that this judgment must be reversed, but not precisely upon the ground stated by Mr. Justice NEWBURGER. The cases cited by the appellant do not completely cover the present case. In this plaintiff against Feuerlicht (90 N. Y. Supp. 467) a judgment in favor of the defendant was affirmed. In the action against Archibald (92 N. Y. Supp. 1121) no written guaranty of a reduction in the defendant's light bills was shown, and the trial justice determined that no oral guaranty had been given. In the present case the plaintiff in writing, and as a part of the contract, guarantied to furnish defendant with advice which will save him about 10 per cent. of the cost of lighting his premises; if not, the amount of the subscription is to be refunded. As the contract was drawn, the defendant agreed to pay $50 for an inspection and certificate, and the plaintiff agreed to refund the $50 if it did not furnish advice resulting in the specified saving. The answer as drawn did not present the defendant's claim properly, since the promise to give beneficial advice was not a false representation avoiding the entire contract, but a guaranty which if not fulfilled would furnish grounds for a counterclaim equal in amount to plaintiff's claim. As there must be a new trial, the defendant will have an opportunity, with the consent of the court below, to so amend his pleading as to properly present the question. No time is stated in the guaranty as to when the advice shall be given which will result in a 10 per cent. saving. The law will supply the deficiency by reading into the contract an agreement to do so, in a reasonable time, and the court will determine, when the question is properly presented, what is a reasonable time. It appeared in evidence that no method had been suggested up to the time of the trial by which the lighting bills could be reduced, unless, indeed, the suggestion to use less light can be considered such advice. This, of course, would be a very obvious method, and, if followed to its ultimate limit, would result in saving 100 per cent. of the lighting costs. It required, however, no expert advice to know that lighting bills could be reduced by using less light, and the giving of that advice could hardly be said to have been what was contemplated when the contract of guaranty was entered into. Not only was defendant's pleading improperly drawn to present his real defense, but, upon his objection, the court refused to permit an expert employed by plaintiff to state whether there were any means known to him whereby defendant might obtain the promised reduction.

I therefore concur in the reversal and the ordering of a new trial, with costs to the appellant to abide the event.

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## SUMMERS v. PHENIX INS. CO.

(Supreme Court, Appellate Term. March 26, 1906.)

1. TRIAL—INSTRUCTIONS—APPLICABILITY TO PLEADING.

In an action for wrongful discharge under an allegation of "employment for one year from May 29, 1904, at a salary of $1,200," a request to charge that, if plaintiff entered defendant's employ on May 29, 1893, under a distinct agreement that the hiring was for one year, there was a presumption, in the absence of evidence to the contrary, that the plaintiff and

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defendant agreed to a continuation for another year, was properly refused.

2. MASTER AND SERVANT—TERM OF EMPLOYMENT—EVIDENCE.

In an action for wrongful discharge under a contract of employment at a certain salary, evidence that plaintiff's salary was increased from time to time, usually on the first of January of each year, and that the last increase began on January 1, 1902, plaintiff's receipts of his monthly salary, signed by him in defendant's book, with knowledge that the same contained an entry to the effect that plaintiff's compensation was to be "at the rate" of $1,200 per annum, by order of the executive committee, constituted an acknowledgment of what constituted the contract from that date, and precluded any implication of a renewal of contract under which plaintiff entered defendant's employ on May 29, 1893, for a term of one year, arising from the fact that after the expiration of a year plaintiff continued in defendant's employ.

3. SAME—HIRING AT WILL—WHAT CONSTITUTES.

A hiring at so much a year, no time being specified, is a hiring at will.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 9.]

4. SAME—TERMINATION—RIGHTS OF PARTIES.

A hiring at will may be terminated at any time by either party.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 19.]

Appeal from City Court of New York, Trial Term.

Action by William E. Summers against the Phenix Insurance Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Argued before SCOTT, P. J., and O'GORMAN and NEWBURGER, JJ.

Job E. Hedges, for appellant.

Fred L. Ingraham, for respondent.

O'GORMAN, J. Action for wrongful discharge under an allegation of "employment for one year from May 29, 1904, at a salary of $1,200." Concededly, there was no express agreement of employment on this date. Plaintiff's theory is that, as he entered the defendant's employ on May 29, 1893, under a distinct agreement that the hiring was for one year, there was a presumption, in the absence of evidence to the contrary, "that the plaintiff and defendant agreed to a continuation for another year," and the ruling complained of by the plaintiff was the court's refusal to so instruct the jury. This rule of law has no application to the facts in this case. The request called for a finding, not as to the alleged implied contract sued upon (that of May 29, 1904) for the succeeding year, but to an alleged contract for one year from May 29, 1894. Moreover, there was "evidence to the contrary." His salary was increased from time to time, not on May 29th of any year, but usually on the 1st of January, which is quite inconsistent with the plaintiff's contention that on the 29th of May of each year there arose a new agreement for another year upon the same terms. His last increase, which was to $1,200, began on January 1, 1902, and thereafter plaintiff's receipts of his monthly salary were signed by him in a book in the defendant's office, which, as plaintiff knew, contained an entry to the effect that plaintiff's compensation was to be "at the rate" of $1,200 per annum, by order of the executive committee. This acknowledgment

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of what constituted the contract of the parties from January 1, 1902, supersedes the previous arrangement, and makes the request of the plaintiff as to the implication of a renewal of the original employment wholly immaterial. A hiring at so much a year, no time being specified, is an indefinite hiring, and such a hiring is a hiring at will, and may be terminated at any time by either party. Martin v. N. Y. Life Ins. Co., 148 N. Y. 117, 42 N. E. 416.

Judgment affirmed, with costs. All concur.

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## KAPLAN et al. v. METROPOLITAN EXPRESS CO.

(Supreme Court, Appellate Term. March 26, 1906.)

CARRIERS—LOSS OF GOODS—ACTION—PLEADING—AMENDMENT.

In an action against an express company for failure to deliver merchandise to defendant, where defendant offered no evidence, and plaintiffs introduced a receipt which contained no provision requiring notice of loss to be given within 60 days, an amendment to the answer, alleging plaintiffs' failure to notify defendant of the loss, was properly denied.

Scott, P. J., dissenting.

Appeal from Municipal Court, Borough of Manhattan, Tenth District.

Action by Joseph D. Kaplan and others against the Metropolitan Express Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Argued before SCOTT, P. J., and O'GORMAN and NEWBURGER, JJ.

Arthur K. Wing, for appellant.

Kahn & Tolleris, for respondents.

O'GORMAN, J. The plaintiffs delivered merchandise of the value of $49.75 to the defendant for delivery to one Mendelson, in Yonkers. Mendelson testified that he never received the goods. The defendant offered no evidence. The defendant claims the evidence does not show nondelivery, and that the court erred in not allowing an amendment to the answer alleging plaintiffs' failure to notify defendant of the loss within 60 days.

Neither contention is well founded. The defendant's printed receipts contained certain provisions which constitute a contract between the parties, and, among other things, required notice of loss within 60 days; but in the particular receipt in evidence the 60-day provision is lacking. A portion of the printed part is torn, and this doubtless embraced the reference to 60 days. Plaintiffs were not required under the receipt which they held to give notice of their loss within 60 days, or any other definite period; but, even if the contract were as claimed by defendant, it is not clear that substantial justice would be promoted by the amendment, and therefore the court was not bound to allow it.

Judgment affirmed, with costs.

NEWBURGER, J., concurs.

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SCOTT, P. J. (dissenting). I dissent. The plaintiffs waited two years before bringing their action, and then offered but slight evidence of nondelivery. The amendment should have been allowed, especially as the plaintiffs did not object.

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## GORDON v. STERN.

(Supreme Court, Appellate Term. March 26, 1906.)

CONTRACTS—CONSTRUCTION—ASSIGNMENT OF CONTRACT TO PURCHASE.

Under the assignment of a contract for purchase of land, providing that, if the title proves unsatisfactory to C. (selected to examine said title), the $500 paid by the assignee to the assignor shall be returned, and that the sale is subject to the assignee assuming the expense for searching, amounting to $144, the obligation of the assignee as regards the $144 is not to pay the assignor anything, but to pay the bill of C. for searching the title.

Appeal from Municipal Court, Borough of Manhattan, Fourth District.

Action by Milton J. Gordon against Zielli Stern. From a judgment for plaintiff, defendant appeals. Reversed.

Argued before SCOTT, P. J., and O'GORMAN and NEWBURGER, JJ.

William Bondy, for appellant.

Milton J. Gordon, in pro. per.

PER CURIAM. One Nachtigall, plaintiff's assignor, assigned to one Solomon Stern a contract for the sale of real estate, which assignment provided: "In the event of the said title to said premises is unmarketable or not satisfactory to the United States Title Guaranty & Indemnity Company, selected to examine the said title," the $500 paid by said Solomon Stern to said Nachtigall should be returned. It also provided: "The above-mentioned sale is subject to Mr. Solomon Stern assuming the expense incurred for searching, surveying, etc., amounting to $144." The title was closed in due course, and the plaintiff sued to recover the $144, upon the theory that this amount was to be paid to Nachtigall or his assignee. A judgment has been rendered in favor of the plaintiff, but an examination of the record fails to disclose any evidence to sustain it. No contractual obligation whatever existed between the plaintiff's assignor and the defendant. Solomon Stern, and not Zielli Stern, undertook to pay the expense for searching the title. Plaintiff claims that Solomon Stern was the agent for the defendant in this transaction, but the evidence is altogether to the contrary. The obligation assumed by Solomon Stern in taking an assignment of the contract was, in substance, that he would pay the bill of the title company named, and that he did pay the $144 to the title company on the closing day is not disputed. On this evidence, the defendant was entitled to succeed.

Judgment reversed, and new trial ordered, with costs to appellant to abide the event.

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## SCHELLER v. SILBERMINTZ.

(Supreme Court, Appellate Term. March 26, 1906.)

1. MUNICIPAL CORPORATIONS—USE OF STREETS—NEGLIGENCE—PRESUMPTION.
Where an owner of a building in process of erection caused a temporary shed to be built over the sidewalk, in accordance with his building permit, the falling of the roof of the shed, causing an injury to a person on the sidewalk, raised a presumption of negligence of the owner.

2. SAME—INDEPENDENT CONTRACTOR.
The duty of an owner of a building to use reasonable care in erecting and maintaining a reasonably safe temporary shed over the sidewalk, in compliance with the requirements of a building permit, cannot be evaded by the employment of an independent contractor.

3. SAME.
Where the roof of a temporary shed over a sidewalk fell after its completion, not while it was being constructed, the principle of delegating work to an independent contractor has no application.

4. MASTER AND SERVANT—TORTS OF SERVANT—LIABILITY OF MASTER.
Where a husband acted as agent or manager for his wife, he is liable with her to third persons only for actual misfeasance or tort, and not for mere neglect; the remedy in that case being against her alone.

Action by Beckie Scheller against Abraham Silbermintz. From judgment in favor of defendant, plaintiff appeals. Reversed.

Argued before SCOTT, P. J., and O'GORMAN and NEWBURGER, JJ.

Morris Meyers, for appellant.

Edwin A. Jones and Saul Bernstein, for respondent.

O'GORMAN, J. The defendant was the owner of a building in process of construction, and caused a temporary roof or shed to be erected over the sidewalk in front thereof, pursuant to the provisions of a permit duly obtained from the municipal authorities. The sidewalk was a temporary structure, and consisted of a number of boards covering the excavation beneath. Some months after its erection the roof suddenly collapsed, and parts thereof fell upon and injured the plaintiff, who at the time was walking upon the sidewalk. The happening of the accident raised a presumption of negligence against the defendant. Stewart v. Ferguson, 164 N. Y. 553, 58 N. E. 662. The defendant sought to rebut the presumption by evidence that the structure became insecure in consequence of an unauthorized excavation, made by an independent contractor, close to one of the timbers which supported the shed. This evidence was sharply disputed, and presented a question of fact for the jury. It was the defendant's duty to employ reasonable care to erect and maintain a reasonably safe structure over this sidewalk, and liability for a defective structure cannot be evaded by the mere employment of an independent contractor to construct it. Deming v. Terminal Ry., 169 N. Y. 1, 61 N. E. 983, 88 Am. St. Rep. 521; Coolidge v. City, 99 App. Div. 175, 90 N. Y. Supp. 1078; Murphy v. Perlstein, 73 App. Div. 256, 76 N. Y. Supp. 657; Mullins v. Siegel Cooper (Sup.) 88 N. Y. Supp. 737. The accident did not occur while the contractor was constructing the shed, and the principle of delegating work to an independent contractor has therefore no application. The shed was under

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the control, ownership, and supervision of the defendant, and, as said in Weber v. Buffalo Ry. Co., 20 App. Div. 292, 47 N. Y. Supp. 7:

"When defendant assumed the duties imposed by the permit, it made itself liable for all injuries resulting from its nonperformance or insufficient performance. The company could not relieve itself from the obligation imposed by its covenant with the state by contracting with another to fulfill it. It was an imperative duty required by the permit, and the company was not absolved from its duty and responsibility because it employed a contractor to do the work."

The complaint was properly dismissed as to the defendant's husband. As agent or manager for his wife, he owes no duty to the plaintiff, and unless a servant is guilty of actual misfeasance or tort he cannot be held liable with his master. If he neglects a duty which his master owes to third persons, the remedy is against the master alone. 20 Am. & Eng. Ency. 52. But the direction of a verdict in favor of the defendant was clearly error, requiring a new trial.

Judgment reversed, and new trial ordered, with costs to the appellant to abide the event. All concur.

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## CAMPBELL v. CONNABLE.

(Supreme Court, Appellate Term. March 26, 1906.)

USURY—PAROL EVIDENCE.

That a contract is in writing does not exclude parol evidence that it is but a cloak for a usurious transaction.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 1872, 2029; vol. 47, Cent. Dig. Usury, § 326.]

Appeal from Municipal Court, Borough of Manhattan, Ninth District.

Action by Arthur K. Campbell against Arthur W. Connable. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Argued before SCOTT, P. J., and O'GORMAN and NEWBURGER, JJ.

John Brooks Leavitt (Stuart G. Gibboney, of counsel), for appellant.

S. C. Sugarman, for respondent.

O'GORMAN, J. This action is brought to recover usurious interest paid by plaintiff to the defendant, and at the close of the plaintiff's case the complaint was dismissed, on the ground, as stated by the learned justice, that it appeared from certain exhibits in the case that the transactions were not loans, but purchases and assignments of salary to become due. But these exhibits did not conclude the plaintiff, and the circumstance that a contract is in writing does not exclude parol evidence that the written instrument is but a cloak for a usurious transaction. Knickerbocker Life v. Nelson, 78 N. Y. 149. Plaintiff testified to usurious exactions, which, undisputed, would support a judgment in his favor. The dismissal was improper.

Judgment reversed, and new trial granted, with costs to the appellant to abide the event. All concur.

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## CAMBRIDGE SOCIETY v. ELLIOT.

(Supreme Court, Appellate Term. March 26, 1906.)

SALES—CONDITIONAL SALES—CANCELLATION OF CONTRACT BY BUYER—REMEDY OF SELLER.

Where a buyer of personalty, under a contract providing for payment in installments and for the retention of title in the seller until the last installment is paid, cancels the contract, and refuses to accept the goods when tendered, the seller may recover the contract price.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 1436.]

Appeal from Municipal Court, Borough of Manhattan, Sixth District.

Action by the Cambridge Society against Walter M. Elliot. From a judgment for plaintiff, defendant appeals. Affirmed.

Argued before SCOTT, P. J., and O'GORMAN and NEWBURGER, JJ.

Henry S. Hooker, for appellant.

Musgrave & Warner, for respondent.

O'GORMAN, J. The defendant agreed to buy a book at a stipulated price, to be paid in installments, the title to remain in the vendor until the payment of the last installment. The following day the defendant in writing canceled the order, and refused to accept the book when the same was tendered. This action was brought to recover the contract price, and the judgment for the plaintiff is criticised on the ground that, the title not having been transferred to the buyer, the seller's sole remedy is an action for damages representing the difference between the contract price and the market value. National Cash Register Co. v. Schmidt, 48 App. Div. 473, 62 N. Y. Supp. 952, is cited as an authority in support of this proposition. But this court in Ideal Cash Register Co. v. Zunino, 39 Misc. Rep. 311, 79 N. Y. Supp. 504, held in a similar case that an action might be brought for the contract price, and the Appellate Division in the Third Department, in Gray v. Booth, 64 App. Div. 231, 71 N. Y. Supp. 1015, reached the same conclusion, and refused to follow National Cash Register Co. v. Schmidt, supra.

The judgment should be affirmed, with costs. All concur.

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## BODINE v. WHITE.

(Supreme Court, Appellate Term. March 26, 1906.)

PLEADING—GENERAL DENIAL—SUFFICIENCY.

Where a general denial in an answer, though carelessly and inartificially drawn, indicates with sufficient clearness the pleader's intention to put all the allegations of the complaint in issue, it is in compliance with Code Civ. Proc. § 500, requiring a denial of each material allegation of the complaint controverted by the defendant.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, §§ 244, 255.]

Appeal from City Court of New York, Trial Term.

Action by Dorothy K. Bodine against Frederick R. White. From a

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judgment in favor of plaintiff, and from an order denying a new trial, defendant appeals. Reversed.

Argued before SCOTT, P. J., and O'GORMAN and NEWBURGER, JJ.

Warren, Warren & O'Beirne (L. E. Warren, of counsel), for appellant.

Daniel O'Reilly and K. Henry Rosenberg, for respondent.

SCOTT, P. J. The purpose of denials in an answer is to advise the plaintiff just what allegations of the complaint are intended to be put in issue. In matters of form the pleading must be literally construed, so as to carry into effect the intent of the pleader. The general denial, sought to be set up in the first paragraph of the answer in this case, although carelessly and inartifically drawn, indicates with sufficient clearness the pleader's intention to put all the allegations of the complaint in issue, and is therefore a compliance with section 500 of the Code.

Judgment reversed, and new trial granted, with costs to appellant to abide the event. All concur.

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## MOORE v. BLAKE.

(Supreme Court, Appellate Term. March 26, 1906.)

APPEARANCE—SPECIAL APPEARANCE—NOTICE.

**Where defendant did not intend to appear generally, and plaintiff was not led to believe that the appearance was general, the notice of appearance will be regarded as notice of a special appearance.**

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appearance, §§ 42–52.]

Appeal from City Court of New York, Special Term.

Action by Clifford C. Moore against George H. Blake. From an order setting aside the service of summons, plaintiff appeals. Reversed.

Argued before SCOTT, P. J., and O'GORMAN and NEWBURGER, JJ.

Warren, Warren & O'Beirne (L. E. Warren, of counsel), for appellant.

James J. Lewis, for respondent.

PER CURIAM. The defendant's practice has, to say the least, been inartistic. He omitted the venue upon his affidavits, and he so framed his notice of appearance as to raise a serious question whether it should not be treated as a general appearance. Although the question is a close one, we think that the notice may properly be regarded as special rather than general. It is clear that defendant did not intend to appear generally, and it does not appear that the plaintiff was in any wise misled as to the nature of the appearance. The proof of defendant's nonresidence was, however, wholly insufficient, and would not be accepted in any case in which it might be necessary to prove non-

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residence as the basis for an order of publication or a provisional remedy. If the defendant really is a nonresident, as he very probably is, it should have been easy to get satisfactory evidence of that fact. A little time might be required, but that could readily have been obtained on proper application to the court below.

For this defect in the moving papers the order must be reversed, with $10 costs and disbursements, and the motion denied, with $10 costs. In order, however, that the defendant may not suffer, leave will be given to renew the motion in the court below upon further papers, and upon payment of the costs hereinbefore awarded to the appellant.

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## HUNTER v. METROPOLITAN EXPRESS CO.

(Supreme Court, Appellate Term. March 26, 1906.)

1. ANIMALS—INJURIES BY—ACTIONS.
   In actions for injuries sustained in consequence of a kick or bite of a vicious animal, the principles governing the ordinary negligence action have no application.
   [Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Animals, §§ 228-241, 254-268.]

2. SAME—LIABILITY OF OWNER.
   One keeping with knowledge of its vicious propensities a dangerous animal incurs a prima facie liability for any injuries caused by it.
   [Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Animals, §§ 223, 228, 268.]

3. SAME—ACTIONS—EVIDENCE—PRESUMPTION—REBUTTAL.
   The presumption that one keeping with knowledge of its dangerous propensities a dangerous animal is liable for injuries caused by it can be rebutted only by proof that the injured party, with knowledge of the animal's evil propensities, wantonly excited it, or unnecessarily put himself in the animal's way.
   [Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Animals, §§ 238-241, 262.]

Appeal from City Court of New York, Trial Term.

Action by Archibald A. Hunter against the Metropolitan Express Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before SCOTT, P. J., and O'GORMAN and NEWBURGER, JJ.

Arthur K. Wing, for appellant.

R. L. Pritchard, for respondent.

O'GORMAN, J. In actions brought to recover damages for injuries sustained in consequence of the kick or bite of a vicious animal, the principles governing the ordinary negligence action have no application. Muller v. McKesson, 73 N. Y. 195, 29 Am. Rep. 123; Lynch v. McNally, 73 N. Y. 347; Id., 7 Daly, 128; Keenan v. Gutta Percha & Rubber Mfg. Co., 46 Hun, 544, affirmed 120 N. Y. 627, 24 N. E. 1096. One who keeps a dangerous animal with knowledge of its vicious propensities incurs a prima facie liability for any injury caused by it, and this presumption or prima facie case can be rebutted only by proof that the plaintiff, with knowledge of the evil propensities of the animal,

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wantonly excited him, or voluntarily or unnecessarily put himself in the way of the animal. Cases supra. In such a case the act of the plaintiff will be deemed to be the proximate cause of his injury. The conduct imputed to the plaintiff would not bring him within this exception to the rule, but, even if the evidence in that respect justified its submission to the jury, the learned trial judge committed no error in his charge. The presumption against the defendant could be met only by credible evidence sufficiently strong to overcome the prima facie case, and this, in effect, is what the learned trial judge said to the jury. The allegations of contributory negligence which appear in the complaint were wholly unnecessary. They may be disregarded and treated as surplusage. The case was fairly submitted to the jury. The verdict is sustained, and should not be disturbed.

Judgment affirmed, with costs. All concur.

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## FRIEDMAN et al. v. SCHREIBER.

(Supreme Court, Appellate Term. March 26, 1906.)

REPLEVIN—PARTIES—RIGHT TO INTERVENE.

Under Code Civ. Proc. § 452, providing that the court may determine the controversy as between the parties before it where it can do so without prejudice to the right of others, but, where a complete determination thereof cannot be had without the presence of others, the court must direct them to be brought in, and where a person not a party to the action has an interest in the subject thereof, and makes application to the court to be made a party, it must direct him to be brought in, one who, in an action to replevin a machine, shows that plaintiffs delivered it to him to make repairs, and that after making repairs of a certain value he turned the machine over to defendant, with instructions to finish the repairs, and deliver the machines to plaintiffs on payment of the entire bill for repairs, for which such person claims a lien, disregarding which claim plaintiffs brought the action, shows a right to be made a party defendant.

Appeal from City Court of New York, Special Term.

Action by Harry P. Friedman and another against William Schreiber. From an order denying the application of defendant and another that such other person be brought in as a defendant, defendant appeals. Reversed.

Argued before SCOTT, P. J., and O'GORMAN and NEWBURGER, JJ.

Jones & McCormick, for appellant.

Herman Gottlieb, for respondents.

O'GORMAN, J. This is an appeal from an order denying the joint application of the defendant and one Sanford that he be brought in as a party defendant. It appears from the moving papers that the plaintiffs delivered to Sanford their automobile for the purpose of having him make certain repairs thereon; that Sanford thereupon made repairs of the reasonable value of $127.30; that he then turned over the car to the defendant, with instructions to finish the repairs and deliver the automobile to the plaintiffs upon payment of the entire bill for repairs and labor, amounting in all to $202.30, for which Sanford claims a lien;

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that the plaintiffs disregarded the claim, and replevied the machine in this action, making Schreiber only a party defendant. Sanford, asserting a lien upon the car for his work and labor, has an interest which may be seriously prejudiced, if not destroyed, unless he may intervene in this action. We think he brings himself clearly within section 452 of the Code, and in our opinion it was error to deny his application. Rosenberg v. Solomon, 144 N. Y. 92, 38 N. E. 982; Bauer v. Dewey, 166 N. Y. 402, 60 N. E. 30; Uhlfelder v. Tamsen, 15 App. Div. 436, 44 N. Y. Supp. 484.

Order reversed, with $10 costs and disbursements, and motion granted, with $10 costs to abide the event. All concur.

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## SEDDON et al. v. TAGLIABUE.

(Supreme Court, Appellate Term. March 26, 1906.)

TRIAL—REQUEST TO DIRECT VERDICT—EFFECT—SUBMISSION TO JURY.

A previous request to direct a verdict does not preclude a party from requesting to have the case submitted to the jury.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 399.]

Appeal from City Court of New York, Trial Term.

Action by Louis E. Seddon and another against Charles J. Tagliabue. Judgment for defendant, and plaintiffs appeal. Reversed.

Argued before SCOTT, P. J., and O'GORMAN and NEWBURGER, JJ.

Einstein, Townsend & Guiterman (Jos. J. Cunningham, of counsel), for appellants.

Kenneson, Emily & Rubino (Thaddeus D. Kenneson, of counsel), for respondent.

O'GORMAN, J. The plaintiffs are fire adjusters, and sue to recover for breach of contract. The plaintiffs claim that they were employed by the defendant to adjust a fire loss upon an agreed compensation, that they accepted the employment, and that upon the following day the defendant attempted to cancel the agreement. The material features of the plaintiffs' testimony are contradicted, but, giving the plaintiffs the benefit of the most favorable inferences deducible from the evidence, the case presented a clear question of fact, which should have been submitted to the jury. This was the impression of the learned trial justice at the close of the trial, but, as each of the parties moved for a direction, the court held that the plaintiffs waived their right to go to the jury, notwithstanding their request so to do, on the intimation of the trial justice that he would direct a verdict for the defendant. This was error. It is well settled that a previous request to direct a verdict does not preclude a party from requesting to have the case submitted to the jury. Second Nat. Bank v. Weston, 161 N. Y. 528, 55 N. E. 1080, 76 Am. St. Rep. 283. As said in the case cited:

"No question was raised by the court or by the counsel for the defendants as to what particular question of fact the plaintiff desired to have the jury

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pass upon, and the request as made was to have them pass upon the whole case. Under such circumstances, it was not necessary to name a particular question of fact any more than when a motion to nonsuit is granted."

Judgment reversed, and a new trial granted, with costs to the appellants to abide the event. All concur.

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## BRADY v. POWERS et al.

(Supreme Court, Appellate Division First Department. April 6, 1906.)

1. PARTNERSHIP—CREATION—CONTRACT—NONCOMPLIANCE—WAIVER.

Partners in a firm engaged in giving indoor bicycle races entered into an agreement with a third person whereby he should become a partner in consideration of his paying $2,000, and whereby he should have a one-fourth interest in the venture. The third person did not pay the $2,000 to the partnership, but it was subtracted from his share of the proceeds of the next meet after the agreement. *Held*, that the third person's failure to pay the money was waived by the partners.

2. SAME—ACTIONS FOR DISSOLUTION—DEFENSES—EVIDENCE.

Evidence in a suit for the dissolution of a partnership engaged in the giving of bicycle races examined, and *held* to support a finding that the money received by plaintiff in consideration of his settlement of a prior suit against the defendants and another, in which he asked for an accounting for his share in a firm engaged in giving pugilistic exhibitions, was not received in settlement of his claim in the profits of the firm engaged in giving bicycle races, and the receipt of the money did not constitute a bar to the suit.

3. SAME—PARTNERSHIP AT WILL—DISSOLUTION.

The sole business of a partnership consisted in giving an annual bicycle race. It had no working capital and no assets save the right to lease a place for the holding of the race. The partners entered into the partnership under an oral agreement. *Held* that, in order to effect a dissolution of the partnership, which was one at will, there must be either a mutual agreement to dissolve, or notice by a partner desiring a dissolution to his copartner of his election to terminate the partnership.

4. SAME.

The bringing of an action for the dissolution of a partnership and for an accounting does not constitute an election on the part of plaintiff to exercise his right to dissolve the partnership, which was one at will, where in his complaint he expressly considered the partnership as existing.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Partnership, § 768.]

5. SAME.

In a suit for the dissolution of a partnership and for an accounting, defendants answered that there was no "partnership now existing between the plaintiff and the defendants, * * * and that every and all business relations heretofore existing * * * have terminated." *Held*, that the answer constituted a notice that defendants desired to exercise their right to dissolve the partnership.

6. SAME.

The sole business of a partnership consisted in giving an annual bicycle race. It had no assets save the right to lease a place for the holding of the race. The agreement for the partnership was oral, and it continued during the will of the partners. There was nothing to show that two of the partners leased the place for the races before service on their copartner of their election to terminate the partnership. *Held*, that the fact that the partners continued to give the races in the same place did not prevent their terminating the partnership, and they were not required to account to the copartner for the profits made from the business after the service of the notice of dissolution.

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7. SAME—DIVISION OF PROFITS.

The business of a partnership consisted in giving bicycle races. It had no assets save the right to lease a place for the holding of the race. It did not appear that any amount of the proceeds of the race of one year was carried over as capital for the next year. Privileges were sold, and from the moneys thus received and on the credit of the enterprise the preliminary arrangements for each annual race were met, and the box receipts were the source to which all looked for compensation. The agreement for the partnership was oral, and the same might be terminated at will. After the meet for 1900, two of the partners served a notice of dissolution on their copartner. The partners continued the business for the years 1901 and 1902. *Held*, that the copartner was not entitled to his share of the profits made during the years 1901 and 1902; there being nothing to show that the proceeds of the race of 1900 were used for the business during the subsequent years.

Action by William A. Brady against Patrick T. Powers and another. From an interlocutory judgment dissolving a partnership and ordering an accounting, and from an order confirming the report of a referee, and from a final judgment thereon, and from an order denying a motion for leave to file and serve nunc pro tunc amended and supplemental exceptions (94 N. Y. S. 259), defendants appeal. Modified.

Argued before O'BRIEN, P. J., and INGRAHAM, LAUGHLIN, CLARKE, and HOUGHTON, JJ.

James A. Allen, for appellants.

Dittenhoefer, Gerber & James (David Gerber, of counsel), for respondents.

CLARKE, J. This action was brought for the dissolution of a partnership and an accounting. The partnership related to the giving of bicycle exhibitions or races. In May, 1897, the plaintiff and the defendants entered into an oral partnership arrangement to give bicycle exhibitions, each of the four parties to receive one-fourth of the profits, and share the losses in the same proportion. At that time the exhibitions contemplated were "outdoor" exhibitions. In August, 1897, it was agreed that the plaintiff should have an interest in indoor racing. Prior to that, Powers, Kennedy, and Batchelder had been holding these indoor races, and the plaintiff asked to be allowed to come in. After some opposition and considerable discussion, it was agreed that Brady, in consideration of his paying $2,000, should have a 25 per cent. interest in indoor bicycle racing at Madison Square Garden. Brady did not pay this money to the partnership, but it was subtracted from his share of the proceeds of the next meet after the agreement. That fact establishes a waiver of any defense which his partners might have had of his claim to an interest in indoor racing on account of his failure to pay this money. Exhibitions were given in Madison Square Garden in 1897 and 1898. Settlements for these years had been had between the parties. No settlement having been had after the exhibitions of 1899 and 1900, this action was commenced on the 18th of January, 1901. The defendants denied the continued existence of the partnership. The learned justice who tried the case said in his opinion on granting the interlocutory judgment:

"The partnership interest of the plaintiff up to a specified time is conceded. The acts of the parties satisfy me that the partnership was not dissolved, but was continued, and is still in existence."

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The case having been tried before the amendment to the Code which required separate findings of fact and conclusions of law, we have not had the assistance of such findings, and have been compelled to examine with minute care all of this voluminous record on this appeal; and, having done so, we find the conclusion that the partnership had not been dissolved up to the time of the commencement of the action fully supported by the evidence. As to the existence and continuance of the partnership relation to October, 1900, there is no longer any pretense of dispute. Powers, one of the defendants, testified that the termination of plaintiff's interest was in October, 1900 (the settlement of the Twentieth Century Athletic Club suit), and that he would have no objection to a judgment in favor of the plaintiff, and directing an accounting down to that time. Kennedy, the other defendant, testified that they had a general settlement in October, 1900, and everything ended then; so that there was no question but there was a partnership, created by oral agreement, without time limitation, under which indoor bicycle races were to be conducted at the Madison Square Garden in the city of New York, and that such races were so conducted in the winter of 1897, 1898, and 1899. The defendants claim, however, that before the race meeting in December, 1900, this partnership was terminated and all matters settled in October, 1900. If so, there should be no accounting after 1899. These men were all engaged in many and various ventures, sometimes together and often apart. They were in no sense general partners. They joined in special ventures. The plaintiff in the case at bar had brought suit against the Twentieth Century Athletic Club and Powers and Kennedy, claiming that he was a partner in that enterprise, and by injunction had tied up a considerable amount of money. That venture was for the purpose of giving pugilistic exhibitions, and was in no way connected with bicycling. That suit was discontinued, and plaintiff received $1,058. Defendants claim that the $1,058 represented moneys which plaintiff claimed to be due him growing out of bicycling matters, and that the payment thereof settled all of their affairs and terminated all of their arrangements. No release was executed or delivered; no writing passed. The plaintiff testifies that, for reasons advanced by a friend whose name did not appear in the case, he was induced to settle the Twentieth Century Athletic Club suit, and release the money, but said that defendants ought to pay him back cerain sums he had advanced; that he gave them a paper showing his claims against them. That paper reads:

**"Advanced P. T. Powers and J. C. Kennedy $600 to bring bicycle riders here last year. An accounting of last 6-day race which I have never received. $258 adv. Kennedy on his note, which I hold, to send Hawkins to Cala. $200 advanced Kennedy on his note last May before leaving for Europe."**

—But that that settlement was solely in regard to the Twentieth Century Club suit, in no way involved bicycling matters, except as to the sums advanced, and that the paper itself shows he was claiming an accounting of the last six-day race, which he had never received.

There was evidence to sustain and require the Special Term's conclusion that "the settlement pleaded in bar has no bearing on the present issues, but related to transactions entirely foreign to the matters litigated." The testimony of plaintiff and Kennedy is in direct contra-

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diction as to the conversation had at the time of settlement, and the witness Sullivan, called by defendants in corroboration, must be dismissed from consideration, as the story told by him is simply impossible, as he narrates a conversation about events which did not occur until over two months after the date of the alleged conversation. In addition, however, the conduct of the parties is utterly at variance with the fact of any such settlement as claimed by the defendants. The defendants furnished the plaintiff statements of box office receipts each night of the meet, and subsequent thereto made statements and appointments in regard to an accounting which are consistent only with a continuance of the partnership. Their testimony upon the stand was so often contradicted by their previous affidavits and by written papers as to leave their evidence unreliable, and to warrant the court which heard and saw them in resolving doubtful questions of fact against them.

The interlocutory judgment declaring a partnership and providing for an accounting was required by the evidence; but I am of the opinion that it went too far. The suit was instituted on the 18th of January, 1901, after the race meet of December, 1900. The interlocutory judgment was not entered until the 25th day of April, 1903. In the meantime the race meets of 1901 and 1902 had been held. The interlocutory judgment provided that the accounting should be had "for the year 1899, and thereafter to the time of the entry of this judgment." The referee, in accordance with the interlocutory judgment, carried the accounting down through the year 1902. I think that the defendants are not liable to account to the plaintiff for the proceeds of the races of 1901 and 1902. At the time of the commencement of this action, the sole business of the partnership consisted in giving a six-day bicycle race in Madison Square Garden once a year. A peculiarity of this partnership is that it had no working capital, it had no particular assets of any kind, save the right to lease Madison Square Garden for a six-day race, which plaintiff testifies was reserved to them by the managers of the garden because they had first conceived the idea of giving these races. In order to effect a dissolution of this partnership at will, there must have been a mutual agreement to dissolve, or there must have been notice by a party desiring a dissolution to his copartners "of his election to terminate the partnership, or his election must be manifested by unequivocal acts or circumstances brought to the knowledge of the other party which signify the will of the former that the partnership be dissolved." Spears v. Willis, 151 N. Y. 449, 45 N. E. 849. Up to the time of the bringing of this action, as the court below found, there had been no agreement to dissolve, and no notice by one of the partners to the others that he exercised his power of dissolving the partnership. The only facts before the court (other than those which preceded the bringing of this action) which have any bearing on the question of the dissolution of the partnership are that plaintiff has brought an action for an accounting, and served his complaint on the defendants, his copartners, and that they have served their answers upon him, in which they deny their liability to account.

It is undoubtedly the rule, as contended by the appellant, that the bringing of an action by one partner against his copartners for an ac-

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counting does not necessarily constitute an election on his part to dissolve the partnership (Sanger v. French, 157 N. Y. 234, 51 N. E. 979); and I do not consider the bringing of this action an election on the part of the plaintiff to exercise his right to dissolve the partnership, for in his complaint he expressly considers the partnership as existing, and asks that it be dissolved by the court, rather than proclaiming its dissolution by his own act.

There is in the answers of the defendants, Powers and Kennedy, who at the time of the commencement of this action were the only partners of the plaintiff, this statement:

"There is no partnership now existing between the plaintiff herein and the defendants in this action, and that every and all business relations heretofore existing between the plaintiff and these defendants have terminated and ceased to exist, and do not now exist, and have not existed at the commencement of this action."

It seems to me that, although the court specifically found against this contention, which was based on the alleged settlement in October, 1900, nevertheless it spoke as of the time when served, so far as the future relations of these parties were concerned, and that this is an unequivocal notice on the part of the defendants, Powers and Kennedy, that they elect to terminate the partnership. It is true that they do not say in so many words "We elect to terminate the partnership," but there can be no possible doubt of their intention that the partnership be considered dissolved, within the rule of Spears v. Willis, supra.

Respondent contends that, even if the appellants have given sufficient notice to him of their intention to terminate the partnership, yet the partnership does not terminate until the appellants cease to carry on these races; that they can only terminate the partnership with a view to winding up its affairs; that since the defendants, Powers and Kennedy, have continued to give these races in the same place, they have appropriated the good will of the business, "which in and of itself required the wrongdoers to account for the protfis made from that business thus continued." In support of this contention respondent cites Mitchell v. Reed, 61 N. Y. 123, 19 Am. Rep. 252, and Struthers v. Pearce, 51 N. Y. 357, where it was held that where, during the existence of a continuing copartnership, one or more of the partners, without the knowledge of the others, obtained a lease in their own name of premises leased and used by the firm, the same becomes partnership property, and upon dissolution it must be treated as a partnership asset, and each partner is entitled to his portion of its value. These cases are not authorities which can govern this case, for the reason that it does not appear that the lease of the garden for the races of 1901 and 1902 were taken by the respondents before the service of their answers in this case which terminated the partnership. From all that appears, a lease was never taken for a longer period than the time of the annual race, and the lease was renewed each year. Again, the cases are only authority for the point that the offending partners are liable to account for the value of the new lease, and not that they are liable to account to the other partners for a proportionate share of the profits of the business, the same as if the partnership had not been dissolved. Respondent cites, also, the case of Slater v. Slater, 175 N. Y. 143, 67 N. E. 224, 61



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L. R. A. 796, 96 Am. St. Rep. 605, which holds that, where a partnership has been dissolved by the death of one of its members, the firm name and good will are assets of the partnership, which must be accounted for to the representative of the deceased partner. That case is only an authority for the point that firm name and good will are partnership assets; not for respondent's main proposition.

Respondent claims that, since appellants have retained the proceeds of the race of 1900, and whatever profits were made in 1901 and 1902 were made out of the cash assets of the partnership so retained, he is entitled to his share of the proceeds of the investment of those assets. This would be true if it had been shown that appellants did in fact use the proceeds of the race of 1900 to carry on the races of 1901 and 1902, but this nowhere appears, and therefore respondent's claim fails, as the cases cited by him show. It does not appear that there was ever any amount carried over upon which, as capital, the business of the next meet was started. Privileges of various kinds were sold, and from the moneys thus received and on the credit of the enterprise the preliminary arrangements were met; the box receipts being the source to which all looked for compensation. The business being of this ephemeral character, no capital being embarked or employed, it seems to me that upon no principle of equity can the plaintiff rightly share in the profits of the two years in which he confessedly took no part in the business, in which the only money of his which by any hypothesis could be considered as embarked in the transaction was the unascertained share of the profits theretofore made, and after his complaint he had asked a dissolution, and by the answer the defendants had notified him of a dissolution on their part of this partnership at will.

It seems to me, therefore, that the interlocutory judgment should be modified by striking out the provisions for an accounting, "and thereafter to the time of the entry of this judgment," and inserting in lieu thereof, after the words "for the year 1899," the words "and 1900," and that the order confirming the referee's report and the final judgment should be modified by confining the same to a confirmation of the report so far as it states the account for the years 1899 and 1900, and that judgment be directed in favor of the plaintiff for $1,220.38 for 1899 and $4,864.97 for 1900, with interest thereon, and, as so modified, affirmed, without costs to any party. All concur.

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## PEABODY et al. v. LONG ACRE SQUARE BLDG. CO.

(Supreme Court, Appellate Division, First Department. April 6, 1906.)

1. LANDLORD AND TENANT—SUMMARY PROCEEDINGS—JURISDICTION—PETITION—SUFFICIENCY.

In summary proceedings to recover possession of real property, a petition alleging that three days' notice in writing, requiring, in the alternative, the payment of rent or possession of the premises and the payment of the taxes or the possession of such premises, was served on behalf of plaintiffs (lessors) on defendant (lessee), and that the service was made by delivering to and leaving with one ————, the treasurer of defendant company, personally, a true copy of the notice, a copy of the certificate of the person serving the notice, and stating that the original

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notice was shown to such treasurer at the time service was made, being annexed to the petition, was sufficient to confer jurisdiction of the proceedings on the Municipal Court.

2. APPEARANCE—OBJECTIONS TO JURISDICTION—WAIVER.
Where a trial in summary proceedings to recover possession of real property proceeded without objection being made by defendant to the jurisdiction of the court because of plaintiff's failure to serve sufficient notice requiring the payment of the rent or the surrender of the premises, such objection was waived.

3. APPEAL—RESERVATION OF OBJECTIONS—JURISDICTION.
Where the court is without jurisdiction of the subject-matter of the proceeding, the objection to jurisdiction may be taken on appeal in the first instance, or at any time.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 1166.]

4. LANDLORD AND TENANT—SUMMARY PROCEEDINGS TO RECOVER POSSESSION—NOTICE OF DEMAND FOR RENT—SERVICE—SUFFICIENCY OF EVIDENCE.
Where, in summary proceedings to recover possession of real property, the treasurer of defendant testified that three days' notice and demand to pay the rent and taxes or move was served on him, that was sufficient as an admission that service was properly and duly made, and it was unnecessary for plaintiffs to prove every detail of the method of service.

5. SAME.
There being no motion to dismiss the petition on the ground of noncompliance with the statute in the service of the notice, the motion made being for dismissal of the petition on the ground that no demand was shown for rent or for taxes, such proof, under the circumstances, was sufficient.

6. SAME—FINAL ORDER OF DISPOSSESSION.
Under Code Civ. Proc. § 2247, providing that the issues joined by the petition and answer in summary proceedings to recover possession of real property must be tried by the judge or justice, where defendants, the lessees of the property involved in such proceeding, did not pay the taxes as required by their lease until after joinder of the issue, and the fact of such payment was not set up in their answer, or in any way communicated to plaintiff, there was sufficient foundation for a final order of dispossession issued for nonpayment of such taxes.

O'Brien, P. J., dissenting.

Appeal from Municipal Court, Borough of Manhattan, Tenth District.

Action by Charles A. Peabody and others against the Long Acre Square Building Company. Appeal from determination of Appellate Term (94 N. Y. Supp. 507), affirming final order in summary proceedings. Affirmed.

The respondents instituted a summary proceeding to recover from the appellant the possession of real property, under the provisions of the Code of Civil Procedure relating to that subject. A petition was presented to a Municipal Court of the city of New York, in which was set forth, among other things, that "the trustees of Henry Astor" were the landlords of the premises described therein, and which by an agreement in writing, and on or about the 15th of October, 1902, they leased to one Milton L. Bouden as tenant for a term of 20 years from the 1st day of November, 1902, and that by the terms of the agreement Bouden undertook and promised to pay to the landlords as rent the sum of $15,200 per annum until the 1st of May, 1913, and thereafter, and during the remainder of the term, the sum of $16,340 per annum, payable in equal quarter-yearly payments on the 1st days of February, May, August, and November in each and every year of the term, and also to pay all

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and every assessment or assessments, tax and taxes, whatsoever, as well extraordinary as ordinary, which may be assessed, levied, or imposed upon the premises, or any part thereof; that thereafter, and on or about the 5th of May, 1903, Bouden assigned the lease to the Long Acre Square Building Company, a domestic corporation, which became and was at the time of the presentation of the petition the tenant of the premises, and had entered into possession and occupied the same under the terms and conditions of the agreement, and as such tenant it duly attorned to the landlords; that on the 1st of May, 1904, there was due to the landlords under and by virtue of the indenture of lease the sum of $3,800, being the rent from the 1st of February, 1904, to the 1st of May, 1904, and there also remained due and unpaid for more than 60 days after the same became due and payable the sum of $692.69 taxes for the year 1903, which had been duly imposed upon a portion of the premises. In the petition it is then set forth that at least three days' notice in writing, requiring, in the alternative, the payment of said rent or the possession of the said premises, had been served on behalf of the landlords upon the Long Acre Square Building Company, and that at least three days' notice in writing, requiring, in the alternative, the payment of the tax or possession of the premises, had also been served by the landlords upon the Long Acre Square Building Company, and that such service was made upon that company on the 12th day of May, 1904, at 3:15 o'clock p. m., by delivering to and leaving with Henry M. Work, its treasurer, personally, a true copy of such notice; that said notice in writing was annexed to the petition, together with due proof of its service, with the certificate of the city marshal serving same, which annexed notice and due proof of service was made a part of the petition. It is also set forth that default was made in the payment of the rent and taxes pursuant to the agreement under which the said premises were held, and that the Long Acre Square Building Company held over and continued in the possession of the premises without the permission of the said landlords, after default in the payment of the rent and taxes, as aforesaid. Thereupon a final order to remove the tenant and a mortgagee, who was made a party, from the possession of the premises was prayed for. The notice in writing, annexed to the petition and made part thereof, is in due form. It contains a full description of the premises, and states that there is justly due to the landlords the sum of $3,800 for one quarter's rent for the quarter ending May 1, 1904, of the premises described, and that there is due and remaining unpaid, for a period of 60 days since the same became due and payable, the sum of $692.69 for taxes for the year 1903, imposed upon a portion of the aforesaid premises; "all of which you are required to pay on or before the expiration of three days from the day of service of this notice, or surrender the possession of the said premises to the landlords, in default of which the landlords shall proceed under the statute to recover the possession thereof." On this notice there is indorsed a certificate of service of C. A. Farley, city marshal, borough of Manhattan, stating that on the 12th of May, 1904, at 3:15 in the afternoon, he served the notice on the Long Acre Square Building Company by delivering to and leaving with Henry M. Work, the treasurer of the said corporation, personally, a true copy thereof, at the same time showing him the original; that such service was made at No. 71 Broadway, in the borough of Manhattan, and that the marshal knew the person so served to be Henry M. Work, and knew him to be the treasurer of the Long Acre Square Building Company, the tenant mentioned and described in the notice. Upon the petition a justice of the Municipal Court issued a precept to the Long Acre Square Building Company and to the mortgagee, by which they were required forthwith to remove from the premises designated and described, being the same premises mentioned in the petition, or show cause before such court on the 25th day of May, 1904, why possession of the premises should not be awarded and delivered to the landlords or the petitioner. The precept was served on the 20th of May on Henry M. Work, treasurer of the building company. On the return day an answer was interposed by Joseph J. Corwin, the president of the Long Acre Square Building Company, which he describes as "his answer" to the petition, in which the allegations of the petition to the effect that the Long Acre Square Building Company was the tenant and in possession of the premises described therein, and that Charles A. Peabody and

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the trustees of the Astor estate are landlords, are admitted; and then he proceeds to state that he "has no knowledge or information sufficient to form a belief as to the rest of the allegations contained therein, and therefore denies the same." The proceeding came on for trial at the Municipal Court before a justice without a jury on the 1st day of June, 1904. Proof was given of the nonpayment of rent and of the nonpayment of taxes on a portion of the premises for the year 1903. The trial was continued on the 2d day of June, when the landlords called as a witness Henry M. Work, the treasurer of the Long Acre Square Building Company. He testified as follows: "I know that the tenant was served with the three days' notice and demand to pay the taxes and rent or move; that was on the 12th of May; that was served upon myself. I am the treasurer of the company. The company has not paid the rent; it has not paid the taxes." On cross-examination he stated that he could not say that the taxes for 1903 on a portion of the premises had not been paid, but that they had not been paid by him, and he did not know whether any one else by the corporation had paid them; but that he was the officer who would pay bills of taxes and pay the rent for the company. The Long Acre Square Building Company then called as a witness on its behalf the attorney for the company who represented it in that proceeding. He testified that on the 31st of May (which was after the proceeding was instituted and after issue joined), at the request of Joseph J. Corwin, president of the Long Acre Square Building Company, he paid taxes amounting to $732.32 on the premises in question, which amount included the taxes mentioned in the petition, and he also paid the water arrears, amounting to $8.97. The bill for taxes was offered in evidence. A check was produced which the witness testified had been paid subsequent to the 31st of May, 1904. The landlords' counsel objected to the tax bill and receipt being received in evidence, but the court admitted them. The tenant rested its case upon that proof, whereupon its counsel moved to dismiss the proceeding, which motion was denied, and the court directed that a warrant should issue removing the tenant from the premises for the nonpayment of rent and also for the nonpayment of taxes. The justice indorsed on the precept the following: "Final order is hereby made the 2d day of June, 1904, in favor of said landlords, awarding to said landlords the delivery of the premises within described by reason of the tenant's nonpayment of said rent and said taxes, together with costs." From this final order the tenant appealed to the Appellate Term of the Supreme Court, where the order was affirmed by a divided court. By permission a further appeal was taken to this court. The order appealed from is assailed on three grounds: First, that no jurisdiction was conferred upon the Municipal Court because of insufficiency of the petition, in that such petition does not contain an allegation of proper service of the notice requiring the payment of rent and taxes or the surrender of the premises; second, that there was a defect in the proof of service, it not having been shown that the original notice was exhibited at the time of the alleged service thereof; third, that the final order was unauthorized, because it appeared on the trial that the taxes for the year 1903 had been paid, and that therefore the tenant could not be dispossessed for their nonpayment.

Argued before O'BRIEN, P. J., and PATTERSON, INGRAHAM, LAUGHLIN, and CLARKE, JJ.

Warren Leslie, for appellant.
William G. Choate, for respondents.

PATTERSON, J. First. The allegations of the petition were sufficient to confer jurisdiction of the proceeding upon the Municipal Court. Mr. Peabody, the petitioner, states positively that three days' notice in writing, requiring, in the alternative, the payment of the rent or the possession of the premises and the payment of the taxes or the possession of the premises, was served on behalf of the landlords

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upon the tenant, and that the service was made by delivering to and leaving with Henry M. Work, the treasurer of the company, personally, a true copy of the notice. He annexes to the petition a copy of the certificate of the person who served the notice, in which it is stated that the original notice was shown to Work at the time service was made. But, even if the petition was defective in not alleging that the original notice was shown when service was made, that was cured by the answer of the tenant. The trial proceeded without objection being taken to the jurisdiction. Objections to proceedings which are not connected with the matters in issue, but are preliminary, and go only to the right and power of the court to hear the case, are technical, and are deemed to have been waived if the party proceeds to the trial or argument without raising them. Cowenhoven v. Hall, 118 N. Y. 232, 23 N. E. 470. This is not a case where the court is without jurisdiction of the subject-matter of the proceeding. In such a case the objection to jurisdiction may be taken on appeal in the first instance or at any time. Matter of Walker, 136 N. Y. 20, 32 N. E. 633. Here the Municipal Court had jurisdiction of the subject-matter. The only doubt arising would be as to its acquiring jurisdiction of the person of the tenant by failure to exhibit the original notice, and that objection was waived. Showing the original notice is only an incident connected with the service of process issued to bring a party into court.

Second. The contention that there was an insufficiency of proof because of the omission to show that the original notice was exhibited at the time of serving is not well founded. The Municipal Court marshal was not called as a witness, but the treasurer of the tenant was put upon the stand, and swore that the three days' notice and demand "to pay the rent and taxes or move" was served upon him. That is sufficient as an admission that the service was properly and duly made, and, the fact of service being shown by this witness, it was unnecessary for the landlords to prove every detail of the method of the service. We fail to find in the record that a motion was made to dismiss the petition on the ground that service was not made according to the requirements of the statute. The motion actually made was that the petition be dismissed on the ground that no demand had been shown for the rent or for the taxes, and to meet that objection the witness Work was called, who gave the testimony above referred to. We think, under the circumstances, that the proof was sufficient.

Third. The final order is attacked because it is stated therein that it was issued for the nonpayment of taxes as well as for the nonpayment of rent; that, the taxes having been paid, there was no foundation for granting the final order because of their alleged nonpayment. The significance and importance of this contention resides in the fact that a tenant dispossessed for nonpayment of taxes has no right of redemption under existing provisions of law (Witty v. Acton, 58 Hun, 552, 12 N. Y. Supp. 757), whereas, if he were dispossessed only for the nonpayment of rent, he may redeem, under section 2256 of the Code of Civil Procedure, where he is a lessee with an unexpired term of more than five years, as he is in the present case. The question arising on this contention relates to the substance of the final order, as well as to its form. There can be no dispute but that at the time the petition was

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filed and at the time the answer was served and the proceeding went to issue the taxes had not been paid. Nor can it be disputed that upon the trial on the 1st day of June evidence was given on the part of the landlords that the taxes had not been paid. On the 2d day of June, Work, the treasurer of the tenant, whose business it was to pay taxes for the corporation, testified first that the taxes had not been paid, and then that he had no knowledge whether they were paid or not; but on the same day the attorney for the tenant testified as a witness on its behalf that two days previously, at the request of the president of the corporation, he had paid by check the taxes upon the premises "against which this proceeding was brought." It is apparent, therefore, that if these taxes were paid, such payment was made after issue was joined, and without the fact being set up in the answer or in any way communicated to the landlords. The justice of the Municipal Court was authorized to try only the issues that were before him. Section 2247 of the Code of Civil Procedure directs that the issues joined by the petition and answer must be tried by the judge or justice. It is not urged that by the payment of the taxes a final order of dispossession was arrested. That final order must necessarily relate to the right of the landlords as claimed at the time issue is joined, and the reasons for granting it are necessarily those which existed at the time the landlords' right to repossession accrued. We are not now dealing with the question of the enforcement of the order by staying the issuance of a warrant. The party against whom a final order is made may stay such issuance by complying with the provisions of section 2254 of the Code of Civil Procedure; that is to say, he must pay or secure all the rent, taxes, interest, and costs. Had the tenant paid or offered to pay, before the final order was issued, all that was necessary to prevent the issuance of a warrant, that might have been sufficient under what was held in the Matter of Flewwellin v. Lent, 91 App. Div. 430, 86 N. Y. Supp. 919; but it did not, and thus the rights of the landlords to their full extent were left unimpaired.

The determination of the Appellate Term must be affirmed, with costs. All concur, except O'BRIEN, P. J., who dissents.

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## LEDERER v. McELROY.

**(Supreme Court, Appellate Division, First Department. April 6, 1906.)**

**BROKERS—COMMISSIONS—ACTIONS—EVIDENCE—SUFFICIENCY.**

**In an action by a broker to recover a commission for procuring a purchaser, the evidence considered, and *held* insufficient to show that defendant had placed the property with plaintiff for sale.**

Appeal from Trial Term, New York County.

Action by Martin Lederer against Daniel S. McElroy. From a judgment in favor of plaintiff, and from an order denying a motion for a new trial, defendant appeals. Reversed.

Argued before O'BRIEN, P. J., and McLAUGHLIN, INGRAHAM, LAUGHLIN, and HOUGHTON, JJ.

Daniel Daly, for appellant.

Mark M. Schlesinger, for respondent.

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LAUGHLIN, J. The plaintiff has recovered a commission of $5,000 on the theory that as broker for defendant he procured a purchaser for premises 1489 Broadway, and the adjacent premises Nos. 202 to 214, inclusive, West Forty-Third street, New York, at the defendant's selling price of $500,000, and that defendant then failed and refused to sign a contract for the sale thereof. The employment of plaintiff as broker at first to procure a tenant for the premises, and thereafter to sell the same, is not disputed; but the defendant contends that it was conditioned upon his ability to procure options for a lease or sale of some of the lots, as to which, he claims, it was understood that he was without authority. Messrs. Klaw & Erlanger are the purchasers claimed to have been procured. It was admitted that they were financially responsible and satisfactory. It is claimed by appellant that the minds of the parties met, and that he is not responsible for the failure to consummate the sale. It is alleged in the complaint that plaintiff, as a broker, rendered services to defendant with respect to leasing or selling said premises, for which defendant promised and agreed to pay $5,000; that defendant employed plaintiff "to find a tenant for a theater to be erected upon said plot, or a purchaser of said plot"; that plaintiff "secured such tenant or purchaser in the person of Messrs. Klaw & Erlanger," who agreed to lease or purchase the premises; that plaintiff brought the parties together, and the price of the property which defendant agreed to accept, and Messrs. Klaw & Erlanger agreed to and were ready and willing to pay and to execute a contract for, was $500,000; that defendant failed or refused to enter into a contract for the sale of the property to Messrs. Klaw & Erlanger; and that plaintiff, by thus procuring a purchaser ready, willing, and able to perform, became entitled to commissions. Plaintiff first proved that he was employed to rent the premises and a theater to be erected thereon for a period of 20 years or longer at an annual rental not to exceed $40,000, the term to commence when the theater should be completed, and that through the agency of one Lawrence, who was business manager for the Lyceum and for Daly's Theater, he sought out and procured Messrs. Klaw & Erlanger, who accepted the proposition, and were ready and willing to take a lease in accordance with those terms. According to the testimony of Lawrence, who by an arrangement with plaintiff was to receive one-half of the commissions, the defendant, after Erlanger had agreed to take a lease, suggested that Messrs. Klaw & Erlanger might desire to purchase the premises, which he said he owned and controlled. Witness also testified that, after plaintiff first came to him concerning procuring a tenant for the premises, defendant told him that "he owned and controlled these premises," and was ready to deliver a lease, and that plaintiff represented him. and could sell them for $550,000, and that thereupon plaintiff opened negotiations with them concerning a purchase. Lawrence further testified that subsequently defendant admitted to him over the telephone that "he had closed the deal," but that the contract was not yet ready, and consented, at the suggestion of Lawrence, that Erlanger retain, "out of the $25,000 which was to be paid upon signing the contract," Lawrence's share of the commissions; that defendant subsequently informed and wrote him, in answer to inquiries about the delay

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in signing the contract for the sale of the premises, that difficulty was encountered concerning one option and in obtaining authority from one of the owners, who was in Europe, and he further testified that the contract was never signed. The positive testimony of Lawrence, to the effect that defendant twice represented that he owned and controlled all of the premises is naturally weakened by the fact that it does not appear that he ever so claimed in conversation or correspondence with defendant, when the latter repeatedly assigned as the reason for the delay in executing the contract difficulty with an option, or in obtaining the consent of an absent owner; but, on the contrary, as appears by his letter of July 22, 1901, to defendant, gracefully acquiesced in the delay, and accepted the obstacle as if he had been fully and truly apprised of the facts from the outset, as claimed by defendant. The letter, omitting the formal parts, is as follows:

"I am just in receipt of your letter, and note all you say. Mr. Erlanger sent for me this morning, and tells me some one else has had the property offered them, and wanted to know how matters stood. I fortunately was able to show him your letter, which reassured him. I trust you will be able to acquire the parcel you want, so that matters can be closed up in the near future."

The defendant testified that he only owned 1489 Broadway, which is 20 feet front by 60 feet in depth, and 204 West Forty-Third street, which is 20 feet front by 60 feet in depth; that plaintiff called at his office, 1489 Broadway, and inquired, in substance, if he knew of a theater plot in that neighborhood that could be leased; that he made a diagram covering his own premises, and more in the rear, which he told plaintiff he thought might be acquired, and at the same time informed plaintiff that he only owned 1489 Broadway and 204 West Forty-Third street, but that he had an understanding with the owner of 202, 206, and 208 West Forty-Third street that they were to act together in offering their property for rent or sale; that the adjoining property all the way down the street was for sale, and probably could be purchased; that he also said to plaintiff that he would undertake to get prices and options on it, and gave a selling price on his own property, and an estimate of what he thought the adjoining property would cost, and expressed the opinion that, if a lease were negotiated on the basis of the lessees constructing a theater, the rental would be about 6 per cent. on the cost of the building and the value of the land; that later plaintiff said, in substance, that he had interested Lawrence, who wanted to see the proposition in writing, and he therefore gave plaintiff a letter, saying, in substance, that he believed he could safely say that his client would erect a theater on Broadway and Forty-Third street, and lease it to Mr. Frohman for 20 to 30 years at an annual net rental of 6 per cent.; that the ground was valued at $370,000, but that they might have to purchase Nos. 210 and 212 West Forty-Third street, and therefore desired the matter kept quiet, and requested plaintiff to "get a written proposition, as that will enable me to get a formal acceptance from my client." Defendant signed another agent's name, with the latter's consent, to this letter, and explains it upon the ground of being a property owner himself, and not desiring to have it known to other property owners that he was interested in the purchase. He further testified he had previously given plaintiff a diagram of his own premises and

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those along Forty-Third street to and including No. 212, and that those were the premises to which his letter related; that Lawrence introduced Erlanger, to whom defendant showed a diagram, with another lot (No. 214) added, and Erlanger said he would need more, and Nos. 216, 218, and 220 were discussed, which Erlanger said would be sufficient, and defendant undertook to look into and submit an agreement for a lease; that, on its being suggested that Erlanger might prefer to buy, defendant said he thought the selling price, according to enlarged diagram, would be $550,000; that subsequently plaintiff presented the selling proposition to Erlanger, and they met, and defendant informed him truly concerning his own title; that he thought he could control lots 202, 206, and 208, and suggested the employment of another broker to acquire the balance of the plot, which Erlanger did, and that negotiations continued for a long period, and finally failed, and the leasing proposition was revived; that they never agreed upon a sale, and he never told plaintiff or Lawrence that they did. Another real estate agent (Mr. Bailey), whose name defendant signed to the letter, and who occupied an office with him and was a distant relative, but had no interest in the matter, fully corroborated defendant as to his informing both plaintiff and Lawrence truly concerning his own title and his relationship to the other premises in question.

The plaintiff at first testified positively that defendant represented that he owned 1489 Broadway and 202, 204, 206, 208, 210, and 212 West Forty-Third street, which he thought would be a good site for a theater, but on cross-examination he modified it, and said defendant only claimed to own 1489 Broadway, and said he controlled the remainder by having options on them, and later on he says defendant claimed to own 204 West Forty-Third street also, and that defendant later on informed him that he only had options on 202, 210, and 212; that defendant employed him to sell or lease the premises; that he called on Lawrence, who said the plot was too small, and when he reported this to defendant the latter added 214 to the diagram; that after the negotiations for the lease they met Erlanger on the proposition to sell, and Erlanger inquired of defendant what he asked for the property, to which defendant replied $550,000, whereupon Erlanger offered $500,000 cash, $25,000 on execution of contract, and balance all cash above the mortgages, and defendant said to plaintiff, "Deliver the property"; that Erlanger told him to tell defendant to draw up the contract, and defendant admitted that he had "made the commission"; that defendant deferred signing the contract on account of the condition of certain options, and to await the return of an owner from Europe.

On this vital point—as to whether defendant assumed to place with plaintiff to rent or sell this entire plot, embracing many lots which he did not own or have any option upon either for leasing or selling, and some concerning which he had no relation whatsoever with the owners—the testimony of the plaintiff is most unsatisfactory. As has been seen, first, he testified that defendant stated that he owned it all, and then he testified that the defendant's representation was that he only owned No. 1489 Broadway, but that he "controlled" the rest, and his third version of the conversation is that defendant said that he owned No. 204 West Forty-Third street also, and had options on the other

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lots. When questioned concerning No. 214, which he admits was added after negotiations were opened, he says defendant said "he controlled it all"; and later on he testifies that defendant's representation concerning that lot was that "he could get the option on the property next door also." The plaintiff utterly failed, until his cross-examination, to show that defendant made any representation concerning lots 216, 218, and 220 West Forty-Third street, which concededly were embraced in the selling negotiations, and then with some indefiniteness and apparent confusion he testified that defendant represented that he could get options on those lots also. Mr. Erlanger, who should be able to give important testimony, was not called.

The defendant's version of employment of the broker is not improbable. It is not incredible that plaintiff, if informed, as defendant says he was, of the true state of the title and defendant's authority, would have given perhaps an hour or a few hours to negotiations with a view to obtaining an acceptance of a proposition which he and defendant thought the latter could induce the adjoining owners to join in carrying out, and whereby he could earn a commission of $5,000 or more. Such methods of procedure would not be specially novel in the real estate brokerage circles. It is doubtful whether an intelligent and financially responsible man would unqualifiedly offer another man's premises for sale at a specific price without any authority. It is, of course, possible, but not probable, for he would thus incur personal liability. Furthermore, it appears that defendant, through plaintiff and Lawrence, endeavored to induce Messrs. Klaw & Erlanger to take a lease of the premises when options on all for a sale could not be obtained, and it does not appear that either plaintiff or Lawrence either refused or demurred on the ground that their commissions had been earned, or had made such claim prior thereto. Moreover, it does not satisfactorily appear that a sale was effected.

We are of opinion, therefore, that the plaintiff has not fairly borne the burden of proof, and that the weight of the evidence is in favor of the defendant. It follows that the judgment and order should be reversed, and a new trial granted, with costs to appellant to abide event. All concur.

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## MORIARTY v. BOARD OF EDUCATION OF CITY OF NEW YORK.

(Supreme Court, Appellate Division, First Department. April 6, 1906.)

1. WORK AND LABOR—QUANTUM MERUIT.

Where, in an action on a contract for work and labor alleged to have been performed for the contractor in the erection of a school building, the court found that there was no contract, but that plaintiff had performed certain work, labor, and services, the court should then have determined how much had been done, the reasonable value thereof, and how much had been paid therefor.

2. APPEAL—FINDINGS—EVIDENCE—REVERSAL.

Where, in an action for work and labor, plaintiff was entitled to recover on a quantum meruit, and there was no way of reconciling the testimony with the findings of the court as to the amount earned, paid, or due, the judgment will be reversed.

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Appeal from Special Term, New York County.

Action by Michael J. Moriarty against Patrick Sullivan and the board of education of the city of New York. From a judgment dismissing the complaint, plaintiff appeals. Reversed.

Argued before O'BRIEN, P. J., and PATTERSON, INGRAHAM, LAUGHLIN, and CLARKE, JJ.

Menken Bros. (Percival S. Menken, of counsel), for appellant.

Kenneson, Emley & Rubino (Thaddeus D. Kenneson, of counsel), for respondent Sullivan.

CLARKE, J. This action was brought to foreclose a municipal lien filed by the plaintiff against the defendant Sullivan with the comptroller of the city of New York and the board of education for labor alleged to have been performed by plaintiff for defendant Sullivan in plastering a certain schoolhouse which Sullivan was under contract with the board of education to erect and build. The dispute is between contractor and subcontractor. The complaint alleges:

"That on or about November 3d, 1903, plaintiff entered into a contract with defendant to plaster * * * the first part to be erected of public school 106, * * * and to supply all the labor and materials necessary therefor, for the agreed price or sum of $8,500, payments to be made as it progressed, 85 per cent. of the work done during its progress, and the balance, or 15 per cent. thereof, when the work was fully finished; it being understood and agreed, however, that the plaintiff was to order the materials from the materialman directed by defendant Patrick Sullivan, and to give orders upon said Sullivan for such materials so purchased, the same to be deducted from the amount of plaintiff's contract. That plaintiff on December 5, 1903, duly entered in and upon the performance of said contract, and continued performing his part thereof until December 21, 1903, when defendant without right or cause wrongfully broke the said contract, and prevented plaintiff from completing. That the amount of labor for plastering under the contract, exclusive of materials, amounted to the sum of $2,950, no part of which has been paid except $132.65, and there is now justly due and owing $2,817.35."

A personal judgment was demanded. It will be seen, therefore, that this is not an action for damages for breach of contract, but for an amount claimed to be due for work done under a contract. The learned court in his findings of fact found that the defendant Sullivan did not enter into the contract set up in the complaint with the plaintiff. There is evidence to support this finding. He further found:

"That the defendant Patrick Sullivan did not enter into any contract with the plaintiff with respect to the plastering work in the first part to be erected of public school building No. 106."

If by this is meant a "written" contract, there is evidence to support the finding, and that this is the meaning is evident from the next finding: That the plaintiff performed certain work, labor, and services, consisting of plastering work, in and upon the building hereinbefore mentioned.

The court having found that there was no contract, and that the plaintiff had performed certain work, labor, and services, the question to be determined was how much had been done, what was the fair and reasonable value thereof, and how much had been paid therefor. The court found that there was nothing due, and dismissed the complaint upon the merits.

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On the trial plaintiff conceded credits amounting to $1,019.19, leaving a balance claimed of $1,890.81. The plaintiff claims that he did 6,000 yards of scratching and browning at 46 cents a yard, which would amount to $2,760, and 1,000 yards of scratching at 15 cents a yard, $150. There is no evidence in the case of the reasonable value of this work other than plaintiffs. It was brought out by defendant on cross-examinations, and, while an attempt by defendant in his case would show another amount per yard, the testimony was stricken out by the court; so that upon the theory of quantum meruit which the court adopted 46 cents per yard for browning and scratching, or 31 cents for browning and 15 for scratching, is established as the reasonable value thereof. The defendant claims that 4,000 yards of browning was done, which at 31 cents would be $1,240, and 1,900 yards of scratching, $285, which would make a total of $525. And if credit is given to the defendant of a payment of $135 to laborers, which plaintiff claims should not have been charged against him, the full amount paid would be $1,154.19, which, accepting defendant's figures, would leave $370.81 due. There is no way of reconciling the testimony with the findings of the court as to the amount earned, paid, or due, and the judgment must be reversed, and a new trial ordered, with costs to the appellant to abide the event. All concur.

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## CONDON v. CHURCH OF ST. AUGUSTINE et al.
## MILLER v. CHURCH OF ST. AUGUSTINE.

(Supreme Court, Appellate Division, First Department. April 6, 1906.)

1. RELIGIOUS SOCIETIES—CHURCHES—ACTS OF AGENT—CONSTRUCTION CONTRACT—ASSENT OF CORPORATION.

The rector of a Catholic church, holding title to certain property for the benefit of the church, executed a contract in his own behalf for the construction of the mason work of a new edifice thereon. The contract appeared not to have been executed nor authorized by the church's board of directors. Thereafter another contract, purporting to have been executed on behalf of the corporation, and signed and sealed by the rector as the act of the corporation, recited that certain extra work had been performed and materials furnished by plaintiff in accordance with modifications made of the previous contract, and arbitrators were appointed thereunder to determine the matters in dispute. Everything connected with the work was in the hands of the rector, and money raised on mortgage of the property was applied to payment of the work, and drawn from the corporation's bank account, which stood in the name of the rector in his representative capacity. *Held*, that such facts were sufficient to establish the assent of the corporation to the original contract.

2. MECHANICS' LIENS—CONTRACTS—PERFORMANCE—FILING OF LIEN—AMOUNT DUE.

A contract for the mason work of a church edifice required plaintiff to complete the work within a limited time, and in case of default the owner might notify him in writing to proceed, and, if he still failed so to do within the space of three days after service, the owner might finish the work as the contractor's agent, and deduct the cost thereof from any moneys due him under the contract. Plaintiff failed to go on with the work after notice properly served, and at the time of his abandonment, of the entire contract price of $27,900, $21.650 had been paid. It cost the church to complete plaintiff's work $10,270, and in an action to foreclose a mechanic's lien the referee found that plaintiff was entitled to

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$4,653 for extra work, but that the church was entitled to a credit of $4,974 for work omitted. *Held*, that such facts established that there was nothing due plaintiff at the time his lien was filed, and that the same was therefore unenforceable.

3. CONTRACTS—BUILDING CONTRACTS—BREACH.

During the completion of a building contract plaintiff signed a memorandum agreeing to ask for no more money until all of the plastering of the building was completed if he was paid $2,000 on that day, which was delivered to him. *Held* that, the plastering never having been completed, plaintiff was not justified in subsequently refusing to complete his contract because of the failure of the church to pay him for extra work.

4. MECHANICS' LIENS—SUBCONTRACTORS—PROCEEDINGS—COSTS.

Subcontractors, having been made defendants in proceedings to foreclose a mechanic's lien, sought to foreclose their lien against any sum found due to the contractor. The main litigation was between the contractor and the owner, 11 witnesses being called and examined on plaintiff's behalf, and 16 on behalf of the owner, while only two were called by the subcontractors. At the beginning of the trial the subcontractors were relieved from attending before the referee until after the proceeding between the contractor and the owner had been settled, and the greater part of the record consisted of testimony of plaintiff's witnesses and exhibits. *Held* that, on the dismissal of the lien of both the contractor and subcontractor, it was not a proper exercise of the court's discretion, conferred by Code Civ. Proc. § 3411, to tax all the costs and disbursements of the action to the subcontractors.

Action by Patrick J. Condon against the Church of St. Augustine and others. From a judgment denying the cross-complaint of Clifford L. Miller and Henry P. Robinson for the foreclosure of a subcontractor's lien they appeal. Modified and affirmed.

Argued before O'BRIEN, P. J., and PATTERSON, INGRAHAM, LAUGHLIN, and CLARKE, JJ.

Jacob F. Miller, for appellants.
David McClure, for respondent.

PATTERSON, J. This action was brought to foreclose a mechanic's lien on real property belonging to the defendant the Church of St. Augustine, a religious corporation. On the 30th of June, 1894, the plaintiff entered into a contract in writing, which upon its face purported to be made between himself and the trustees of St. Augustine's Roman Catholic Church of the city of New York. It was signed by T. F. Gregg, rector of the church, and does not appear to have been executed, or, when it was made, authorized, by the board of trustees of the church at a regular meeting. By that contract the plaintiff agreed to complete and finish mason work to be done in the erection of a new church and rectory building on land belonging to the church corporation, and to supply materials therefor. The owner agreed to pay the contractor for doing the work and furnishing the materials the sum of $27,900 in partial payments, at certain stages of the work. The contractor stipulated to provide whatever was necessary for the proper completion of the mason work within a limited time, and that if he failed to do so the owner might notify him in writing to proceed and complete the work, and if he failed so to do for the space of three days after service of a notice the corporation might do the work as the agent of the contractor, and deduct the cost thereof from any moneys due or

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to become due to him under the contract. Alterations and extra work were provided for, and a stipulation was made that, if any dispute should arise regarding the alterations or extra work, it should be decided by arbitrators. On the 16th day of December, 1894, another contract in writing was made, which on its face purports to be between the plaintiff and the Church of St. Augustine, "formerly the trustees of St. Augustine's Roman Catholic Church of New York." To that contract was affixed the official seal of the corporation, and apparently on its behalf was signed, "T. F. Gregg, Rector St. Augustine's, N. Y." This second contract recited that certain extra work had been performed and materials furnished by the plaintiff in accordance with modifications made of the previous contract, and arbitrators were appointed to determine the matters in dispute arising between the parties relating to such extra work. When the contract of June was made, the title to the real property was in the name of Thomas F. Gregg, as rector of St. Augustine's Roman Catholic Church of the city of New York. On the 27th day of September, 1894, Thomas F. Gregg, individually, and as rector of St. Augustine's Roman Catholic Church of the city of New York, conveyed the property to the Church of St. Augustine of the city of New York. On the 25th of October, 1894, the church corporation mortgaged the property to the Emigrant Industrial Savings Bank of the city of New York, and that mortgage was executed by the president and secretary of the mortgagor, the corporate seal was affixed, and the acknowledgment was made by Thomas F. Gregg, rector of the Church of St. Augustine, who in the certificate of acknowledgment swore that the seal of the corporation was affixed by order of the board of trustees; that he signed his name thereto by like order, as secretary of the corporation, and that the president of the corporation signed the instrument by like order of the board of trustees. That mortgage was authorized by order of the Supreme Court upon a petition presented by the board of trustees of the Church of St. Augustine, with the object of raising money to pay off a prior mortgage upon the property, and for use in the construction of a new church building and a new rectory upon the real estate involved in this action. The plaintiff proceeded to do the work and to furnish materials under the contract with the Rev. Mr. Gregg, the rector of St. Augustine's Church, and he also did certain extra work upon the requirement of the rector. Concerning that extra work an arbitration was had, but it is unnecessary to enter into the details of it. The plaintiff contracted with the firm of Miller & Robinson, defendants herein, for materials to be used in the performance of his (the plaintiff's) contract. Those materials, consisting of brick, lime, and laths, were furnished. On the 10th of April, 1895, the plaintiff filed a lien against the property described in the complaint and against the Church of St. Augustine, as owner, for the sum of $20,417.95, "for work, labor, and services done and materials furnished between the 1st day of July, 1894, and the 10th day of April, 1895." On the 20th of December, 1895, Miller & Robinson filed a notice of lien for the sum of $4,354, for cement, lime, brick, flue linings, and lath furnished between July 30, and December 13, 1894, of the agreed value of $7,-354.10, upon which they credited as having been received on account the sum of $3,000, leaving a balance due of $4,354.10. To the action

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to foreclose his lien the plaintiff made parties defendant the church corporation, Miller & Robinson, and other lienors. The church answered, as did also the defendants Miller & Robinson, the latter setting up in their answer their lien, and claiming their right to payment from any amount that might be found due from the St. Augustine Church to the plaintiff. The referee found that the contract of June 30, 1894, between the Rev. Mr. Gregg and the plaintiff was not binding upon the church corporation, inasmuch as it was not executed or authorized formally by the trustees of that corporation; that that contract was not ratified by the corporation, because its trustees failed as a body to ratify it; that the corporation did not consent to the performance of work and the furnishing of materials by the plaintiff; that the notice of lien filed by the plaintiff was insufficient and ineffectual; that there was nothing due to the plaintiff for extra work or under the contract at the time notice of lien was filed; that the plaintiff without excuse abandoned the work; that the notice of lien filed by Miller & Robinson was also defective, but that Miller & Robinson had a claim against the plaintiff for the material furnished by them. He dismissed the complaint against St. Augustine's Church, but directed a money judgment in favor of Miller & Robinson against the plaintiff, with costs, and he charged all the costs and disbursements of the church corporation against Miller & Robinson. Appeals were taken by the plaintiff and the defendants Miller & Robinson, but that of the last-named parties is alone before us.

Many matters were discussed on the argument which we do not find it necessary to consider in the determination of this controversy as it is now presented. We are concerned only with the rights of Miller & Robinson and of the plaintiff so far as they are connected with or related to each other, and as those of the former depend upon those of the latter. It is as well to say, perhaps, that we are not satisfied of the correctness of the ruling of the referee that the notice of lien filed by the plaintiff was insufficient, but we are satisfied that the notice of lien filed by Miller & Robinson was sufficient, and that is all that is required under the mechanic's lien law of 1885. That the referee was technically correct in ruling that the church corporation was not bound as an original contracting party to the agreement of June 30, 1894, need not be questioned, and that there was no technical ratification of that agreement may also be conceded; but it is very plain that there was a consent on the part of the corporation to the plaintiff performing work and supplying materials under the June contract, above referred to. The property upon which the improvements were made and to which the contract related was always that of the church. The rector, on the whole evidence, is clearly shown to have been in fact the agent of the church corporation. All through the record it appears that everything connected with the progress of this work, from its initiation until the end, was left in the hands of Mr. Gregg as the representative of the corporation. Money raised upon the mortgage was applied to the payment of work done in part by the plaintiff in the construction of the church and the rectory connected therewith; that money was put into and drawn from the bank account of the church, kept in the name of "Thomas F. Gregg, Rector of St. Augustine's, New York," and the church corporation had no other bank account than the one kept in that

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way, and the Rev. Mr. Gregg paid out the money to the plaintiff on account of his work. Upon the proof before us, we conceive it to be an impossibility that those who constituted the board of trustees could have remained in ignorance of the fact that the plaintiff was doing work and furnishing materials under the employment and direction of the Rev. Mr. Gregg, and was being paid by him from money in his hands belonging to the church. The president of the board of trustees testified that in a general sense the Rev. Mr. Gregg was the superintendent in the construction of the church building and the rectory. If there are any cases in which the assent of the owner (that owner being a corporation) is to be implied from facts and circumstances, we conceive this to be a most conspicuous one. But it is unnecessary to dilate upon that subject, for we have reached the conclusion that the referee was right in finding that at the time the lien was filed by the plaintiff there was nothing due to the plaintiff, that he had no right to a lien, and that he abandoned the work without reason. He had begun work on the church structures in July, 1904, and at the end of October of that year had completed it so far as might be done, in the absence of iron girders or trusses which another contractor had agreed to furnish and put into the buildings. He had also done extra work not included in the contract. In December, 1904, a contractor who was under obligation to furnish the girders began to put them in, and the Rev. Mr. Gregg gave notice to the plaintiff to proceed with his work. The plaintiff had already presented his bill for extra work, but the rector refused to pay it, and the plaintiff declined to go on until that bill was paid. Thereupon the rector caused to be served a notice, in accordance with the provision of the contract referred to, requiring the plaintiff to go on with his work, and that, in the event of his not doing so, other persons would be employed to finish it, and the cost would be deducted from any moneys found due to the plaintiff under his contract. That course was authorized. The contract price of the work was $27,900, upon which had already been paid the sum of $21,650. It cost the church to finish and complete the work of the plaintiff $10,270. The referee found that upon this statement of figures there was a balance to be deducted from the plaintiff's claim for extra work of $4,020, and that he was entitled for extra work to the sum of $4,653, but that the church was entitled to credit for work omitted to the amount of $4,974. If those findings are right, there was nothing owing to the plaintiff at the time the liens were filed. We think the figures as found by the referee are correct and supported by the evidence.

It is claimed, however, that the plaintiff was justified in refusing to complete the work in consequence of the refusal of the church corporation to pay him for the extra work. What is said in Flaherty v. Minor, 123 N. Y. 389, 25 N. E. 418, to the effect that where a contract required defendants to make to a plaintiff payments as the work progressed, and the defendants refused to pay as required, there was a breach of the contract by the defendants, which justified a refusal on the part of the plaintiff to continue the work, does not apply under the facts as they appear in the record before us. On the 1st of December, 1894, the plaintiff received a sum of money from the church, and delivered to it a writing in the following words:



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"I hereby agree to ask for no more money for work on St. Augustine's Church and rectory, in which I am the contractor, until all plastering is completed in both buildings, if I am paid the sum of $2,000 to-day."

That sum was paid, and it would appear that nothing was due the plaintiff when it was paid. The plastering never was completed. When the plaintiff left the work, the first truss had been put up. It fell, and they were re-erecting it about December 17, 1894. On December 14, 1894, the three days' notice was served. Before the expiration of that period, the first truss was in position, and much work could have been done by the plaintiff under his contract. The remarks of the referee in his opinion on this subject are satisfactory, and in our judgment dispose of it.

We are of the opinion that the referee did not err in his finding that the plaintiff and the defendants Miller & Robinson had no right to enforce a lien against the property at the time their respective notices of lien were filed, but we are unable to see how upon any just, reasonable, or equitable ground all the costs and disbursements of this action should be charged upon the defendants Miller & Robinson. They did not foment a litigation nor did they protract it. They were made parties to the action, and they merely endeavored to enforce their rights in subordination to those of the plaintiff, if, peradventure, his lien were established, and the church property made subject to it. The proceedings before the referee, set forth in the voluminous record before us, were almost all connected with the efforts of the plaintiff to establish his claim and those of the church corporation to resist it. Eleven witnesses were called and examined on the plaintiff's behalf, sixteen were called and examined on behalf of the St. Augustine Church corporation, and but one or two on behalf of the defendants Miller and Robinson. At the beginning of the trial the referee directed what course of procedure should be pursued, namely, that:

"The plaintiff shall prove his case, and, after the taking of the testimony, it appearing that the defendants other than the Church of St. Augustine are sublienors, if the referee shall deny a motion to dismiss the complaint or to dismiss the lien of the plaintiff, he will then direct that the other defendants claiming liens on the property shall prove their cause of action, and will cause a notification to be given to the attorneys of such sublienors in due time for them to prove the same before him. Until that time, the attorneys for said lienors are excused from attendance on the reference if they so desire, and their defaults will not be noted."

The greater part of the record of the proceedings before the referee consist of testimony of the plaintiff's witnesses and some exhibits which are interspersed through it. It is within the discretion of the court in mechanic's lien cases to award costs to the prevailing party. Section 3411 of the Code of Civil Procedure. We think it was an erroneous exercise of judicial discretion to charge the immense bill of costs taxed in this case against defendants, who were merely standing upon their legal rights, dependent upon the fate of a claim which the plaintiff sought to establish against the owner of the property. The costs should have been charged only against the plaintiff.

The judgment should be modified by striking out the provision respecting the recovery of costs against Miller & Robinson, and, as modified, affirmed, with costs of this appeal to Miller & Robinson. All concur.

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## LIPIS v. METROPOLITAN ST. RY. CO.

(Supreme Court, Appellate Division, First Department. April 6, 1906.)

STREET RAILROADS—COLLISIONS—INJURY TO TRAVELER—CONTRIBUTORY NEGLIGENCE.

Evidence in an action against a street railway company for injuries received by a pedestrian in a collision with a car examined, and *held* not to support a finding of freedom from contributory negligence necessary to a recovery.

Appeal from Trial Term, New York County.

Action by Giovanni Lipis, an infant, by Fabrizio Lipis, his guardian ad litem, against the Metropolitan Street Railway Company. From a judgment for plaintiff, and from an order denying a motion for a new trial, defendant appeals. Reversed.

Argued before O'BRIEN, P. J., and PATTERSON, INGRAHAM, LAUGHLIN, and CLARKE, JJ.

Bayard H. Ames, for appellant.

M. P. O'Connor, for respondent.

PATTERSON, J. The judgment in favor of the plaintiff in this action and the order denying a motion for a new trial must be reversed. From the evidence adduced on the plaintiff's behalf, it is impossible to understand the conditions and the surrounding circumstances in which the accident resulting in his injury occurred, and he has completely failed to show freedom from contributory negligence. It appears that on the day mentioned in the complaint the infant plaintiff, a boy 12 years of age, was at the southeast corner of Second avenue and 115th street, intending to cross the avenue from east to west. He testifies that he looked up and down Second avenue for approaching cars; that he saw a car on the easterly track about four or five houses from the corner; that car was proceeding uptown. He also swears that at the same time he saw another car going downtown—that is to say, on the westerly track—and that it was at 115th street. He did not look again until he was on the easterly track, and when he was getting off the last rail of the track the north-bound car struck him. Again he states that he was on the track before he looked a second time, and that he stood waiting for "the other"—that is, the downtown—car to pass. He was struck and injured by the uptown car. He also testifies that he was prevented from crossing the avenue by the south-bound car; that he did not stand on the easterly track, but returned to the sidewalk, and then proceeded again to cross. All this time the north-bound car which struck him was in full progress. The testimony of the plaintiff is so contradictory and confused that it is impossible to gather a coherent story from it; but the one fact prominently appears that it was, according to his statement, the south-bound car at 115th street which prevented his crossing the avenue when he made his first attempt. But it is apparent from the testimony of two of plaintiff's witnesses, who were spectators of the occurrence, that the plaintiff's alleged reason for not at once crossing the avenue has no foundation in fact. Both those witnesses testified that there was no south-bound

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car. One of them (Serra) says he saw the occurrence from the time the boy stepped off the sidewalk until he was struck by the car; and further, that, "during all the time that the boy was going over from the crosswalk to the track, there was no car on the downtown track. The only car that I saw was the one that was on the uptown track." The witness Benedette says: "I did not see a car coming on the downtown track. No car was there at all, only this one; the only car was the uptown car." If these witnesses are correct, the boy could have crossed in safety when he first started. With the proof in such a state, the verdict of the jury that the plaintiff was free from contributory negligence must have been the result of mere conjecture.

The judgment and order appealed from should be reversed, and a new trial ordered, with costs to the appellant to abide event. All concur.

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## WEISBERG v. WEISBERG.

(Supreme Court, Appellate Division, First Department. April 6, 1906.)

1. MARRIAGE—PARTIES—COMPETENCY—ANNULMENT.
   Where at the time plaintiff and defendant, who were uncle and niece, were married such marriage was not incestuous by statute, and plaintiff contracted the same voluntarily, and with full knowledge of her relationship to defendant, she could not have the same annulled after cohabiting with defendant as his wife for more than 14 years, and bearing 2 children as the result of the marriage, on the sole ground that such marriages were subsequently prohibited by Laws 1893, p. 1387, c. 601, as amended by Laws 1896, p. 215, c. 272.

2. CONSTITUTIONAL LAW—STATUTES—DECLARATION OF EXISTING LAW—ENCROACHMENT ON JUDICIARY.
   It is not within the province of the Legislature to enact laws declaring what the law of the state was at any prior time, as such enactment constitutes an infringement on the power of the judiciary.

3. STATUTES—RETROACTIVE OPERATION—MARRIAGE—COMPETENCY OF PARTIES.
   Laws 1893, p. 1387, c. 601, as amended by Laws 1896, p. 215, c. 272, prohibiting marriage between uncles and nieces, was not retroactive, so as to invalidate a prior marriage between such relatives.

4. MARRIAGE—COMPETENCY OF PARTIES—INCEST.
   A marriage between uncle and niece, of statutory age, neither of whom is disqualified by any statutory law, is not incestuous, and cannot be deemed so in the administration of either the civil or criminal law.

   [Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Marriage, §§ 28, 98.]

Appeal from Trial Term, New York County.

Suit by Jennie Weisberg against Morris Weisberg. From a decree in favor of defendant, plaintiff appeals. Affirmed.

Argued before O'BRIEN, P. J., and McLAUGHLIN, PATTERSON, LAUGHLIN, and HOUGHTON, JJ.

S. A. Potter, for appellant.

Jacob R. Schiff, for respondent.

LAUGHLIN, J. This is an action to annul a marriage contract, on the ground that the marriage was incestuous and void owing to the fact that the parties stood in the relationship to each other of uncle

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and neice; the wife being the daughter of the husband's sister. The plaintiff's case as presented by the complaint does not commend itself to the favorable consideration of the court. She does not show that she was of immature age or under any disability at the time of the marriage, or that any fraud or deception was practiced upon her, or that she did not of her own free will contract and consummate the marriage with full knowledge of the relationship between her and the defendant. She coolly alleges that she and the defendant were married in the city of New York on the 22d day of March, 1891, and that two children, aged 12 and 10 years, respectively, have been born to them as the issue of such marriage. She does not aver that they have not lived happily together, or even that they have separated with or without cause, or that the children are deficient physically or mentally in consequence of the close consanguinity of the parents, or that there is danger of further issue with like misfortune. She merely alleges the bald fact that her husband is her uncle, and, after voluntarily cohabiting with him for more than 14 years, she asks the court to annul the marriage on the ground of relationship alone, and thereby further disgrace her children, her husband, and herself. In the early jurisprudence of this state, Chancellor Kent, after carefully reviewing the authorities, including Harrison v. Busswell, 6 Ventris, vol. 2, p. 9, upon which the appellant relies, announced the doctrine that, in the absence of statutory law, the courts would not be warranted in going further in declaring marriages incestuous and void than marriages in the direct line of consanguinity and between brothers and sisters in the collateral line. Wightman v. Wightman, 4 Johns. Ch. 343; Campbell v. Crampton, 8 Abb. N. C. 363. Since the regulation of marriages by statutory law in this state, marriage has been regarded as a civil contract, which any person competent to make other contracts, and not disqualified by statute, was competent to make. Ever since the enactment of the Revised Statutes, our statutory law has prescribed disqualifications rendering parties ineligible to contract marriage; and not only have the age of consent and other essential prerequisites been specified, but marriage within certain degrees of consanguinity, not, however, extending to uncles and neices or nephews and aunts, have been prohibited. 2 Rev. St. p. 139, pt. 2, c. 8, tit. 1, § 3; In re Williams, 2 City Ct. R. 143. Marriages between uncles and neices are now prohibited, but they were not prohibited until after this marriage took place. Chapter 601, p. 1387, Laws 1893, as amended by chapter 272, p. 215, Laws 1896. There is no force in the argument that this statute should be regarded as declaratory of existing law. It is the province of the Legislature to enact laws, not to adopt resolutions or pass statutes declaring what the common law or any other law was in this state at any prior time. That would be trespassing on the functions of the judiciary. "The Legislature has no power to assume the functions of the judiciary to determine controversies among citizens, or even to expound its own laws so as to control the decisions of the courts in respect to past transactions. People v. Supervisors, 16 N. Y. 432. To declare what the law shall be is a legislative power; to declare what it is or has been is judicial." People ex rel. McDonald v. Keeler, 99 N. Y. 480, 2 N. E. 615, 52 Am. Rep. 49. The statute

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under consideration cannot be given a retroactive effect. If the marriage was valid when made, it is protected by the federal Constitution from impairment by any Legislature. It is idle to argue that, since by legislative enactment such marriages are now declared to be incestuous and void, they must have always been incestuous and void. One day certain acts are lawful, although disapproved of by most people. The opposition takes form, and later on such acts are prohibited by the Legislature. What is to-day lawful may to-morrow, if not protected by the federal or state Constitution, be declared a crime, or prohibited by legislative authority.

The argument of the learned counsel for the plaintiff that his client by continuing to live with her uncle is violating the provisions of section 302 of the Penal Code declaring incest a crime punishable by imprisonment for not more than 10 years emphasizes the argument already made. A marriage between parties of the statutory age, neither of whom is disqualified by any statutory law, is not incestuous, and cannot in the administration of either the civil or the criminal law of this state be deemed incestuous.

It follows that the interlocutory judgment, which in such case, since the complaint cannot be cured by amendment, should have been a final judgment, should be affirmed, with costs. All concur.

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## DE WOLFF et al. v. HOWE et al.

**(Supreme Court, Appellate Division, First Department. April 6, 1906.)**

SALES—MISTAKE—RELIEF.

**Where the seller intended to sell a certain car of merchandise, and by mistake, which was brought about by the seller giving an insufficient sampling order on the carrier, the purchaser sampled another car and paid for the goods, on discovery of the mistake the purchaser could recover the payment.**

Appeal from Trial Term, New York County.

Action by Nicolay de Wolff and another against Charles T. Howe and another. From a judgment in favor of plaintiff, and from an order denying a new trial, defendants appeal. Affirmed.

Argued before O'BRIEN, P. J., and McLAUGHLIN, PATTERSON, LAUGHLIN, and HOUGHTON, JJ.

J. H. Hildreth, for appellants.

M. J. Kohler, for respondents.

PATTERSON, J. There are two causes of action set forth in the complaint herein—the first for money had and received, and the second for an alleged breach of a contract for the sale of goods by sample. On the trial the controversy was limited to the issues arising on the first cause of action, as to which the defendants in their answer interposed a general denial. There is no serious dispute concerning the material facts of the case. The defendants (copartners) about the 21st of April, 1902, had for sale a car load of merchandise called "apple waste." One Gibbs, a broker, ascertaining that fact, and acting on

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behalf of the defendants, offered that merchandise for sale to the plaintiffs at a price of $1.85 a hundred pounds; the quality to be "prime bleached waste." The plaintiffs agreed to buy the goods if the quality were suitable, and, in order to ascertain that, a sampling order appears to have been required. The broker reported to his principals the result of his negotiations with the plaintiffs, and the defendants gave to the broker a sampling order, which was taken by him and delivered to the plaintiffs. That order is in the following words:

"The New York Central & H. R. R. R. Co., 33rd Street Station, N. Y.—Gentlemen: Please allow bearer to sample waste and chops in lot No. 1,068. and oblige,

"Yours very respectfully, Charles T. Howe & Co."

When the order was delivered to the plaintiffs, Gibbs was told that they could not for certain reasons inspect the merchandise that day, and he then volunteered to have one Foy, employed by him or his firm, make the examination for the plaintiffs, who agreed that that should be done. Foy was sent to the Thirty-Third street station of the carrier, and when he arrived there in search of the car containing the merchandise he applied to the person "in charge of that department" to point out the car from the contents of which the samples were to be taken, and he exhibited the sample order. He was told that the company did not recognize lot numbers, but only car numbers. Foy then inquired for the car number corresponding with the lot number, and was told that the car number was 33,184, and he wrote that number on the sample order. He then went to a dock on which the car was standing, presented the order to the railroad company's foreman, and sampled the merchandise in that car. The apple waste which the defendant intended to sell was not contained in car No. 33,184, but was actually in a car No. 13,877. That in car No. 33,184 was sound and of prime quality; that in car No. 13,877 was of inferior quality, and would have been rejected by the plaintiffs. The samples taken by Foy were satisfactory to the plaintiffs. After the sampling, the defendants called upon the plaintiffs for payment, and presented their bill. Mr. de Wolff, one of the plaintiffs, directed attention to the fact that on the bill rendered the car number mentioned was 13,877, whereas on the examination order No. 1,068 was mentioned, and asked for an explanation of the discrepancy. The defendant Howe thereupon stated that:

"The numbers are identical. I simply made a mistake in putting the number 1,068, or the lot number, on the sampling order. The numbers are identical—No. 1,068 and No. 13,877. There can be no mistake in the matter, because I had only one car of apple waste on the dock."

It is true that the defendants then owned but one car load of apple waste on the dock, but they had owned another car load, namely that in car No. 33,184. They had sold it in January, 1902, but it still remained on the dock undelivered to the purchaser, and the consignment still stood in the defendants' name. The plaintiffs paid the amount of the bill, and they received the merchandise, believing it to be prime quality taken from the only car which the defendant had on the dock. Upon receiving the merchandise, and finding that it was not of prime quality, the plaintiffs offered to return it to the defendants, but they would

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not receive it, whereupon it was sold as perishable, and the plaintiffs sued to recover the difference between the amount realized on the sale and the amount paid to the defendants. No complaint is made of the conduct of the plaintiffs in that regard.

It is scarcely necessary to cite authorities in support of the doctrine that money paid under a mistake of fact may be recovered back in an action for money had and received, where the money is paid in consequence of a mutual mistake as to facts which if known would have prevented the payment; that an error of fact takes place either when something which really exists is unknown, or some fact is supposed to exist which really does not exist; and that the action will lie unless the mistake results from inexcusable neglect by the party paying, and there was no legal or moral obligation on his part to pay, or the payment was made intentionally, without reference to the state of facts under which it was made. It is plain upon this record that the defendants intended to sell, and the plaintiffs to buy, a car load of apple waste of prime quality. It is also clear that both parties intended that the goods should be inspected or sampled upon an order applying to a car load of merchandise in the possession of the railway company, and that the defendants intended to furnish a sample order, which would identify the merchandise, and that the plaintiffs in the first instance relied upon the order furnished as sufficient for that purpose. The defendants made an original mistake in sending the order as sufficient. It was not so, as it referred only to a lot number instead of a car number. The defendant Howe states in his testimony that he made the mistake. The plaintiffs sending to the railway company for the purpose of drawing the samples sought information from a proper source with respect to the car, and the messenger was told that the identification could not be made by lot number, but must be by car number. Car No. 33,184 was pointed out as that which corresponded to lot No. 1,068. The defendants were mistaken in giving an insufficient sampling order, and the plaintiffs were mistaken in relying upon the sufficiency of that order. When, on presentation of the bill for the merchandise, the plaintiffs called upon the defendants for an explanation of the discrepancy between the number appearing on the sample order and that appearing on the bill, Howe stated that there was but one car load there belonging to them, and the plaintiffs were justified in believing that that must have been the car from which the samples were taken. As stated before, it is true that the defendants owned but the one car load, but the other still remained on the dock, and in it the sound merchandise, which still was in the apparent ownership or control of the defendants, was contained. There was on both sides a mistake as to the identity of the car containing the merchandise to which the sample order applied, and which the defendants intended to sell.

In this view of the case, it is immaterial whose agent Foy was in making the examination. The money was paid under a mutual mistake of facts, and the plaintiffs were entitled to recover.

The judgment and order must be affirmed, with costs. All concur.

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## DAVIDSON v. JONES.

(Supreme Court, Appellate Division, First Department. April 6, 1906.)

1. WILLS—CONSTRUCTION—ESTATES CREATED—VESTED REMAINDERS.

Under a will devising all testator's property to his wife during life, and on her decease to testator's children or their legal representatives, such of testator's children as were living at the time of his own death and the heirs of such as were then dead became absolutely vested with the remainder, which was not subject to be devested by the death of any of the children during the lifetime of the widow.

2. SPECIFIC PERFORMANCE—DOUBTFUL TITLE.

Where the only defect in a title arose from a pure question of law involved in the construction of a will, the title was, after a construction of such question in favor of the validity of the title, sufficiently free from doubt to justify the enforcement of specific performance of a contract for the sale of the land.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Specific Performance, § 275.]

Submission of controversy on agreed case by Julius Davidson and James A. Jones. Judgment for defendant.

Argued before O'BRIEN, P. J., and PATTERSON, McLAUGHLIN, LAUGHLIN, and HOUGHTON, JJ.

Milton Mayer, for plaintiff.

Edward E. Sprague, for defendant.

HOUGHTON, J. The parties submit their controversy with respect to the title of real property which the plaintiff agreed to buy and which the defendant agreed to convey by good and sufficient deed. The defendant's title came through John L. Hardee, who died in 1891, leaving a last will and testament by which he devised all his property to his wife "for her sole and separate use for and during the term of her natural life, and on her decease to my children or to their legal representatives." The will was duly proved, and the wife and all of the testator's children conveyed to plaintiff's grantor. The defendant tendered a deed proper in form, but the plaintiff, although willing to fulfill his contract, objected to the title, on the ground that under the will of Hardee the remainders to his children did not vest absolutely in them, but vested subject to be divested on their deaths during the lifetime of the widow, who is still living. If from the language of the will, measured and governed by established rules of construction, the testator can be said to have intended to use the words "or to their legal representatives" as words of substitution, in the sense that he meant by that expression to substitute as devisees the descendants and heirs of such of his children as should die after his own death and during the lifetime of his widow in place of such child of his own, thereby postponing the absolute vesting of his real property until her death, when those who answered the description could be ascertained, then the title was properly rejected. If such was not his intent, and if it can be fairly said that he did intend that such of his children as should be living at the time of his own decease and the heirs or representatives of such as might be then dead should take absolutely subject to the life estate of their mother, then the title tendered was good, and should have been

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accepted. Little difficulty is experienced from the words: "on her decease." There is a long line of uniform authorities that the words "on," "when," "after," "from and after," and like expressions, used in a devise of a remainder following a life estate, do not afford sufficient ground in themselves for adjudging that a remainder is contingent and not vested, and that such words, unless their meaning is enlarged by the context, are to be construed as relating merely to the time of the enjoyment of the estate, and not to the time of its vesting an interest. Connelly v. O'Brien, 166 N. Y. 406, 60 N. E. 20; Hersee v. Simpson, 154 N. Y. 496, 48 N. E. 890; Nelson v. Russell, 135 N. Y. 137, 31 N. E. 1008; Moore v. Lyons, 25 Wend. 119. Nothing appears in the context of the will which enlarges these words, and they do not, therefore, of themselves, effect a postponement of the vesting of the remainder until the death of the life tenant. We must therefore determine what construction shall be given to the phrase "or to their legal representatives" as used by the testator.

The law favors such a construction of a will as will avoid the disinheritance of remaindermen who may happen to die before the determination of the precedent estate, and a remainder is not to be considered as contingent in any case where is may fairly be construed to be vested, since the law favors the vesting of estates. Connelly v. O'Brien, supra; Corse v. Chapman, 153 N. Y. 466, 47 N. E. 812; Matter of Russell, 168 N. Y. 169, 61 N. E. 166. The presumption is that a testator intends that his dispositions shall take effect in enjoyment and interest at the date of his death, and upon the happening of that event, unless the language of the will by fair construction makes his gifts contingent, they will be regarded as vested. Nelson v. Russell, supra. While technically the words "legal representatives" mean administrators or executors, they may refer to heirs or next of kin. Griswold v. Sawyer, 125 N. Y. 411, 26 N. E. 464. A representative is one who stands in the place of an owner of real estate as heir, of personalty as next of kin. He is one, also, who takes by representation, and in wills and settlements the terms "representatives" and "legal representation" are frequently held to mean heirs and next of kin, and not executors and administrators. Lee v. Dill, 39 Barb. 521, and cases cited. It is manifest that, as used by the testator, the words refer to the heirs of his deceased children. We therefore have a devise to the wife for life, and on her decease to the testator's children, "or to their heirs." We think it must be held to have been the clear intent of the testator to vest absolute title to his real estate in such of his children as were living at the time of his death, and in the heirs of such as may have died before that event, and that the time of full enjoyment only was postponed until the death of the widow, and that the death referred to was one occurring in testator's own lifetime, and that the substituted gift to "heirs" was only to take effect in case such event transpired. None of the children predeceased the testator, and all joined in the deed with the widow to defendant's grantor, and full title therefore passed.

The effect of a devise to one for life, and "from and after" the death of the life tenant remainder to others, "or to the survivors" "or heirs," was considered, as was said, as a new question in the court of errors in Moore v. Lyons, 25 Wend. 119, and it was concluded that the words

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of survivorship primarily referred to the death of the testator, and not to the death of the tenant for life, unless from other parts of the will it was manifest that the intent of the testator was otherwise; and it was held that the remainder vested absolutely in the remaindermen living at the death of the testator, and that the failure of some of them to survive the life tenant did not operate to divest them of such title. While the ruling made in this case has not been applied to various constructions of wills, because it appeared from the context of the instrument that the testator intended to postpone the vesting until the happening of a particular event enumerated, the decision does not seem to have been questioned, but, on the contrary, it has been cited with approval and as a leading authority in many cases, including Livingston v. Green, 52 N. Y. 118; Embury v. Sheldon, 68 N. Y. 227; Matter of Accounting of Mahan, 98 N. Y. 372; Nelson v. Russell, supra; Stokes v. Weston, 142 N. Y. 433, 37 N. E. 515; Matter of Brown, 154 N. Y. 313, 48 N. E. 537; Hersee v. Simpson, supra; Connelly v. O'Brien, supra; Matter of Russell, supra; and Lewis v. Howe, 174 N. Y. 340, 60 N. E. 975, 1101. In each of these cases there was a precedent life estate, and in all of them it was held that the title vested absolutely in the remaindermen on the death of the testator, and that the time of enjoyment only was postponed until the death of the life tenant. In the Matter of Tompkins, 154 N. Y. 634, 49 N. E. 135, the effect of the words "or their lawful descendants" used in a devise of real property was considered. The Appellate Division had treated the words as a gift by substitution in case of the death of the first-named devisee at any time during the continuance of the trust created by the will. The Court of Appeals was unanimously of the opinion that a fundamental error was committed by such construction, and determined that the words referred to a death in the lifetime of the testator, and operated as a substituted gift only in case such event transpired. In the will under consideration in Miller v. Gilbert, 144 N. Y. 68, 38 N. E. 979, a life estate was given to testator's widow, and on her death "then" to testator's four children "or their heirs." It was held that the children living at the death of the testator took a vested remainder, and that it was quite inconceivable to suppose the testator intended to substitute the issue of a deceased child for the child himself in case he should die during the lifetime of the mother, and that the substitution of the word "and" for "or" would be quite proper, and in accordance with the evident intent of the testator.

We have been led to this lengthy discussion of the authorities because it is asserted, erroneously, as we think, that Lyons v. Ostrander, 167 N. Y. 135, 60 N. E. 334, is an authority compelling the interpretation of the will under consideration, as giving to the children of the testator, not an absolutely vested remainder, but one subject to be divested by the death of any one of them during the lifetime of the widow. An examination of that case will show that the court felt constrained, from the peculiar language used by the testator, to hold that he intended to and did fix a particular time when the remainder should vest. It is not to be presumed that the Court of Appeals by this decision intended to overrule the long line of its own decisions, to which we have adverted; giving practical construction to wills, in many of

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which are found expressions which might be said to point to an intent on the part of the testator to postpone the vesting of the remainder created by him with much more precision than any language which can be found in the will at bar.

Upon authority, as well as upon the plain reading of the will, we think it must be held to have been the clear intent of the testator that such of his children as should be living at the time of his own decease and the heirs of such as might be then dead should become vested absolutely with the remainder which he created by his will, subject only to a life estate therein given to the widow; and that such remainder was not subject to be divested by the death of any one of such children during the lifetime of the widow. From this it follows that the defendant had good title, and tendered a good deed, which the plaintiff should have accepted.

The only remaining question is whether or not the title is in such doubt, although good, that plaintiff ought not to be compelled to specifically perform. The general rule is that a doubtful title should not be forced upon an objecting purchaser. Abbott v. James, 111 N. Y. 673, 19 N. E. 434. This rule does not apply with its full force where the validity of the title tendered depends upon a pure question of law, without extrinsic facts being involved. Ebling v. Dreyer, 149 N. Y. 460, 44 N. E. 155. Although the validity of the title depended upon the construction of wills, the purchasers were compelled to take in the cases of Nelson v. Russell and Hersee v. Simpson, cited herein.

Our conclusion is that the defendant's title was so marketable that the plaintiff was not justified in refusing it, and that judgment should be directed in favor of the defendant for specific performance, with costs. All concur.

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## WEIR v. UNION RY. CO. OF NEW YORK CITY.

(Supreme Court, Appellate Division, First Department. April 6, 1906.)

1. CARRIERS—INJURY TO PASSENGER—ACTIONS—RES IPSA LOQUITUR.

The maxim res ipsa loquitur is applicable to a case where a passenger in a street car is injured by the fall of a device used for registering fares.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1290.]

2. SAME—EVIDENCE—SUFFICIENCY.

In an action against a carrier for injuries to a passenger owing to the fall of a device used for registering fares, evidence considered, and *held* sufficient to warrant a finding that there had not been proper inspection on the part of the carrier.

3. TRIAL—INSTRUCTIONS—CREDIBILITY OF WITNESSES.

In an action for injuries to a passenger owing to the fall of a device used for registering fares, the court instructed that defendant's witnesses had testified that the fall was caused by the breaking of an iron prong owing to a flaw therein which could not have been seen until after the iron had been broken, and that it was for the jury to pass upon the credibility of such witnesses, and say whether their testimony should be accepted, and that, if the evidence appeared to be a satisfactory explanation, there should be a verdict for defendant. *Held*, that the instruction was a proper one on the credibility of defendant's witnesses, and it was not error for the court not to have told the jury explicity that they should find a verdict for defendant if they believed its witnesses.

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Appeal from Trial Term, New York County.

Action by Winant W. Weir against the Union Railway Company of New York City. From an order granting defendant's motion to set aside a verdict in favor of plaintiff, plaintiff appeals. Reversed.

Argued before O'BRIEN, P. J., and McLAUGHLIN, PATTERSON, LAUGHLIN, and HOUGHTON, JJ.

J. S. Ross, for appellant.

B. H. Ames, for respondent.

PATTERSON, J. On the trial of this action, which was brought to recover damages for personal injuries alleged to have been sustained by the plaintiff through the negligence of the defendant, the former obtained a verdict, and after its rendition and before the entry of judgment the defendant moved to set it aside. It appears from the clerk's minutes of the trial that that motion was denied. Thereupon judgment was entered on the verdict. Subsequently the justice presiding at the trial reconsidered such denial, and granted the motion, the verdict was set aside, a new trial was granted, and the judgment entered was vacated. From the order so directing, the plaintiff appeals. The reasons of the learned trial judge for setting aside the verdict are contained in an opinion printed in the record. He considered that his instructions to the jury were in some repects insufficient, and that the verdict was against the weight of evidence.

Reluctant as we are to interfere with the disposition made by a trial judge of such a motion as this, yet we are forced to the conclusion in the present case that the instructions given by the justice to the jury were full, adequate, and correct, and that the verdict was not against the weight of evidence in the view which the jury were authorized to, and evidently did, take of that evidence. A plaintiff in an action to recover damages for personal injuries has an interest in a verdict obtained by him in the nature of a property right (Wood v. Phillips, 11 Abb. Prac. [N. S.] 2; Carr v. Rischer, 119 N. Y. 125, 23 N. E. 296); and he should not be deprived of that right unless the verdict is set aside for good and substantial reasons which compel that course to be pursued. The material facts connected with the accident from which the plaintiff suffered personal injuries are, in brief, the following: He was a passenger on a car belonging to and operated by the defendant corporation. In that car was an apparatus used for registering fares collected from passengers. It was attached to the car by brackets, and at the top was held in position by a prong about two inches long. That prong was attached to the car, and if the apparatus, which is called in the record both "register" and "clock," is taken away, the prong remains in the car as a permanent attachment. While the plaintiff was in the car, this apparatus fell without apparent cause, and struck the plaintiff on his foot, causing him some injury. The learned trial judge ruled that the case was controlled by the maxim res ipsa loquitur, and that the obligation rested upon the defendant to explain the accident. Without discussing that subject at length, it is sufficient to say that we are not disposed to differ with the view the trial judge entertained concerning it. The defendant undertook to explain the

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cause of the accident, and it was attributed to a defect in the casting of the prong, in which it was claimed (and there was some evidence to substantiate that theory) that there existed an air bubble or blister. Proof was offered that the car and everything connected with it was regularly and frequently inspected by servants of the defendant who were charged with the performance of that duty, and the attempt was made, also, to prove that the defect in the prong could not have been detected by inspection. In his charge the learned judge stated to the jury what the duty of inspection was. He told them that it was incumbent upon the defendant to make a proper inspection of its cars and the instrumentalities connected therewith for the safety of the traveling public. He said:

"The defendant, however, contends that this was such a defect as would not have been disclosed by a proper inspection, and that is a question which must address itself to you. As men of intelligence and as men of affairs, you must use your good judgment in passing upon that point. If there were a latent, inherent defect which would not have been manifest under proper inspection, and the defendant used care to furnish proper safeguards for the traveling public, and in the exercise of proper care did nothing which it should not have done, or omitted nothing which it should have done, then, of course, this accident is one which it is not responsible for, and your verdict should be for the defendant."

Thus it was left to the jury to say whether a proper inspection had been made, or whether the defendant exercised proper care in inspecting. The court was not asked to charge the jury what degree of care should have been exercised, or to define more specifically what was meant by a proper inspection. It was for the jury to say what caused the fall of the register, and whether the defendant had sufficiently explained it by showing that it was the breaking of the prong that caused the apparatus to fall, and, if it were, whether that prong had been properly inspected. In setting aside the verdict, the trial judge considered that, if the verdict were based upon the insufficiency of the explanation, it was not only against the weight of evidence, but it was without any evidence whatever to support it. As we read the testimony of the witnesses, there was abundant proof upon which the jury were authorized to reject the explanation. They were called upon to determine whether the duty of inspection had been performed. There is testimony to the effect that the car was inspected, and that some of the immediate surroundings and attachments of the register were also inspected; but there is no evidence to show that the prong, which was a permanent attachment of the car, had ever been inspected, or its sufficiency to support or aid in support of the register was ever tested, unless it may have been by one of the servants of the defendant placing his whole weight upon the apparatus, and thus attempting to see what strain it would bear. But, even if that were done, there is evidence that, had the defect existed in the prong as claimed by the defendant, the weight applied to it in the manner indicated would have caused it to snap and break. There was also testimony as to the insufficiency of the inspection of the prong if it were inspected, because the simple method of striking it with a hammer would have disclosed the existence of the air bubble or blister, and it was not tested in that

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manner. The defendant sought to exonerate itself from responsibility by showing adequate inspection, and the existence of a defect which could not have been detected by reasonable and proper inspection. Under the condition of the evidence, the jury were justified in finding that there had not been reasonable and proper inspection of the prong, and that the defendant had not satisfactorily explained the accident. The trial judge was of the impression that, if the cast-iron prong had a latent defect described by the witness, it was manifest that no kind of inspection, however careful, could have revealed the same. But it appears in evidence that it would have been revealed had the prong been tested by a hammer.

As stated before, the learned trial judge also considered that he did not charge the jury with sufficient distinctness, referring to his remarks as to the credibility of the defendant's witnesses, and he was of the opinion that he should have given them more definite instructions upon that subject, and that he should have told the jury in so many words that they should find a verdict for the defendant if they believed its witnesses. He did charge the jury, not in those words, but very clearly and unmistakably to the same effect. He told them that witnesses had been called by the defendant for the purpose of explaining the cause of the accident; that those witnesses testified that it was caused by the breaking of the cast-iron prong which projected from the frame of the car, and to which the register was attached; that the breaking was caused "through a flaw or an air blister in the cast-iron projection"; that that was something that could not have been seen until after the iron had been broken; that it was for the jury to pass upon the credibility of those witnesses who are in the employ of the defendant, and to say whether or not their testimony shall be accepted by them in its entirety. He said:

"All of the witnesses, as I recall them, except Weiler, are now in the employ of the defendant, and Weiler was in such employ at the time of the accident. You are to weigh their evidence and pass upon their credibility with reference to that fact, and, if their evidence appeals to you as a satisfactory explanation of this accident, and you are satisfied that there was no negligence on the part of the defendant, your verdict should be for the defendant."

Thus was submitted to the jury the credibility of the defendants' witnesses, and they were instructed to base their judgment and determination upon the credibility of such witnesses. We do not see how the jury could have been better instructed upon this subject. The meaning of the court is clearly expressed in plain language.

It is intimated in the opinion we have been considering that there may have been an error in the charge respecting the plaintiff's right to recover for loss of profits in his business, but the learned judge did not pass upon that question. It is sufficient to say now that evidence was given of the nature of the plaintiff's business, and of what his expenses were, and in that evidence the only expense or outlay of the plaintiff in conducting his business is stated. It is also intimated in the opinion that the conduct of such business involved the question of the rental of premises and use of capital and the employment of men. The expenses for the employment of men were testified to, the outlay of capital was also testified to, and it appeared that there were no other expenses

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to which the plaintiff was put in "running" the oyster stand at which he conducted his business. Outside of those expenditures, everything else he received was profit. The charge to the jury concerning the loss of profits was very guarded, and, under the proof, was not erroneous.

The order appealed from should be reversed, and the verdict reinstated, with costs of this appeal. All concur.

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## SCALLON et al. v. MANHATTAN RY. CO. et al.

(Supreme Court, Appellate Division, First Department. April 6, 1906.)

EMINENT DOMAIN—DAMAGES—APPEAL—REVIEW—HARMLESS ERROR—FINDINGS.

**In an action for damages caused by the construction of a railway in front of plaintiffs' property, the complaint described the property as a lot 25 feet front and 75 feet deep. The deeds offered in evidence gave the same description. There was a building fronting on the street having a depth of 50 feet. Back of the structure was a small extension. The evidence on which the court acted in awarding damages was confined to that much of the lot and the building thereon as was of the dimensions of 25 feet front by 50 deep. *Held*, that an error in the finding, describing the property as 25 feet by 75 feet, was immaterial, for there could be no subsequent recovery for the taking of easements appurtenant to the area in the rear of the structure.**

Appeal from Special Term, New York County.

Action by Frances M. Scallon and another against the Manhattan Railway Company and another to recover damages caused by the construction and operation of railways by defendants in front of the premises of plaintiffs. From a judgment awarding damages, defendants appeal. Affirmed.

Argued before O'BRIEN, P. J., and McLAUGHLIN, PATTERSON, LAUGHLIN and HOUGHTON, JJ.

Julien T. Davies, for appellants.

Vincent P. Donihee, for respondents.

PATTERSON, J. It is urged by the appellants that what was decided by this court in Hindley v. Manhattan Railway Company, 103 App. Div. 504, 93 N. Y. Supp. 53, while it is controlling in the case of Wohlers against these defendants, argued and decided herewith, does not apply to this case. That is a misapprehension of counsel. The Hindley Case is directly in point, and, for the reasons stated in the opinion of Mr. Justice Hatch therein, we conclude that the statute of limitations does not bar the plaintiffs' right to relief. We have carefully examined the record with reference to the awards of fee and rental value, and find that there is sufficient evidence to sustain the judgment appealed from. It is contended, however, by the appellants that the court erred in its finding of fact, and that an award was made with respect to a larger and somewhat different property than that to which the proof related. The plaintiffs' premises are situated at the southeast corner of Forty-Second street and Second avenue in the city of New York. The lot is 25 feet front and 75 feet deep, and is so described

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in the complaint and in the deeds which are in evidence. There is a four-story building fronting on Second avenue, having a depth of 50 feet, with a store on the first floor, and two apartments, of four rooms each, on the three upper floors. Back of that structure there is a small and apparently insignificant extension. All the evidence which was before the court and upon which it acted was confined to that much of the lot and the building thereon as was of the dimensions of 25 feet front by 50 feet deep, and the evidence shows that the estimates as to fee and rental value were confined thereto. The finding of the court with reference to dimensions was evidently taken from the complaint and from the deeds. The proofs upon which the court acted established that the property really involved was damaged to the amount found. The error in description in the findings of fact is of no importance, for the proofs were limited, and there can be no recovery at any time for the taking of easements appurtenant to this small area in the rear of the property, and for which no award was actually made. The award covers the whole premises.

The judgment should be affirmed, with costs. All concur.

HOUGHTON, J. The case of Hindley v. Manhattan Railway Company, 103 App. Div. 504, 93 N. Y. Supp. 53, is in principle, I think, applicable to the present case. I therefore feel constrained to concur in the opinion of Mr. Justice PATTERSON. But for this former decision, however, I should be of the opinion that the defendant could and has obtained prescriptive rights against abutting owners, and that its occupation of the streets became hostile before the decision of the courts in 1882, adjudging that the rights of abutting owners had been invaded, and that the purchase or recognition of the rights of one abutting owner on the route did not destroy defendant's prescriptive rights against other abutters whose claims were not conceded. Although the defendant began its occupancy under grant from the state to the street only, yet from its manner of occupation, and from its resistance to payment for invasion of the individual rights of abutting owners, it must be deemed, I think, to have occupied under claim of right to use all that was necessary to the erection, maintenance, and operation of its railroad. From the very nature of the structure, and from the necessary manner of operation, the light, air, and access of abutting owners was appropriated. That the defendant believed it had the right to these under its grant from the state, or that it insisted that abutting owners had no redress for their invasion, did not change its rights or the character of its occupation. That occupation was open and notorious and exclusive, either under claim of title or in hostility to the owner's rights, and contained all the elements, it seems to me, necessary for the ripening of prescriptive title. While the right of way is continuous, and, in a broad sense, must be treated as a whole, yet the invasion of individual rights is single, and I see no reason why such single right cannot be obtained by adverse possession, notwithstanding the rights of other abuttors similarly situated may be recognized.

The question in the present case as to whether or not the statute of limitations was suspended by the death of the owner and the descent



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of the real property to her infant heirs would be important if defendant could obtain title by prescription, but under the decision as rendered it becomes immaterial. Because of the decision of this court in Hindley v. Manhattan Railway Company, supra, I concur in an affirmance of the present judgment.

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## GREEHY v. METROPOLITAN ST. RY. CO.

(Supreme Court, Appellate Division, First Department. April 6, 1906.)

CARRIERS—INJURY TO PASSENGER—EVIDENCE—SUFFICIENCY.

In an action against a street railroad company for injuries to a passenger, evidence considered, and *held* insufficient to show that the car was started while plaintiff was in the act of alighting.

Appeal from Trial Term, New York County.

Action by Kate Greehy against the Metropolitan Street Railway Company. From a judgment in favor of plaintiff, and from an order denying a motion for a new trial, defendant appeals. Reversed.

Argued before O'BRIEN, P. J., and McLAUGHLIN, PATTERSON, LAUGHLIN, and HOUGHTON, JJ.

Bayard H. Ames, for appellant.

George W. Dease, for respondent.

LAUGHLIN, J. This is an action by a passenger for personal injuries alleged to have been caused by the negligence of the defendant in suddenly starting the car while she was in the act of alighting therefrom. The testimony of the plaintiff is wholly uncorroborated, and is flatly contradicted by three apparently disinterested passengers and the conductor, who at the time of the trial was in the employ of the Adams Express Company, and contradicted in part by a pedestrian on the street and by the motorman. We agree with the contention of the learned counsel for appellant that the verdict is against the weight of the evidence. The plaintiff alleged and testified that at about 7:30 o'clock in the evening on the 18th day of January, 1898, she was a passenger on one of defendant's south-bound cars on Madison avenue; that she was seated on the right-hand side a short distance from the door, leaving vacant a space for the accommodation of about four people to sit between her and the door; that she desired to stop at Seventy-Seventh street, and after the car passed Seventy-Eighth street she signaled the conductor, who was standing nearer the front, about the middle of the car, to stop, and said that she wished to get off at Seventy-Seventh street, to which he replied, "All right"; that the car was going fast, and she remained seated until it stopped, and then arose and proceeded to the door, where she met a woman and a man entering, and stepped back inside the body of the car, but at the edge of the door, to let them pass; that as soon as they passed, and while they were between her and the conductor, she stepped out upon the rear platform, and was, with one hand on the rail, one foot on the platform, and the other down on the step, ready to alight when she heard two bells, and the car suddenly started, loosening her grasp,

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and precipitating her into the street. She was 21 years of age, had been in this country four years, and was employed as a cook. It is not entirely clear that on her own testimony the conductor, even if he had been informed that she desired to alight at Seventy-Seventh street, was negligent, or would not have been justified in assuming that she had changed her mind. Her conduct was quite unusual for a young active person. She remained seated, not merely until the car slowed down, but until it came to a full stop, and she evidently took it leisurely after that, or the couple waiting to board the car would not have reached the platform, and met her in the door. Even then, instead of manifesting her intention of getting off, so that they would step aside and allow her to pass, she stepped back into the body of the car and aside for them, and waited until they passed, whereupon, without taking any precautions to notify the conductor, or discover whether he was aware that she had not alighted, and while the gentleman and lady were in the aisle between her and the conductor, she proceeded out, and descended to the position from which she claims to have been thrown. If passengers made no preparations, even while cars are slowing down, to alight, but waited until the momentum ceased altogether, and then stepped back or aside for passengers to board the car, the long distance speed of a street car would not equal that of a pedestrian. If she were ill, aged, crippled, or blind her conduct was such as might have been expected, but in the enjoyment of youth, health, and all her faculties the course she pursued is contrary to common observation. The testimony of the plaintiff, herself, therefore, perused alone, is not convincing, and we look further to see whether any other witness gives a more reasonable or probable explanation of the accident. The witnesses for the defendant differ as to the block in which the accident occured, but most of them say it was in the block between Seventy-Eighth and Seventy-Ninth streets, and all agree that it did not occur at any regular stopping place, and their testimony all tends to show that it occurred about in the middle of a block, and a block or two above Seventy-Seventh street. The conductor and these passengers say that the car was going very fast before plaintiff arose, and that she hurried out, and stepped or fell off before it stopped or even slackened its speed, and without giving any notice or signal of her intention to alight. The conductor on seeing her step off the car says that he pulled three bells (the danger signal), which requires a sudden stop, and rushed off after her before the car stopped. The motorman says he got three signals in the middle of a block. A passerby testified that he saw her on the street in the middle of a block, and assisted the conductor in taking her to the drug store at the corner of Madison avenue and Seventy-Seventh street. We think, therefore, that plaintiff was a little more tardy than she now recollects or admits in reaching the platform, and that the car after taking on the last passengers (the gentleman and lady to whom reference has been made) had already started, but that the plaintiff, desiring to alight, then ventured to do so, and received the injuries of which she complains.

The judgment and order should be reversed, and a new trial ordered, with costs to appellant to abide the event. All concur.

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## DEPEW v. NEW YORK CITY RY. CO.

(Supreme Court, Appellate Division, First Department. April 6, 1906.)

1. CARRIERS—PASSENGERS—NEGLIGENCE—QUESTION FOR JURY.

Where one of the rails of defendant's horse car track had been depressed from four to six inches below its opposite rail for several days during improvements in the street, which depression extended about three feet along the track, making a sharp pitch hole, over which defendant's car at the time of the accident was rapidly driven, and by the bounding of the car intestate was thrown from the front platform, on which he was riding as a passenger, and killed, whether the carrier was guilty of negligence was for the jury.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1318-1321.]

2. SAME—POSITION—CARE REQUIRED.

While a passenger standing on the front platform of a street car is not guilty of negligence by such fact alone, he nevertheless owes to the carrier some precaution, either by the manner of standing or by grasping some support, to guard against losing his balance by any sudden motion of the car.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1359, 1379.]

3. SAME—CONTRIBUTORY NEGLIGENCE.

Where, in an action for death of a street car passenger by being thrown from the front platform of the car by a sudden jolt thereof, there was no evidence describing the manner in which deceased was standing with reference to bracing himself, nor whether he had hold of any part of the car just prior to the accident, nor any facts from which the jury could have inferred that deceased was taking any precaution whatever to guard against losing his balance, plaintiff failed to establish that deceased was not guilty of contributory negligence.

Appeal from Trial Term, New York County.

Action by Lorah A. Depew, as administratrix of the estate of Hayward A. Depew, deceased, against the New York City Railway Company. From a judgment in favor of plaintiff, and from an order denying defendant's motion for a new trial, it appeals. Reversed.

Argued before O'BRIEN, P. J., and INGRAHAM, McLAUGHLIN, CLARKE, and HOUGHTON, JJ.

Joseph F. Daly, for appellant.

Gratz Nathan, for respondent.

HOUGHTON, J. The action is to recover for the negligent killing of plaintiff's intestate. The street over which defendant's horse car track ran had been, or was, in process of repair, and for some days, at least, the southerly rail of the east-bound track was depressed from four to six inches below its opposite rail. This depression extended about three feet along the track, making, as claimed, a sharp pitch hole, over which defendant's car at the time of the accident was driven rapidly, and by the swaying and bounding of which plaintiff's intestate was thrown from the front platform, upon which he was standing, under the wheels of the car, receiving injuries from which he died. If the hole existed to such extent and for such time as plaintiff claimed, and defendant's driver drove at a rapid pace, regardless of it, knowing that men were standing on the front platform with him, a question was made

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for the jury to determine whether or not the defendant used due care in the management of its car, in view of all the circumstances.

We think the judgment must be reversed, however, because the plaintiff failed to show that the deceased himself exercised any care or vigilance to guard against falling from the car. It was late at night. The car was not full. The deceased and his companion, Eustace, were smoking, and remained on the front platform. The conductor collected their fare while they stood there. While it was not negligence per se for the deceased to stand upon the platform (Nolan v. Brooklyn City & Newtown R. Co., 87 N. Y. 63, 41 Am. Rep. 345; Bradley v. Second Ave. R. Co., 34 App. Div. 285, 54 N. Y. Supp. 256), yet he was manifestly in a more dangerous position, if the car should rock or sway, than if he were seated inside the car. If an accident had occurred to him while so seated, there would have been no occasion to prove that he was on his guard in any manner, because there would have been no occasion for such precaution. One standing upon an open platform, however, owes to himself and his carrier some precaution, either by manner of standing or grasping some support, against losing his balance by any sudden motion of the car. While exposure to danger may not constitute negligence of itself and as matter of law, yet such position enjoins upon a party a degree of care commensurate with the surroundings and the situation. Palmer v. Dearing, 93 N. Y. 7; Thomas on Negligence, vol. 1, p. 691.

The only testimony adduced upon this point by the plaintiff was by the companion, Eustace, who says that both he and deceased boarded the car at Sixth avenue, and that he himself took a position on the platform against the left side of the dashboard, holding onto it, and that the deceased stood with his back against the body of the car on the opposite side, and that the last he noticed of the deceased was when the car crossed Broadway; the accident happening about 50 feet therefrom. When the jolt came the witness was thrown against the driver, and he did not see the deceased pitched from the car. An alarm was given, and the car very shortly stopped, and deceased was found with his leg pinned under the forward wheel. The witness does not describe in any manner how the deceased was standing with reference to bracing himself, or whether he had hold of any part of the car; and he gives no facts from which the jury could have inferred that the deceased was taking any precaution whatever. The plaintiff, therefore, failed to prove, as she was required to do, that the deceased was free from contributory negligence on his part, and to show any facts from which that fact could be inferred, and for that reason we think a new trial must be ordered.

There are other serious questions raised by the appellant; but, in view of our conclusion that another trial must be had, upon which they may not arise, we do not deem it necessary to consider them.

The judgment and order should be reversed, and a new trial granted, wtih costs to the appellant to abide the event.

O'BRIEN, P. J., and McLAUGHLIN and CLARKE, JJ., concur. INGRAHAM, J., concurs in result.

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## SCHEU v. UNION RY. CO. OF NEW YORK CITY.

(Supreme Court, Appellate Division, First Department. April 6, 1906.)

CARRIERS—INJURY TO PASSENGERS—ISSUES—VARIANCE.

The variance between the complaint, in an action for injuries to a passenger, which alleges that while she was riding as a passenger, and seated, the carrier propelled its cars at such a dangerous rate of speed around a curve as to throw her from her seat to the ground, and the proof, which shows that the injuries were received while she attempted to alight, is fatal to a recovery, in the absence of an amendment to the complaint, though the carrier was not misled.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1281.]

Ingraham, J., dissenting.

Appeal from Trial Term, New York County.

Action by Magdalena Scheu against the Union Railway Company of New York City. From a judgment for plaintiff, and from an order denying a motion for a new trial, defendant appeals. Reversed.

Argued before O'BRIEN, P. J., and McLAUGHLIN, INGRAHAM, CLARKE, and HOUGHTON, JJ.

Anthony J. Ernest, for appellant.

Alfred J. Talley, for respondent.

HOUGHTON, J. We are constrained to reverse this judgment because the plaintiff was permitted to recover upon proof of a state of facts wholly at variance with the negligent acts which she alleged in her complaint. The negligence which she pleaded was that while riding as a passenger, and seated, the defendant propelled its car at such a dangerous and high rate of speed around a curve that she was thrown from her seat to the ground, sustaining the injuries of which she complains. Against the timely and repeated objection of the defendant that the proof was at variance with the pleading, she was permitted to show that she notified the conductor of her desire to alight, and that he gave the signal for the car to stop, and that as the speed slackened and as she was preparing to alight the car gave a sudden and violent jerk, breaking her hold and throwing her to the ground.

There is a wide difference between the negligence of running a car at such a reckless speed as to hurl passengers from their seats, and that of not permitting a passenger a reasonable opportunity to alight after signal which has been complied with. The one in no sense involves the other. A party, having chosen and pleaded the acts for which he seeks to hold his adversary in damages, must abide by his allegations, unless relieved by amendment. In an action brought to recover damages because of negligence, the plaintiff cannot allege in his complaint one thing as the proximate cause of his injury, and upon the trial, if objection be made, prove another to have been such proximate cause. Woolsey v. Trustees of Ellenville, 69 Hun, 489, 23 N. Y. Supp. 410; Newman v. Pennsylvania R. R. Co., 33 App. Div. 171, 53 N. Y. Supp. 456; Hoffman v. Third Ave., R. R. Co., 45 App. Div. 586, 61 N. Y. Supp. 590; Davis v. Broadalbin Knitting Co., 90 App. Div. 567, 86 N. Y. Supp. 127. And where such variance exists, and timely protest is made, and no amendment is asked for or allowed, a judgment in

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plaintiff's favor cannot be sustained on appeal, notwithstanding defendant was probably not misled. Southwick v. First Nat. Bank of Memphis, 84 N. Y. 420; Northam v. Dutchess Co. Mut. Ins. Co., 177 N. Y. 73, 69 N. E. 222; Ray v. United Traction Co., 96 App. Div. 48, 89 N. Y. Supp. 49.

In addition to the objections and motions which the defendant made to the receipt of proof that plaintiff was injured while she was attempting to alight from the car which was being brought to a stop to permit her so to do, the defendant requested the court to charge that there could be no recovery by reason of the failure of the defendant to afford the plaintiff a reasonable opportunity to alight, because the complaint contained no such allegation, and such request was refused. There was no proof that the plaintiff was thrown from her seat to the ground by reason of the high rate of speed of the car around a curve, and she therefore failed to sustain her allegation that such act brought about her injuries. She was permitted to recover upon proof of acts not set forth in her complaint nor embraced within its allegations. No amendment was asked for or allowed, and the judgment cannot be permitted to stand.

The judgment and order should be reversed, and a new trial granted, with costs to the appellant to abide the event.

O'BRIEN, P. J., and McLAUGHLIN and CLARKE, JJ., concur.

INGRAHAM, J. (dissenting). I do not think that there was such a variance between the complaint and the proof as justified a reversal of this judgment. The testimony is entirely consistent, as I view it, with the allegations of the complaint that the plaintiff was thrown from the car while rounding the curve, after the speed had been accelerated as the car was approaching the curb. The defendant does not claim that it was surprised upon the trial by the variance between the complaint and the proof.

I think the evidence was sufficient to sustain the recovery, and that the judgment should be affirmed.

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## LAWRENCE et al. v. BINNINGER et al.

(Supreme Court, Appellate Division, First Department. April 6, 1906.)

1. WILLS—DEBTS OF TESTATOR—LIABILITY OF DEVISEES.

Under the express provisions of Code Civ. Proc. § 1843, devisees are liable for the debts of the decedent to the extent and value of the real property which was devised to them.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 2141.]

2. SAME—DEBTS OF DECEDENT—RECOVERY FROM DEVISEE—INSUFFICIENCY OF ASSETS—PROOF.

Under Code Civ. Proc. § 1848, relative to the liability of devisees for the debts of decedent, and providing that in an action to recover such indebtedness from devisee it must be proven that the decedent's assets were not sufficient to pay the plaintiff's debt, and that the executor's or administrator's account as rendered to and settled by the surrogate may be used as presumptive evidence, a so-called "intermediate account" of an

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executor, filed in the surrogate's court, but not shown to have been settled by the surrogate, or to have been made the basis of any decree, is insufficient to show want of other assets.

3. SAME—INABILITY TO COLLECT FROM EXECUTOR.
Under Code Civ. Proc. § 1848, relative to proceedings to recover the debts of decedents from devisees, and providing that the plaintiff must show that he has been, or will be, unable with due diligence to collect his debt by action against the administrator or executor, etc., a mere showing that a judgment has been obtained against an executor is not sufficient to show that plaintiff will be unable to collect his debt, in the absence of any proof that any attempt has been made to collect the judgment from the executor.

4. SAME—LIABILITY OF DEVISEE—RIGHTS OF CREDITOR—LIEN.
Under Code Civ. Proc. § 1852, relative to the liability of devisees for debts of the decedent, and providing that, if any of the real property which was devised has not been alienated at the time of the commencement of the action against the devisee, the final judgment must direct that the debt of the plaintiff be collected out of that real property, and that such a judgment is preferred as a lien upon that property, the plaintiff in an action against devisees to recover a debt due from decedent is not entitled to a lien on a fund arising from the condemnation of the property which was devised.

5. SAME—PLEADING—IMPROPER PRAYER FOR LIEN.
Where, in proceeding against heirs and devisees to collect a debt due from decedent, the complaint improperly prayed for the establishment of a lien upon the proceeds of the devised land, but also was sufficiently broad to charge defendants as devisees with such property as came to their hands, or its value, the prayer for the lien did not nullify those portions of the complaint which properly sought to charge the devisees personally.

Appeal from Special Term, New York County.

Action by George H. Lawrence and others, as executors of the last will and testament of Elizabeth H. Sias, deceased, against Regina Binninger and others. From a judgment for plaintiffs, the defendant named and others appeal. Reversed and remanded.

Argued before O'BRIEN, P. J., and PATTERSON, McLAUGHLIN, LAUGHLIN, and HOUGHTON, JJ.

James Z. Pearsall, for appellant Regina Binninger.
Frank Brookfield, guardian ad litem, pro se.
Louis Wendell, Jr., for appellant George F. Binninger.
Henry C. Henderson, for respondents.

HOUGHTON, J. Lizetta Binninger died the 26th day of January, 1900, leaving a last will and testament by which she made her children, the defendants Regina, Lillie, and Ida, residuary legatees and devisees. This will was admitted to probate and letters testamentary issued to Christian Trinks, the executor named therein, February 23, 1900. The real property coming to the residuary estate consisted of two parcels, upon one of which there were two mortgages, the second of which, accompanied by a bond given by testatrix, was held by these plaintiffs. The first mortgage was foreclosed and the property sold; nothing being realized to apply on the plaintiff's mortgage and bond. The other parcel, after the death of testatrix and after title had vested in these defendants as devisees, was condemned by the city of New York for street purposes, and an award was made which, after the payment of the mortgage on the land and taxes and assessments accrued thereon, left a surplus of several hundred dollars, the exact amount of which is not

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stated, which at the commencement of this action was on deposit with the comptroller of the city of New York to the credit of these defendants, devisees. Before the trial this fund was directed to be paid into court without prejudice to the rights of any parties thereto, and the action was discontinued as to the comptroller.

The plaintiffs brought action against the executor on the bond which had been given by his testatrix, and obtained judgment against him; but during the three years following the issuing of letters testamentary, in which their claim was a lien against any real property of which the testatrix died seized, they made no application to sell it for payment of debts, or to have the award applied to that purpose. After the three years had expired, and on the 14th of April, 1903, they brought this action against the defendants as devisees to charge them and their equity in the award made in the condemnation proceedings with the payment of such indebtedness. The particular form of relief which the plaintiffs ask is that their claim be declared to be a lien upon the award, treating the fund as real estate, and that they be decreed payment thereof out of the shares of the defendant devisees therein.

Heirs of an intestate and devisees of a testator are liable for the debts of the decedent to the extent and value of the real property which descended or was devised to them. The manner in which, and the conditions under which, they may be charged in an action at law, are regulated by sections 1844 to 1860 of the Code of Civil Procedure. Amongst the conditions are those found in sections 1848 and 1849, which prescribe that in such an action the plaintiff must show that the assets of the decedent's estate were not sufficient to pay his debt, or that the plaintiff has been, or will be, unable with due diligence to collect his claim by proceedings in proper Surrogate's Court, or by action against the executor or administrator, or legatees or next of kin. This condition with respect to their claim the plaintiffs attempted to prove; but we think they failed to do so, and that for that reason the judgment must be reversed.

Section 1848 prescribes that an executor's or administrator's account, as rendered to and settled by the surrogate, may be used as presumptive evidence of lack of assets and inability to collect. The plaintiffs introduced in evidence what is called an "intermediate account" of the executor of decedent's estate, filed in the proper Surrogate's Court. No proof was made that this account was settled by the surrogate, or that any decree was entered thereon. The language of the section is, "account as rendered to, and settled by the surrogate." So far as the record discloses, a paper was found on file in the Surrogate's Court, purporting to be a statement by the executor of Lizetta Binninger that he had been unable to find any substantial assets belonging to her estate. Under what proceeding the account was there does not appear, nor was it settled by the surrogate, evidenced by formal decree or otherwise. It was found on file in the surrogate's office, and was properly received in evidence; but it should have been followed by some proof that the surrogate had passed upon it and settled it as presented, or otherwise. As the proof stood it was a mere declaration of the executor that he had been unable to find any assets with which to pay debts. The executor was not called to show the condition of the estate, and there was

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no other proof of this fact. This was a prerequisite to the liability of these defendants as devisees, and to the charging of the real estate which descended to them, or the avails of it arising from condemnation proceedings, if that was chargeable at all.

Nor did the plaintiffs produce any proof sufficient to warrant the trial court in finding that they had been unable, or would be unable, with due diligence, to collect the debt by proceedings in proper Surrogate's Court, or by action against the executor or legatees. They introduced the judgment which they had obtained against the executor, but they failed to show that they had made any attempt to collect it from the executor by calling him to account, or otherwise. The mere obtaining of a judgment against an executor is not sufficient to show that fact.

The appellants urge, in addition to this technical defect, that the plaintiffs cannot maintain their action under any circumstances, because the fund arising from the condemnation proceedings has lost its character of real property and has become personalty by the involuntary sale to the city. Whether this be so or not, or, if so, whether it would affect the ultimate result, we do not feel called upon now to determine.

Actions against legatees and heirs and devisees are very similar in character and in the objects sought to be attained. Legatees are liable, as well as heirs and devisees, and the action is not defeated if one person takes the property in more than one capacity. Code Civ. Proc. § 1860; Matteson v. Palser, 173 N. Y. 404, 66 N. E. 110. Nor does the heir or devisee escape personal liability, if the plaintiff shall so elect, if he has voluntarily aliened the real property which has descended or was devised to him; for he must then respond personally for its value. Code Civ. Proc. § 1854. The prayer of plaintiffs' complaint is wrong, for there is no ground upon which any lien against the fund could be established, and, even if the judgment was to stand, that part of it would necessarily be modified. Where the real property still remains in the devisee or heir, the most that can be done is to direct that the execution be satisfied out of such property. Code Civ. Proc. § 1852. The complaint, however, as amended upon the trial, is sufficiently broad to charge the defendants as devisees with such property as came to their hands, or its value, as all the facts are stated. The prayer for relief does not nullify the complaint in these respects. On the new trial which must be had, if the plaintiff shall succeed, very probably the objections to the present judgment, which we have pointed out, can be obviated.

The judgment should be reversed, and a new trial granted, with one bill of costs, including the disbursements of all, to appellants to abide the event. All concur.

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## RANSOM et al. v. CUTTING et al.

(Supreme Court, Appellate Division, First Department. April 6, 1906.)

1. ATTORNEY AND CLIENT—CONTRACT FOR FEES—REASONABLENESS.

Defendant C., having been disinherited by his father, who died leaving a very large estate, employed plaintiffs to oppose the probate of his father's will by a contract assigning to plaintiffs 40 per cent. of any and all recovery, to be reduced to 33⅓ per cent. if the contemplated litigation

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was ended by a decision of the surrogate, and to 10 per cent. in the event of a settlement realizing $50,000 or more; plaintiffs agreeing not to call on C. for money to pay disbursements required in such proceedings. Plaintiffs succeeded in obtaining a settlement of the controversy by which C. was paid $30,000 in cash, and secured an annuity of $4,000. *Held* that, in the absence of fraud, such contract was not unconscionable.

2. CHAMPERTY AND MAINTENANCE—CONTRACT FOR ATTORNEYS' SERVICES—CONSTRUCTION.

Where an unsolicited contract for attorneys' services provided for payment of a percentage of the recovery, and the attorneys agreed not to call on the client for any money to pay necessary disbursements required in the proceedings, it should be construed as providing that the percentage should be figured after deducting the expense incurred from the recovery, and was not therefore void for champerty.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Champerty and Maintenance, §§ 22–51.]

3. ATTORNEY AND CLIENT—LIENS—ENFORCEMENT—EQUITY.

Where, under an agreement for attorneys' services, the attorneys were entitled to 10 per cent. of the proceeds of an annuity as the same was paid, with a lien to secure payment thereof, and both the trust company obligated to pay such annuity and the annuitant refused to recognize the attorneys' claim, their remedy was by a suit in equity to enforce their lien.

Appeal from Special Term, New York County.

Action by Rastus S. Ransom and others against Robert L. Cutting, impleaded with the Farmers' Loan & Trust Company. From a decree in favor of plaintiffs, defendant Cutting appeals. Affirmed.

Argued before O'BRIEN, P. J., and McLAUGHLIN, PATTERSON, LAUGHLIN, and HOUGHTON, JJ.

Franklin Bartlett, for appellant.

William H. Hamilton, for respondents.

McLAUGHLIN, J. In January, 1894, one Robert L. Cutting died, leaving a will by which he gave all of his property, with the exception of an annuity to his widow, to one of his sons, James De Wolfe Cutting. The other son, Robert L. Cutting, the appellant, feeling that he had been unjustly treated, and that the instrument offered for probate did not correctly express his father's wish, retained the plaintiffs, a firm of lawyers, to oppose the probate of the will. He was unable financially to pay the plaintiffs, and, for the purpose of securing them for the services to be rendered in his behalf, he entered into an agreement with them on the 1st of February, 1894, by the terms of which he agreed, "in consideration of legal services heretofore and hereafter to be rendered," to assign, transfer, and set over to them "forty per cent. of any and all recovery" which he should receive, which per cent., however, was to be reduced to 33⅓ per cent. provided the contemplated litigation was ended by the decision of the surrogate, and to 10 per cent. in the event of a settlement realizing $50,000 or more. The agreement further provided that the plaintiffs should not "call upon the said Robert L. Cutting * * * for any sum or sums of money to pay the necessary disbursements required in the said proceedings." The plaintiffs, under their retainer and the agreement referred to, rendered services as attorneys for the appellant in proceedings to compel an accounting of his grandfather's estate, as well as in the Surrogate's Court

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to prevent the probate of his father's will. Their efforts were successful, because they obtained a settlement and compromise by which he was paid $30,000 in cash, and to be thereafter paid an annuity of $4,000; payment of which was secured by a deposit with the defendant trust company of $95,000. The appellant, appreciating the value of the services rendered for him by the plaintiffs and the validity of the agreement which he had entered into with them, when he received the $30,000 in cash paid them the 10 per cent. stipulated, and thereafter for a certain time paid them 10 per cent. of the annuity received from the trust company. Subsequently, however, he refused to pay the plaintiffs the 10 per cent. stipulated on the annuity, and repudiated the agreement; whereupon this action was brought against him and the trust company to enforce the same. The plaintiffs were successful; the trial court holding that they had a lien to the extent of 10 per cent. on the annuity as the same matured, which it directed should be paid by the trust company, and Cutting alone has appealed.

The judgment is attacked principally upon the ground that the agreement to pay the 10 per cent. is unconscionable, for which reason it ought not to be enforced by a court of equity, and that it is also champertous, and therefore void, and cannot be enforced. Under the findings of the trial court (and there is an abundance to sustain them), the agreement cannot be said to be unconscionable. In Matter of Fitzsimons, 174 N. Y. 15, 66 N. E. 554, it was held that the mere fact that an attorney was to receive one-half of the recovery did not render an agreement unconscionable, in the absence of proof that it was induced by fraud, or that the compensation provided for was so excessive as to evince a purpose to obtain an improper or undue advantage. There is not a suggestion in this record that there was any fraud practiced upon the appellant in obtaining the agreement, or that he did not when he executed it fully appreciate its legal effect. On the contrary, it appears that he did appreciate it, and subsequently recognized it as binding upon him by paying 10 per cent. of the $30,000 received when the settlement was made, and for several years thereafter paying 10 per cent. of the $4,000 annuity. An attorney or counsellor at law, by express provision of statute, can agree with his client as to the amount to be paid for services to be rendered (section 66, Code Civ. Proc.), and an agreement made for that purpose, in the absence of evidence showing that a fraud has been perpetrated on the client, or that he did not fully understand the purport of the agreement, must be enforced like other contracts, according to its terms. The statute gives the right to an attorney and client to make a contract as to the former's compensation, and it is a matter of no importance, when the contract is brought under review, what the compensation agreed to be paid is, providing the contract is legal in other respects. The court cannot make contracts for parties, and only has power to construe them as made. If the contract as made were the result of a fraud practiced upon the client, or if it appeared that the compensation were so excessive, in view of the services rendered, as to indicate that an improper or undue advantage had been taken of the client, then relief would be afforded. But that is not this case. Here was a large estate, in which the appellant, if his father's will were probated, had no interest what-

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ever. He thought he had been wronged, and that the instrument sought to be probated was not his father's will, and to prevent its probate he applied to the plaintiffs, and that the services rendered by them were very valuable to him is evidenced by the fact that a compromise was effected by which he received, not only $30,000 in cash, but an annuity of $4,000 so long as he should live. It cannot be said, therefore, especially in view of the findings and conclusions of the trial court to the contrary, that the amount agreed to be paid to the plaintiffs was so excessive as to indicate a purpose to obtain improper or undue advantage of the appellant.

Nor do I think it can be said the agreement was champertous. The entire claim of the appellant in this respect is based upon that part of the agreement which provided that the plaintiffs would not call upon the appellant to pay the disbursements incident to or necessarily incurred by the prosecution of the proposed litigation. It is true an attorney cannot, directly or indirectly, either before or after an action or proceeding is instituted, promise or give a valuable consideration to any person as an inducement to placing or having placed in his hands a demand of any kind for the purpose of bringing an action thereon. Section 74, Code Civ. Proc. But the plaintiffs did not seek the defendant. He voluntarily went to them, and, for the purpose of securing their services, made the agreement. The fact that they were not to call upon him to pay the expenses of the proceeding did not, upon its face, make the agreement bad. There is no express provision in it that the attorneys were to pay the expenses, and, even if that is fairly to be inferred, it does not prevent the agreement being enforced; because, if that be held, then the legal effect of it is that they were to have the 10 per cent. after deducting therefrom the expenses incurred; and in this respect the case in principle is precisely like Fowler v. Callan, 102 N. Y. 395, 7 N. E. 169. There the attorney expressly agreed to conduct for his client certain legal proceedings, and pay all the costs and expenses of the same, receiving as compensation a one-half interest in certain land, a deed of which was given, which was the subject-matter of the litigation. The attorney, having been successful in the litigation, thereafter brought an action of ejectment under the deed thus given to him. The defense was that the agreement was champertous. The trial court so held, and the same was affirmed by the late General Term of the Court of Common Pleas. The judgment, however, was reversed, the Court of Appeals holding that the contract was not in violation of the statutory provision, but was an agreement purely for compensation, and therefore valid. This case was cited with approval and followed in Matter of Fitzsimons, supra, where Judge Martin, in delivering the opinion (and his language is quite as applicable to this case as it was to that), said:

"The appellant neither sought the retainer, nor did anything to induce it. So far as appears, it was not occasioned by any offer or solicitation of his, but originated in the free and unprejudiced choice of the client. The agreement appears to have been purely one for compensation. The arrangement contemplated success, in which event one-half the recovery would pay both attorneys. The compensation for the services of both would be discharged out of the portion of the property which would come into the hands of the attorney for that precise purpose. The contract in no respect induced or

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protracted the litigation. The appellant stirred up no strife, induced no litigation, but merely agreed to take for the compensation of himself and his associate, who was present at the time of the agreement, and presumptively consented to it, one-half of the recovery, to be divided between them as they should agree. The contention that this agreement was within the prohibition of section 74, and therefore void, cannot, we think, be upheld."

The agreement here under consideration, when construed in the light of the evidence and the findings of the trial court, was simply to the effect that the plaintiffs were to receive as compensation for the services to be rendered a certain percentage, payable out of the recovery. This did not make the agreement champertous, under the provision of the statute before referred to. In reaching this conclusion, the cases of Stedwell v. Hartman, 74 App. Div. 126, 77 N. Y. Supp. 498, affirmed 173 N. Y. 624, 66 N. E. 1117, and Begly v. Weddigen, 86 App. Div. 629, 83 N. Y. Supp. 805, and others cited by appellant's counsel, have not been overlooked.

The action was properly brought in equity. The trust company declined to recognize the validity of the agreement, and the appellant repudiated it. Therefore, there was nothing for the plaintiffs to do but enforce the lien which they had upon the annuity agreed to be paid. Fischer-Hansen v. Brooklyn Hts. R. R. Co., 173 N. Y. 492, 66 N. E. 395.

I am of the opinion that the judgment is right, and should be affirmed, with costs to the respondents. All concur.

PATTERSON, J. I concur fully in the views expressed by Mr. Justice McLAUGHLIN in his opinion in this case. Much was said upon the argument concerning the so-called "unconscionable" character of the agreement upon which the action was brought. There is nothing whatever in the record even to suggest that the agreement was of that character. The services rendered by the plaintiff's firm were of the greatest value to the defendant Cutting, and secured for him a result for which a compensation of 10 per cent. upon the amount realized cannot be called exorbitant. In view of what was accomplished by the plaintiff's firm, that compensation is reasonable. Mr. Cutting acquiesced in the contract with knowledge of all its bearings, and from time to time paid the amounts he agreed to pay, and thus repeatedly ratified it after abundant opportunity for consideration. In such circumstances, a party will not be heard upon a claim that the arrangement he assails is unconscionable. Kent v. Quicksilver Mining Co., 78 N. Y. 190.

LAUGHLIN, J., concurs.

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## FAWCETT v. CITY OF NEW YORK et al.

(Supreme Court, Appellate Division, First Department. April 6, 1906.)

1. EXECUTION—SUPPLEMENTARY PROCEEDINGS—TIME FOR TAKING PROCEEDINGS.
Under Code Civ. Proc. § 2435, giving a judgment creditor the right at any time within 10 years after the return unsatisfied of an execution to require the judgment debtor to be examined concerning his property, and section 2464, providing for the appointment of a receiver at any time

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after making an order requiring the judgment debtor to attend and be examined, an order appointing a receiver in supplementary proceedings may be made after the expiration of 10 years after the docketing of the judgment, provided the proceeding is instituted within 10 years after the return of the execution unsatisfied.

2. SAME—PRESUMPTION.
In the absence of an allegation to the contrary, it will be presumed, in an action by a receiver in proceedings supplementary to execution, that the supplementary proceedings were instituted within 10 years after the return of the execution against the debtor unsatisfied, as prescribed by Code Civ. Proc. § 2435.

3. SAME—RECEIVER—TITLE TO PROPERTY.
Where a receiver was appointed in a proceeding supplementary to execution before an award was made by a city for the taking of the property of the judgment debtor for a public use, the title to the award immediately vested in the receiver, under the express provisions of Code Civ. Proc. § 2468, and the debtor had no interest therein.
[Ed. Note.—For cases in point, see vol. 21, Cent. Dig. Execution, § 1179.]

4. JUDGMENT—LIEN—DURATION.
An award made by a city for the taking of a judgment debtor's real estate for a public use is personal property, and the 10-year limitation as to liens on real estate has no application.

5. EXECUTION—SUPPLEMENTARY PROCEEDINGS—ACTION BY RECEIVER—PARTIES.
In a suit by a receiver in a proceeding supplementary to execution to recover from a city an award made by it for the taking of the judgment debtor's real estate for a public use the judgment debtor is not a necessary party.

6. PARTIES—NONJOINDER—MODE OF OBJECTION.
Where the complaint in an action by a receiver in proceedings supplementary to execution to recover from a city an award made by it for the taking of the debtor's property for public use showed on its face that there was a defect of parties defendant, if the judgment debtor was a necessary party, the failure to join the judgment debtor as a party must be raised by demurrer.
[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Parties, § 134.]

7. SAME—WAIVER OF DEFECTS.
Where a complaint showed on its face a defect of parties defendant if a third person was a necessary party, the failure to make such person a party was waived, under Code Civ. Proc. §§ 488, 498, unless the same was raised by demurrer.
[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Parties, § 167.]

Appeal from Special Term, New York County.

Action by Lewis L. Fawcett, as receiver of Louis Edelmuth, against the city of New York and others. From an interlocutory judgment overruling a demurrer to the separate defenses interposed by defendant the city of New York, plaintiff appeals. Reversed.

Argued before O'BRIEN, P. J., and McLAUGHLIN, PATTERSON, LAUGHLIN, and HOUGHTON, JJ.

Henry R. Ham, for appellant.
Theodore Connoly, for respondent.

McLAUGHLIN, J. The plaintiff in proceedings supplementary to execution was appointed receiver of the property of on Edelmuth, and as such brought this action to determine the title to, and recover Edelmuth's interest in, an award made to unknown owners for land taken by the city of New York for street purposes. The complaint

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alleged, in substance, that on December 24, 1897, Edelmuth was the owner of an undivided one-sixth part of the land taken; that on that day title vested in the city of New York, for which an award of $336 was thereafter made to unknown owners; that on February 3, 1904, the plaintiff in proceedings instituted for that purpose was appointed receiver of Edelmuth's property; that he gave the bond required, entered upon and has since been discharging the duties of his office. The complaint also alleges a demand for and refusal of payment by the city. The city, among other defenses interposed the following:

"(3) And for a further and separate defense, the defendant the city of New York, upon information and belief, alleges that the plaintiff is not now, and was not at the time of the commencement of this action, entitled to claim, sue for, or recover any part, parcel, or portion of the award herein sued upon, in that the plaintiff, as by his complaint alleged, claims to have been appointed such receiver in supplementary proceedings on the 3d day of February, 1904, and in that on examination of the docket of judgments in the office of the clerk of the county of New York it appears that the judgment upon which these proceedings are founded was entered on the 7th day of August, 1891, in City Court of the city of New York, and duly docketed in said county clerk's office on the 8th day of August, 1891—a period more than ten years prior to entry of the alleged order appointing this plaintiff receiver therein.

"(4) And for a further and separate answer and defense the defendant the city of New York alleges that there is a defect of parties defendant, in that one Louis Edelmuth, the person of whom, as aforesaid, the plaintiff herein claims to be receiver in supplementary proceedings, has not been made a party plaintiff or defendant herein, and that the aforesaid Louis Edelmuth is a necessary party to the action."

To each of these defenses the plaintiff demurred, upon the ground that it was insufficient in law upon the face thereof. The demurrer was overruled, and the receiver has appealed.

I am of the opinion the demurrer should have been sustained. As to the third defense, the contention of the learned corporation counsel is that, inasmuch as the judgment under which the proceeding was instituted which resulted in plaintiff's appointment was recovered more than 10 years prior to the time of his appointment, the order appointing him was either void or else of no effect, under the decision of Importers & Traders' National Bank of New York v. Quackenbush, 143 N. Y. 567, 38 N. E. 728; but that case is not in point, nor do I think it has any application. That was an appeal from an order vacating a stay of proceedings, and denying a motion by the appellant to set aside an execution issued upon a judgment and order for the examination of the judgment debtor in proceedings supplementary to execution. There the judgment was recovered in 1879, and the execution upon it was issued in 1894, which was returned unsatisfied, and thereupon an order was obtained requiring the defendant to appear and answer in supplementary proceedings, and it was simply held that a motion to vacate the order was improperly denied; that under section 1251 of the Code the lien of the judgment upon defendant's real estate ceased after 10 years, and the execution was ineffective to reach all of the debtor's property; that the judgment creditor's legal remedy had not been exhausted, inasmuch as no steps had been taken to re-establish the lien on the real estate, and for that reason the proceeding was improperly instituted. It also appeared that a prior execution had been issued

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upon the judgment immediately after its rendition, which was returned unsatisfied, and it was held that the right to maintain supplementary proceedings accrued upon the return of that execution, and was barred after the lapse of 10 years, in the absence of some proceeding to revive it, to which the debtor was a party. Here the only allegation in the third defense is that the order appointing the receiver was made more than 10 years after the docketing of the judgment. The judgment was docketed August 7, 1891. The receiver was appointed February 3, 1904. The appointment of the receiver is, of course, a step in the proceedings supplementary to execution, and he may be appointed at any time in the course of a properly instituted proceeding. Section 2464, Code Civ. Proc. If the proceeding itself is instituted within the required time, then the date of the appointment is entirely immaterial, and, for aught that appears, the proceeding which resulted in the appointment of this plaintiff may have been instituted (and, in the absence of an allegation to the contrary, such must be presumed) within the time prescribed by statute. The only limitation within which such proceeding may be instituted is contained in section 2435 of the Code of Civil Procedure, which is, "At any time within ten years after the return, wholly or partly unsatisfied, of an execution." The 10 years does not begin to run with the docketing of the judgment, but with the return of the execution. As already indicated, there is no allegation that the proceeding was not instituted within 10 years after the return of the execution, and therefore the validity of the appointment itself is not questioned by this defense. The receiver was appointed before the award was made, and, under section 2468 of the Code of Civil Procedure, title to the award, when made, immediately vested in him. The moment that the title to the land vested in the city, that moment the judgment debtor ceased to have any interest in the land, as the award made took its place. Ballou v. Ballou, 78 N. Y. 325; King v. Mayor, 102 N. Y. 171, 6 N. E. 395. The award being personal property, the 10-year limitation as to liens upon real estate has no application. Treacy v. Ellis, 45 App. Div. 492, 61 N. Y. Supp. 600; Van Loan v. City of New York, 105 App. Div. 572, 94 N. Y. Supp. 221.

As to the fourth defense. The judgment debtor is not a necessary party. The title to the award, in so far as he had any interest therein, vested in the receiver, and the only interest that the judgment debtor thereafter had was the right to an accounting in the event of a surplus after the payment of the judgment. (Matter of Wilds, 6 Abb. N. C. 307; Goddard v. Stiles, 90 N. Y. 199; Bostwick v. Menck, 40 N. Y. 383); and, in addition to this, if there were a defect of parties, then the city should have demurred. It appeared upon the face of the complaint, if the fact were important, that the judgment debtor should have been made a party to the action, and the omission to join him as a party should have been raised by demurrer. Not having been thus raised, it was waived. Sections 488, 498, Code Civ. Proc.; De Puy v. Strong, 37 N. Y. 372; Straus v. Tradesmen's Bank, 36 Hun, 451.

The judgment appealed from, therefore, must be reversed, with costs, and the demurrer sustained, with costs, with leave to the city to serve an amended answer on payment of the costs in this court and in the court below. All concur.



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## PEOPLE v. NEW YORK BUILDING LOAN BANKING CO.

### In re BACON'S CLAIM.

(Supreme Court, Appellate Division, First Department. April 6, 1906.)

ATTORNEY AND CLIENT—EVIDENCE—SUFFICIENCY.

On a claim against the receiver of an insolvent corporation for legal services rendered to the corporation, evidence *held* insufficient to support a finding that the services were actually rendered.

Appeal from Judgment on Report of Referee.

Proceedings by the people of the state of New York for the dissolution of the New York Building Loan Banking Company, in which Charles M. Preston was appointed receiver after the entry of judgment dissolving the corporation, and Charles P. Bacon filed a claim for legal services rendered to the corporation. From a judgment in favor of claimant, the receiver appeals. Reversed.

Argued before O'BRIEN, P. J., and McLAUGHLIN, PATTERSON, LAUGHLIN, and HOUGHTON, JJ.

Charles W. Dayton, for appellant receiver.
Julius M. Mayer, Atty. Gen., for the People.
John B. Stanchfield, for respondent.

PER CURIAM. The conclusion at which we have arrived renders it unnecessary to pass upon the contention raised by the appellants that the agreement is invalid, having been made by the first vice president and secretary without authority, because, even though it be assumed that a valid contract were made with the claimant, by which he was to receive $100 a day for services to be thereafter rendered to the corporation, we are of the opinion that the evidence does not sustain the finding that he did render under such contract 250 days' service. It nowhere appears what service was in fact rendered, except in the most general way, other than that he went to Albany several times, and had interviews with the Attorney General of the state with reference to proceedings which had been, or were about to be, taken to place the corporation in the hands of a receiver. What took place at these interviews or what was accomplished by them does not appear. He never represented the corporation as its attorney in any litigation, never tried any cases for it, nor did he ever appear in court or prepare a paper for it. All that he did, according to his own testimony, was to go to Albany and consult with the Attorney General (and he had no definite recollection as to when these trips were taken, because he kept no register), and give general advice to the officers of the corporation. The claim is an extraordinary one, and especially so in view of the slight evidence given to sustain it, the financial condition of the corporation at the time the claimant was retained, and the other attorneys which it then had in its employ. Before a claim for 250 days' service, rendered between November 5, 1902, and September 12, 1903, at $100 a day can be allowed against an insolvent corporation, evidence highly satisfactory and most convincing must be presented that the services were in fact actually rendered. Here all that appears is that the claimant went to Albany several times; that he was always at the corporation's disposal;

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that he went to the office of the corporation "almost daily"; that between the date of the retainer and the time when the corporation went into the hands of a receiver, "each and every day, excluding Sundays," he acted under his retainer as legal adviser to the corporation, and was consulted daily by the first vice president "in a general way about the affairs of the company, including the reference." The establishment of these facts is not only not convincing or satisfactory, but is insufficient to sustain a finding that the services were in fact rendered.

The judgment appealed from, therefore, must be reversed, the referee discharged, and a new trial ordered before another referee, with costs to appellant to abide event.

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## TREFFINGER v. M. GROH'S SONS.

(Supreme Court, Appellate Division, First Department. April 6, 1906.)

1. MASTER AND SERVANT—WRONGFUL DISCHARGE—ACTION FOR DAMAGES—PLEADING.

   In an action by a servant for breach of the contract of employment, a complaint alleging that on or about the 18th day of April, 1897, plaintiff and defendant entered into a contract that, in consideration of plaintiff faithfully serving defendant for the period from January 1, 1897, to to December 31, 1897, defendant would pay to plaintiff a certain sum per year, was sufficient to show a hiring from January 1, 1897, to December 31st, of the same year, although a part of this period had passed, and there was no direct allegation that the yearly contract was in consideration of plaintiff having rendered services in the past and agreeing to render services in the future.

2. PLEADING—CONSTRUCTION ON DEMURRER.

   As against a demurrer, a pleading will be deemed to allege whatever may be implied from the statements by fair and reasonable intendment, and the demurrer cannot be sustained simply because the facts are imperfectly or informally averred.

3. MASTER AND SERVANT—CONTRACT OF EMPLOYMENT—RENEWAL.

   Where there is a hiring for one year, and the servant continues in the employment after the expiration of the year with the consent of the master, this effects a hiring for another year.

   [Ed. Note.—For cases in point, see vol 34, Cent. Dig. Master and Servant, §§ 8–11.]

4. SAME—WRONGFUL DISCHARGE—ACTION—PLEADING.

   In an action by a servant for wrongful discharge, an averment that plaintiff after the expiration of the year for which he was employed continued to render services, for which defendant paid, whereby defendant elected to continue the employment for the ensuing year, sufficiently showed a hiring for such ensuing year, and was not defective because of failure to also allege that plaintiff, as well as defendant, elected to renew the contract.

   McLaughlin, J., dissenting.

Appeal from Special Term, New York County.

Action by Gottlieb Treffinger against M. Groh's Sons. From judgment sustaining a demurrer to the complaint, plaintiff appeals. Reversed.

Argued before O'BRIEN, P. J., and McLAUGHLIN, INGRAHAM, CLARKE, and HOUGHTON, JJ.

Abram I. Elkus, for appellant.

Thomas F. Keogh, for respondent.

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HOUGHTON, J. The plaintiff obtained leave to serve an amended complaint to obviate the difficulties pointed out by this court in reversing a judgment which he had obtained on proof at variance with his allegations. 100 App. Div. 433, 91 N. Y. Supp. 837. The gravamen of the action is that the plaintiff was hired by the defendant for the entire year 1900 at an annual compensation, and that without cause defendant discharged him before the end of the period, for which breach damages are demanded. No specific contract is alleged to have been made for the year 1900; the plaintiff claiming that there was a contract for that year because there had been yearly hirings for the same service at the same compensation for previous years, and that the holding over constituted a rehiring for the subsequent year. The plaintiff's services began in the year 1897. The allegation with respect to the hiring at that time is:

"That on or about the 18th day of April, 1897, the plaintiff entered into an agreement with the defendant by which it was understood and agreed that, in consideration of the plaintiff's faithfully serving defendant * * * for the period from January 1, 1897, to December 31, 1897, the defendant would pay to the plaintiff the sum of $6,000 per year for said services, and the defendant thereupon hired the plaintiff to work for it, as its brewmaster, for the said period at the said salary, * * * and the plaintiff agreed with the defendant so to work and serve for the said time and the said compensation."

Then follows the allegations that plaintiff performed and defendant paid, and that plaintiff held over for the years 1898, 1899, and 1900, whereby defendant elected in each year to continue the said employment for that year at the same compensation, and that the plaintiff performed to the 1st day of November, 1900, when defendant wrongfully discharged him. The criticism is that the allegation quoted does not show a hiring from January 1 to December 31, 1897, because no contract could be made in April of that year for services during the entire year. If the allegation had been that on the 18th of April, 1897, the parties agreed that, in consideration of the plaintiff having from the previous 1st of January to that time faithfully served the defendant as brewmaster, and of his continuing to do so until the following 31st of December, his employment should be deemed a yearly one, at a yearly compensation, we apprehend there would have been no criticism that the plaintiff did not allege a yearly hiring. If the parties saw fit, in consideration of future faithful service, they could agree, even in the midst of the term, to make the hiring of a definite character, measured by a particular period. Taking the plaintiff's complaint as a whole, we think he has so alleged. He says, in substance, that on the 18th day of April, 1897, he entered into an agreement by which it was understood and agreed, in consideration of his faithfully serving the defendant for the period from January 1, 1897, to December 31, 1897, the defendant would deem his hiring a yearly one, pay him a certain compensation per year, and that the defendant thereupon hired him to work for such period of a year at the stipulated salary, and that he assented thereto and served in accordance therewith. There is no allegation that the plaintiff had faithfully served from the 1st of January to the 18th of April, and there is some ambiguity as to what the term "said period" relates. A pleading, as against a demurrer, will be deemed to allege

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whatever may be implied from its statements by fair and reasonable intendment, and the demurrer cannot be sustained simply because the facts are imperfectly or informally averred, or argumentatively stated, or lack definiteness and precision. Kain v. Larkin, 141 N. Y. 144, 36 N. E. 9.

In addition, the plaintiff alleges that he held over and continued in the employ of the defendant for the entire year 1898 on the election of the defendant to continue his employment for the period of that year, and that the same occurred with respect to the year 1899, and that he entered upon the year 1900 under the same agreement. If there was a yearly hiring for either of the years preceding the year 1900, the holding over, under the circumstances alleged, would constitute a hiring for such year. Where there is a hiring for one year, and the servant continues in the employment after the expiration of the year with the consent of the master, this effects a hiring for another year. Brightson v. Claflin Co., 180 N. Y. 76, 81, 72 N. E. 920; Adams v. Fitzpatrick, 125 N. Y. 124, 26 N. E. 143.

Criticism is made that the plaintiff alleges that only the defendant elected to continue the employment for another year. It is not alleged in words that the plaintiff assented, but the facts which he alleges show that he did, and by fair intendment that he and the defendant both assumed that he was serving during the years 1898 and 1899, at least, under a contract of yearly hiring. It might well be said that he alleges a contract created by operation of law for the year 1900. Bennett v. Mahler, 90 App. Div. 22, 85 N. Y. Supp. 669. Our conclusion is that the demurrer was improperly sustained, and that it should have been overruled.

The interlocutory judgment should be reversed, with costs, and the demurrer overruled, with costs, with leave to the defendant to withdraw the demurrer and to plead, upon payment of costs of the appeal and of the trial court.

O'BRIEN, P. J., and INGRAHAM and CLARKE, JJ., concur.

McLAUGHLIN, J. (dissenting). Unless the original contract of hiring in 1897 was for one year, then the complaint does not state a cause of action, because the only facts stated from which it can be inferred that there was a yearly hiring thereafter are that the plaintiff "held over and continued in the employ of the defendant in said capacity during the entire year of 1898, * * * 1899, * * *," and to about the 1st of November, 1900, when he was wrongfully discharged. The original contract of hiring was not for one year. The allegation is:

"That on or about the 18th day of April, 1897, the plaintiff entered into an agreement with the defendant, by which it was understood and agreed that, in consideration of the plaintiff's faithfully serving the defendant in the capacity of brewmaster * * * for the period from January 1, 1897, to December 31, 1897, the defendant would pay to the plaintiff the sum of six thousand ($6,000) dollars per year for the said service."

Manifestly, under a contract made the 18th day of April, the plaintiff could not, as a consideration of his employment, render service from the 1st of the preceding January to that time. All he could

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do would be to render service during the life of the contract, and this, according to the allegation of the complaint, he did at the rate of $6,000 per year. A contract to pay for services at a given rate is not equivalent to a contract of yearly hiring. Martin v. N. Y. Life Ins. Co., 148 N. Y. 121, 42 N. E. 416.

It may be, as suggested in the prevailing opinion, that if the parties had agreed, in consideration of the plaintiff's having from the previous 1st of January to that time faithfully served the defendant as brewmaster, and of his continuing to do so until the following 31st of December, his employment should be deemed a yearly one, at a salary of $6,000 per year, that this would constitute a good contract for the following year at the same compensation, in case nothing was said and the services were rendered. But no such contract is pleaded. The validity of the contract must be tested by the facts stated in the complaint, and not by what might have been stated. In my opinion, the only contract alleged in the complaint for the year 1897 was from the 18th day of April to the 31st day of December, and at the rate of $6,000 per year. If it be sought to infer that any other contract was made, then the only fair inference, as it seems to me, is that one was made, not for any specific time, but one by which the services rendered were to be paid for at so much per year; in which event the same might be terminated by either of the parties to it at any time.

For these reasons, I think the judgment should be affirmed.

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## REPORTERS' ASS'N OF AMERICA v. SUN PRINTING & PUBLISHING CO.

(Supreme Court, Appellate Division, First Department. April 6, 1906.)

1. LIBEL AND SLANDER—PUBLICATION LIBELOUS PER SE.

An article reading: "Roosevelt called police, and got back his letter from Newsboys' employés. Blue pencil grafters have exchanged mendicancy for peddling certificates of stock in philanthrophic plant. $250,000 to sell. Watch your check book"—with other statements with respect to, the Newsboys' Company and its agents being shadowed, and that many concerned in the publication had police records, probably in possession of the chief of police still, and followed by that portion of the article relating to plaintiff, the Reporters' Association of America, wherein it was said that "Washington had been fruitful of checks until this, but thereafter the activity was transferred to this city [New York]. The beggars have been busy here ever since. Subscription lists seem to have been exchanged along the 'Press Artists' League,' the 'Reporters' Association of America,' and a score of other concerns organized for the same purpose, because the canvassers have always seemed to hit on the same easy marks"—was not libelous per se; the innuendoes that plaintiff was engaged in "grafting," and was being shadowed by the police, was associated with people with police records, and was procuring money by swindling and false representations, not legitimately flowing from the article.

2. SAME—CORPORATIONS—RIGHT OF ACTION.

A corporation may maintain an action for libel.

[Ed. Note.— For cases in point, see vol. 32, Cent. Dig. Libel and Slander, § 174.]

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3. SAME—PUBLICATION LIBELOUS PER SE.

Language used concerning a corporation which is defamatory in itself, and injuriously and directly affects the credit of, and necessarily and directly occasions pecuniary injury to, the corporation, is libelous per se.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Libel and Slander, §§ 3-16, 80-90, 97.]

4. SAME—PLEADING AND PROOF—SPECIAL DAMAGE.

When words published of a corporation are not libelous per se, special damages must be allowed and proven.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Libel and Slander, § 213.]

5. SAME—COMPLAINT—SUFFICIENCY.

Where an article published concerning plaintiff, engaged in publishing a magazine, was not libelous per se, the requirement of pleading special damages was met by the allegation that by reason of the publication plaintiff had met with serious loss in business by refusal of clients to pay the just claims due by contract to plaintiff.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Libel and Slander, § 214.]

Patterson and Laughlin, JJ., dissenting.

Appeal from Special Term, New York County.

Action by the Reporters' Association of America against the Sun Printing & Publishing Company. From a judgment overruling its demurrer to the amended complaint, defendant appeals. Affirmed.

Argued before O'BRIEN, P. J., and McLAUGHLIN, PATTERSON, LAUGHLIN, and HOUGHTON, JJ.

Franklin Bartlett, for appellant.

A. P. Bachman, for respondent.

HOUGHTON, J. The defendant demurs to the plaintiff's amended complaint on the ground that it fails to state a cause of action. The plaintiff is a corporation, and brings this action against the defendant for publication of a libel. The article which is alleged to be libelous against this plaintiff related especially to criticisms concerning the Newsboys' Magazine and its management, with respect to which it was said:

"Roosevelt called police, and got back his letter from Newsboys' employés. Blue pencil grafters have exchanged mendicancy for peddling certificates of stock in philanthropic plant. $250,000 to sell. Watch your check book."

With other statements with respect to the Newsboys' Company and its agents being shadowed, and that many concerned in the publication had police records, probably in possession of the chief of police still. Then follows that portion of the article relating to the plaintiff, wherein it is said that:

"Washington had been fruitful of checks until this, but thereafter the activity was transferred to this city [New York]. The beggars have been busy here ever since. Subscription lists seem to have been exchanged along the 'Press Artists' League,' the 'Reporters' Association of America,' and a score of other concerns organized for the same purpose, because the canvassers have always seemed to hit on the same easy marks."

The innuendo is alleged to be that this plaintiff is engaged in "grafting," and was being shadowed by the police, and was associated and concerned with people with police records, and was procuring money by swindling and false representations. The article does not charge

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actual crime even on the part of the Newsboys' Magazine, or its promoters or managers. The most that can be said is that it is pointed out as a concern sailing under false colors, not philanthropic, but an institution organized for the benefit of its organizers. The statement is that this defendant is a concern organized for the same purpose.

The defendant claims that the article is not libelous per se. We think this contention is correct. The complaint, however, alleges special injury to plaintiff's business, which made it proper to overrule the demurrer. The innuendoes alleged by the plaintiff do not legitimately flow from the article. What is said with respect to the Newsboys' Magazine as to "grafters" and "police" and "police records" cannot be said to legitimately refer to this plaintiff. What does fairly refer to this plaintiff is that it is begging subscriptions, and is organized for the purpose of benefitting itself and allied concerns. That a corporation is a suppliant for favors, and that it is allied with like corporations, does not necessarily injure its business or credit, or accuse it of improper conduct or management or fraud.

A corporation can maintain an action for libel. When language is used concerning it which is defamatory in itself, and injuriously and directly affects its credit, and necessarily and directly occasions pecuniary injury, it is libelous per se. When the words are not such as to make them libelous per se, special damage must be alleged and proven. Union Associated Press v. Heath, 49 App. Div. 247, 63 N. Y. Supp. 96. The words not being actionable per se, the plaintiff has, however, met the requirement of pleading special damages by its allegation that it has met with serious loss in business by refusal of clients to pay the just claims due by contract to it. The plaintiff is engaged in publishing a magazine known as the "Public Inspector." Its contracts presumably are valuable, and, while the allegation with respect to damage in this respect is not as full and specific as it might be made or as is desirable, yet we think it does not come within the condemnation of the rule laid down by this court in King v. The Sun Printing & Publishing Association, 84 App. Div. 310, 82 N. Y. Supp. 787. In that case there was a general allegation that plaintiff had been ruined in his business, and had been and would be prevented from procuring subscriptions and making sales of various publications. Here the allegation is that the plaintiff has been put to serious loss in its business by the refusal of clients to pay just claims due upon contracts. The plaintiff's damages should be confined to the loss sustained in that manner. What those damages may be composed of, whether more than the cost incurred in enforcing the contracts, we do not feel called upon now to decide. It is sufficient for the demurrer that some special damage is alleged, notwithstanding the article was not libelous per se.

From our view of the article complained of, and the allegation with respect to special damage, it follows that the demurrer was properly overruled.

The interlocutory judgment should be affirmed, with costs, with leave to the defendant to withdraw its demurrer and to plead, upon payment of the costs of appeal and of the trial court.

O'BRIEN, P. J., and McLAUGHLIN, J., concur.

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PATTERSON, J. (dissenting). I concur in the view that the article of which the plaintiff complains is not libelous per se, but I dissent from the conclusion that there is a sufficient allegation of special damage such as is required to enable the plaintiff to maintain the action. All that is alleged in the complaint in that regard is that the publication, so far as it related to the plaintiff, is false, and has caused to the plaintiff "a serious loss in business," and "the refusal of clients to pay the just claims due by contract," and "has greatly damaged the said plaintiff in credit and reputation." It is not disputed that the allegations of a serious loss of business and damage to the plaintiff in its credit and reputation are not good as stating special damage, and therefore the sufficiency of the complaint must depend upon the simple phrase, "the refusal of clients to pay the just claims due by contract." There is not an allegation of actual loss. If the claims are just and due, they may be recovered by action. There is no allegation that the plaintiff has been put to expense, or will be, in efforts to collect the just claims due it. Nor can that be assumed, for it may be indemnified in costs of actions instituted by it. Who the clients were, what the claims or the contracts were, are not set forth. The allegations are not only vague, but are as unsubstantial as would be one of loss of customers. Such an allegation would be entirely insufficient without giving the names of the customers. Loftus v. Bennett, 68 App. Div. 131, 74 N. Y. Supp. 290, and cases cited. The rule in an action for libel is, of course, the same as that in an action of slander, and in Linden v. Graham, 1 Duer, 672, it is well stated as follows:

"We apprehend that, in all actions of slander for words not in themselves actionable, the right to recover depends upon the question whether they caused special damage, and that the special damage must be fully and accurately stated. If the special damage was a loss of customers or of a sale of property, the persons who ceased to be customers or who refused to purchase must be named. Kendall v. Stone, 5 N. Y. 14."

I think the demurrer should have been sustained, and that the interlocutory judgment should be reversed, but with permission to the plaintiff to amend its complaint on payment of costs of this appeal and in the court below.

LAUGHLIN, J., concurs.

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## In re DEUEL.

(Supreme Court, Appellate Division, First Department. April 6, 1906.)

1. JUDGES—DISABILITIES—ENGAGING IN OTHER BUSINESS—STATUTE—CONSTITUTIONALITY.

Laws 1895, p. 1294, c. 601, § 25, providing that no city magistrate or justice of the Court of Special Sessions shall hold any other public office, or carry on any other business, or practice as an attorney or counselor at law, but shall devote his whole time and capacity, so far as the public interests demand, to the duties of his office, is constitutional.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Judges, § 72.]

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2. JUDGES—REMOVAL—JURISDICTION.

**Under Const. art. 6, § 17, providing that justices of the peace and judges of inferior courts not of record may be removed for cause after hearing by such courts as may be prescribed by law, and Laws 1895, p. 1283, c. 601, the Supreme Court of the county of New York has power to remove a justice of the Court of Special Sessions for cause.**

**[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Judges, § 43.]**

Proceedings for the removal of Joseph M. Deuel from the office of justice of the Court of Special Sessions for the City of New York for the First Division. Objections to the petition overruled, and respondent required to answer.

Argued before INGRAHAM, McLAUGHLIN, LAUGHLIN, CLARKE, and HOUGHTON, JJ.

Howard S. Gans, for petitioner.

Edward Lauterbach, for respondent.

PER CURIAM. There was presented to this court, upon notice to the respondent, a petition praying for the removal of the respondent from the position of justice of the Court of Special Sessions of the City of New York. The petition contained certain charges made against the respondent, and in opposition to the application the respondent appeared, making a preliminary statement, submitting that the petition should be dismissed, or that the petitioner should be required to file an amended petition.

The Court of Special Sessions was constituted or continued by chapter 601, p. 1283, of the Laws of 1895. By that act the police courts of the city of New York were abolished. Provision was made for the appointment of nine city magistrates, and section 12 provides that the mayor "shall appoint five justices of the Court of Special Sessions of the City and County of New York"; and section 13 provides that the Court of Special Sessions "shall be composed of and must be held by three of the justices of the Court of Special Sessions appointed pursuant to this act." Section 25 provides that "no person shall be appointed to the office of justice of the Court of Special Sessions in the City of New York, unless he shall be a resident of said city and shall have been admitted to practice as an attorney and counselor at law in the courts of this state at least ten years prior to the date of such appointment"; that "no city magistrate or justice of the Court of Special Sessions appointed pursuant to this act shall receive to his own use any fees or perquisites of office, nor shall any such magistrate or justice hold any other public office, or carry on any business, or practice as an attorney or counselor at law in any court in this state, or act as referee; but each such magistrate or justice shall devote his whole time and capacity, so far as the public interests demand, to the duties of his office." Section 28 provides that "the city magistrates and their clerks, and the justices of the Courts of Special Sessions and the clerk of said court appointed pursuant to this act may be removed for cause after due notice and an opportunity of being heard by the General Term of the Supreme Court in the First Department; or, after the first day of January, eighteen hundred and ninety-six, by the Appellate Division of the Supreme Court in the First Department." These provisions, with the exception of section 28, were continued by the charter of

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1897 (chapter 378, p. 1, of the Laws of 1897) and by the charter of 1901 (chapter 466, p. 1, of the Laws of 1901). Section 1416 of the charter of 1901 contained substantially the same provisions as the act of 1895 in relation to the qualifications of justices of the Court of Special Sessions, and prohibited them from practicing as attorneys and counselors at law, or from holding any other public office, or carrying on any other business. The act of 1895 was not repealed and is still in force, and under its provisions this court has power to remove the justices of the Court of Special Sessions "for cause"; this following the provisions of section 17 of article 6 of the Constitution, that "justices of the peace and judges or justices of inferior courts not of record, and their clerks, may be removed for cause, after due notice and an opportunity of being heard, by such courts as are or may be prescribed by law."

We think that these charges present a situation which requires that this court should take cognizance of them and that the defendant should be required to answer. The respondent raises a point as to the constitutionality of the provision that a justice of the Court of Special Sessions shall not carry on any business; but we think it clear that the Legislature that created the court and provided for the appointment of the justices thereof had authority to provide for the qualifications of the justices to be appointed and to regulate their proceeding while in office. There was nothing that required any particular individual to become a justice of the Court of Special Sessions, and nothing that invaded any of the constitutional rights of any individual; but any one who accepted an appointment as a justice of the Court of Special Sessions was bound to comply with the provisions of the statute while holding the office. This respondent can engage at any time in any business that he sees fit, by resigning his position as a justice of the Court of Special Sessions; but as long as he holds that position he must comply with the statute.

The other objections taken by the respondent to the petition should not be discussed at this time. After the answer of the respondent is filed, the question will then be presented as to subsequent proceedings which can be determined when it arises. The objection of the respondent to the petition is therefore overruled, and the respondent is required to answer within 10 days.

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(49 Misc. Rep. 82.)

## GICK v. STUMPF.*

(Surrogate's Court, Saratoga County. December, 1905.)

1. EXECUTORS—DISCOVERY OF ASSETS—EXAMINATION OF THIRD PARTY.

Where an executor applies, under Code Civ. Proc. §§ 2706–2714, for an order permitting him to examine a person alleged to be in the possession of certain property of the estate, he is entitled to an order permitting such examination, and the person sought to be examined cannot defeat it by a verified answer alleging that he has no property of the estate in his possession, and that he is an absolute owner of the property described in the executor's petition.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, §§ 343, 347.]

*For opinion in department, see 98 N. Y. Supp. 961.

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2. SAME—TERMINATION OF PROCEEDING.

Code Civ. Proc. § 2710, providing for terminating a proceeding for the examination of a person claimed to have property belonging to an estate in his possession, where a dispute arises as to the ownership of the property, does not refer to a dispute created by the allegations in the answer to the petition for the examination, but to one arising after the examination of such person.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 347.]

In the matter of the application of Frank Gick, executor of Rosina Stumpf, for a discovery against Frank Stumpf.

This is a proceeding to discover property of the estate withheld from the executor or administrator, founded upon a petition setting forth that about $1,200, which was in the possession of the deceased within two years prior to her death, is in the possession or under the control of one Frank Stumpf, who was about the person of the deceased prior to her death and in whose hands the effects of the said deceased have fallen and who withholds the same from the petitioner, together with the documents and papers belonging to the deceased, and all knowledge and information relating to them. Frank Stumpf has filed an answer, alleging he is the absolute owner of the sums of money, property, goods, chattels, and credits mentioned in the petition, and that he was such owner thereof at the time of, and for a long time prior to, the death of the said Rosina Stumpf.

Chambers & Finn, for petitioner.
George B. Lawrence, for respondent.

LESTER, S. This proceeding is brought under sections 2707 et seq. of the Code of Civil Procedure, contained in article 1 of title 4 of chapter 18, and relating to the aid, supervision, and control of an executor or administrator. The present statute is derived from chapter 394, p. 928, of the Laws of 1870, which, together with its various modifications since that date, has been the subject of much discussion by the courts. In 1880 the General Term of the Third Department held that this statute was unconstitutional, because, under its provisions, a person might be deprived of his property without due process of law. Matter of Beebe's Estate, 20 Hun, 462. The following year the General Term of the First Department held that the act was not unconstitutional, because it involved merely the question of possession, in a case where possession was wrongfully withheld from the petitioner, and that, although it dispensed with a jury trial, it was not on that account to be considered unconstitutional; for a trial by a jury was not in all cases an essential element in due process of law; for cases within the jurisdiction of the equity courts, although they often involved the title and final disposition of property, are nevertheless due process of law within the meaning of the Constitution. Matter of Curry's Estate, 25 Hun, 321. The same year, 1881, the Legislature amended the statute by inserting in section 2710 the following provision:

"In case the person so cited shall interpose a written answer, duly verified, that he is the owner of said property, or is entitled to the possession thereof by virtue of any lien thereon or special property therein, the surrogate shall dismiss the proceeding as to such property so claimed."

Under this provision it was held by the General Term of the Third Department (Matter of Wing, 41 Hun, 452) that, where the respondent asserted in his answer that he had a lien upon the property and

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claimed the right to its possession, the surrogate, having the right to determine the question of possession, but not the question of title, had no jurisdiction of the issues necessary to be decided in order to decide whether the respondent should surrender the property and thereupon affirmed the order of the surrogate dismissing the proceedings. Judge Parker dissented, stating that, as the answer was not in the form provided by statute, the surrogate was not ousted of jurisdiction, and therefore was bound to permit the examination to go on.

In Doyle v. Doyle, 15 N. Y. St. Rep. 318, it was held that, where the answer conformed to the statute, the surrogate had no power to investigate the verity of the denial. In Matter of Estate of Hasings (Sur.) 2 N. Y. Supp. 22, where the answer was held insufficient because too general, the surrogate ordered the examination to proceed; and in Matter of Peyser, 35 App. Div. 447, 54 N. Y. Supp. 832, where the answer was insufficient because in the alternative, the same rule was followed. In Matter of Estate of Cunard (Sur.) 6 N. Y. Supp. 883, where it appeared by the answer that the respondent originally came rightfully into possession of the assets of the decedent with the right to dispose of them, that they remained in his possession under the same terms subsequent to the decedent's death by virtue of his contract with the representative of the decedent's estate, and that the respondent had disposed of them in accordance with these arrangements—it was held that the petition should be refused, the surrogate remarking that, if the application should be granted, it would virtually be for an inquisitorial purpose.

In Matter of O'Brien v. Baker, 65 App. Div. 282, 72 N. Y. Supp. 1001, the respondent answered, alleging that he had been appointed temporary administrator of the estate of the decedent by a court of competent jurisdiction in the state of Texas, and had in his possession as such temporary administrator certain personal property of the decedent located in Texas; that all the property of the decedent in his possession or under his control, except that in the state of Texas, had been turned over by him to the petitioner; that, as to the Texas property, he was entitled to the possession thereof by virtue of a special property therein arising out of his appointment as temporary administrator; that he had withheld no information in regard to any property belonging to the estate of the decedent, but had given all the information in his power to the petitioner and had repeatedly offered to answer any question in regard to the estate which the petitioner might ask. The court held that this answer did not set up a lien thereon or special property therein upon the part of the respondent. His appointment as temporary administrator in Texas constituted him a mere custodian of the property, and that the case was one to which the provisions of the Code were designed to apply, and that the order of the surrogate directing the respondent to attend and be examined should be affirmed. In this case Judge Ingraham, in a carefully written opinion, says (page 286 of 65 App. Div., page 1003 of 72 N. Y. Supp.):

"It will be noticed that this section [2707] is not confined to a proceeding to compel a person in the possession of property belonging to a decedent to deliver such property to the administrator. It also provides for a case where there is personal property that should be included in an inventory or appraisal,

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and which 'is in the possession, under the control or within the knowledge or information of a person who withholds the same' from the representative of the deceased, or who refuses to impart knowledge or information he may have concerning the same, or to disclose any other fact which will aid such executor or administrator in making discovery of such property, so that it cannot be inventoried or appraised. It is for the purpose of procuring information as to the property that should be inventoried and appraised, as well as of the property that should be delivered to the administrator, that the proceeding is allowed, and an examination of a person having knowledge of the decedent's property is allowed so as to give information as to such property which the administrator here is required to inventory or appraise, although its present situation is such that it would be impracticable to order its delivery to the administrator. * * * The petition to be presented to the court must allege facts tending to show that money or other property which should be delivered to the petitioner, or included in an inventory or appraisal, is in the possession, under the control, or within the knowledge or information of a person who withholds the same from him, or refuses to impart knowledge or information he may have concerning the same, or to disclose any other fact which would aid such executor or administrator in making a discovery of such property, and upon presentation of that petition such a person may be cited to attend the inquiry and be examined accordingly; and I can see no reason why this statute should be confined to a proceeding in which the surrogate could order property in the hands of such a person delivered to the temporary administrator."

In this case (Matter of O'Brien v. Baker) the court seems to have asserted, more clearly than in any former case, the legislative intent of providing in this proceeding a remedy which should be, to some extent, inquisitorial in its character, and to have dissented from a construction of the statute made with the avowed purpose, as expressed by Surrogate Ransom, of preventing the remedy from becoming such. According to the prevailing opinion in this case, the proceeding was not intended solely as a method by which an executor or administrator might obtain possession of assets withheld; but was intended, as well, to enable an executor or administrator to obtain information in regard to such assets and the grounds upon which they were withheld and to inquire into the facts and circumstances upon which an adverse claim thereto was based, so that the executor or administrator might have some reasonable ground upon which to proceed in the performance of his duties, so far as such assets were concerned. The amendments to the statute which have been made since 1901, it seems to me, emphasize this aspect of the proceeding, and show more clearly that such was the legislative intent. The provision for answer of title or claim of special property, which was to oust the surrogate of jurisdiction to proceed further, has been modified, so that, upon the attendance of a person to whom citation is issued, he is permitted to submit an answer, duly verified, showing cause why the examination should not proceed. The surrogate may then dismiss the proceeding or direct the examination to proceed. It is, therefore, left to the discretion of surrogate, to a certain extent, whether to proceed with the examination; and it is no longer possible for the respondent, by filing such an answer as was provided for in the former statute, to oust the surrogate of jurisdiction.

A still more significant change, however, has been made in the statute by adding the provision in section 2709 that, if the witness is examined concerning any personal communication or transaction between himself and the decedent, all objection under section 829 to his testi-

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mony as to the same in future litigation is waived. There could hardly be any reason for inserting this provision in the statute if the Legislature did not contemplate the examination of the respondent touching assets which he might claim to own, or in which he might claim some special property, or upon which he might claim to have some lien. Such, I am convinced, was the intention. I cannot see how any harm should arise therefrom to the respondent. His rights are, it seems to me, adequately protected by this provision. If his right to the property which he had in his possession depends upon any personal transaction between himself and the decedent, the executor will interrogate him in reference thereto at his peril; for, if he does so, the respondent's mouth will be opened and he will be permitted thereafter to testify in his own favor as to such transaction and in support of his claim.

I am convinced, therefore, that, whatever the Legislature may have intended by the act of 1870, the provisions, as they now stand, are intended to afford the executor or administrator a remedy which is, as I have said, in a certain sense, and to a certain degree, inquisitorial, and one that is not likely to do any harm, but, on the contrary, one that is likely to be of great service to executors and administrators in performing duties that the law casts upon them and which often place them in a position of great difficulty and hazard.

The objection of the respondent that the petition is indefinite does not strike me as having much force. This very proceeding is intended to remove indefiniteness and uncertainty in respect to things that are unknown to the executor or administrator, and to give the representative an opportunity to find out, with certainty and definiteness, about things as to which he lacks information. These things are more likely to be in the knowledge of the respondent; and, perhaps, as a result of the examination, the petitioner in this proceeding will obtain the information which the respondent now possesses and can then tell in what bank the moneys he refers to were deposited.

Nor am I able to accept the theory of the respondent's counsel as to the meaning of the word "witness" as employed in section 2710, nor to subscribe to the proposition that the provisions of this section for ending the proceeding will be satisfied if the respondent files an answer admitting that he has control of the property and alleging that the facts as to petitioner's right are in dispute. A simple reading of these sections in their consecutive order will exhibit the fact that, until the proceeding progresses to the point where the respondent is sworn and actually becomes a witness, in the ordinary meaning of the word, he is not so denominated. He is spoken of as "a person who withholds the same" or "the person complained of," or "the person to be cited," or "the party cited," but he is never called a "witness" until that part of the proceeding is reached at which the statute contemplates his having been sworn as a witness. It seems to me, therefore, that the statute contemplates the respondent as having been sworn and as having been examined, and that a dispute has been developed by such examination in regard to the facts as to the petitioner's right to the moneys or property, in relation to which discovery is sought. This means something more, it seems to me, than the mere statement of a conclusion on the part of the witness, that the property is his, or that he has a right to its

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custody. It is the facts out of which his right to maintain such a claim arises, and not the mere fact that he makes it, which ends the proceeding; and those facts, I apprehend, are the facts brought out upon the examination contemplated by the statute.

Let an order be entered, therefore, denying the motion to dismiss the proceeding and directing the examination of the respondent to proceed on the 3rd day of January, 1906, to which time the proceeding is now adjourned.

Decreed accordingly.

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## In re McGOVERN.

(Surrogate's Court, Westchester County. March 14, 1903.)

DESCENT AND DISTRIBUTION—COLLATERAL HEIRS—STATUTES.

Code Civ. Proc. § 2732, subd. 5, provides that, if intestate leaves no widow and no children nor representative of a child, the whole surplus shall be distributed to the next of kin in equal degree to the deceased and their legal representatives. Subdivision 11 provides that those who take by representation shall receive the share to which the parent whom they represent if living would be entitled, and subdivision 12, as amended by Laws 1898, p. 941, c. 319, declares that representation shall be admitted among collaterals in the same manner as allowed by law with reference to real estate. *Held* that, where intestate left no widow but nieces and nephews and a grandniece and grandnephew as his next of kin, the grandniece and grandnephew were entitled to receive the share of his personal estate to which their parent would have been entitled if living.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Descent and Distribution, §§ 118–120.]

Judicial settlement of the accounts of Owen D. McGovern, as administrator, etc., of the estate of Patrick McGovern, deceased. To a surrogate's decree allowing one-fifth of the surplus of the estate to a certain grandnephew and grandniece objections were filed. Overruled.

James E. Kelly and C. D. Jones, for contestant.

Hamilton & Beckett, for respondent.

SILKMAN, S. The testator, Patrick McGovern, died in March, 1902, never having married, and leaving no ancestor, descendant, brother, or sister, but survived by a nephew, three nieces and a grandnephew and grandniece. The administrator, Owen D. McGovern, has filed his account, and exception thereto is made. The three nieces claim that the entire estate should be awarded to the nephew and themselves in equal shares, and that the grandnephew and grandniece should be debarred from any share therein. The general guardian of Robert J. McGovern, the grandnephew, has appeared on this accounting, and asks that the account be approved and passed. Therein the moneys to be distributed have been divided into five equal shares, and one share (being the sum which would be allotted to their parent were he living) has been allotted in equal shares to the grandnephew and grandniece. Subdivision 5, § 2732, Code Civ. Proc., controls the order of distribution in this proceeding, as follows:

"(5) If there be no widow and no children, and no representative of a child, the whole surplus shall be distributed to the next of kin, in equal degree to the deceased and their legal representatives."

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Subdivision 11 of the same section provides that "those who take by representation shall receive the share to which the parent whom they represent if living would have been entitled." Applying the rule thus laid down, the objection to this account should be overruled, and the grandnephew and grandniece should receive one-fifth of the surplus of this estate, to be divided equally between them.

Prior to September, 1898, these collateral descendants of intestate would not have been entitled to this share, because subdivision 12 of section 2732, supra, debarred representation among collaterals after brothers' and sisters' children. The Legislature (chapter 319, p. 941, Laws 1898) amended subdivision 12 so as to read as follows:

"(12) Representation shall be admitted among collaterals in the same manner as allowed by law in reference to real estate."

Whenever the next of kin are as here, section 287, art. 9, Real Property Law, Laws 1896, p. 620, c. 547, applies, and its provisions are explicit. Collateral relatives take, those of equal degree of kinship with the intestate, share and share alike; those of unequal degree of kinship, by representation, the share to which the parent whom they represent, if living, would have been entitled. The purpose of the Legislature is manifest, and the result accomplished by this amendment to section 2732 of the Code of Civil Procedure is that representation among collaterals is the same in the distribution of personal property and in the inheritance of real property. Debarring representation among collaterals beyond brothers' and sisters' children is done away with.

Counsel for the three nieces, objecting to the account, cites Matter of Davenport, 172 N. Y. 459, 65 N. E. 275, N. Y. Law J., Dec. 11, 1902, and urges that under the rule there laid down this grandnephew and grandniece cannot share now. The facts in that case differ from the one at bar. There were cousins and second cousins, descendants of deceased uncles and aunts of the intestate, to the number of 80 or more. The Appellate Division had held, and the Court of Appeals affirmed them, that these remote collaterals were not entitled, by virtue of the amendment of 1898, to take by representation with nephews and nieces, uncles and aunts. At page 457 in that case (172 N. Y., and page 276 of 65 N. E.), the court says:

"It is not reasonable to assume that the Legislature in amending a statute, coming down, in substance, from Justinian, providing that 'no representation shall be admitted among collaterals after brothers' and sisters' children,' would open wide the gates to all collaterals, thus dividing up estates in many instances into sums so small as to benefit no one."

And again, on page 458 of 172 N. Y., and page 277 of 65 N. E.:

"We cannot conceive that it was the intention of the Legislature to establish any such rule of distribution as indicated by the decree of the Surrogate's Court."

—viz.: that second and third cousins, numbering 80 or more, should, under the amendment to subdivision 12, supra, be allowed to take infinitesimal shares.

Following this contention, it is entirely conceivable that in a case like this the Legislature meant by the amendment of 1898 to remove the only bar to allowing this grandnephew and grandniece to take,



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pursuant to the other provisions of section 2732 of the Code. This belief is confirmed by reference to section 287 of the real property law, supra, which explicitly states that they inherit real estate of an intestate as representatives of their deceased parent. Moreover, by the same law, uncles and aunts and their descendants only inherit on failure of nephews and nieces, or of descendants thereof, all of whom are preferred before them in the event that any exist. Vide section 288 of real property law.

The entire purpose and scope of section 2732 being considered, and the effect thereon of the amendment of 1892, confirms the opinion that the objections to this account should be overruled, and the grandnephew and grandniece be allowed to share. If counsel's contention is correct, confusion results because of this amendment, when the purpose of it manifestly was to simplify and make consistent the provisions for distribution of property of an intestate.

The rights of the parties in the case at bar must be determined upon the facts as they exist here. A fair construction of section 2732 of the Code of Civil Procedure shows it consistent in all its subdivisions upon the point of the order of distribution in this case. The grandnephew and grandniece should receive the share allotted to each in the account, and the objections thereto should be overruled.

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(48 Misc. Rep. 589.)

## In re FLEMING et al.

## In re BROWN et al.

**(Surrogate's Court, Erie County. November, 1905.)**

1. DESCENT AND DISTRIBUTION—NEPHEWS AND NIECES.

Testator's will contained no residuary clause, and his only next of kin were nephews and nieces and children of deceased nephews and nieces. *Held*, that the grandnephews and grandnieces take by representation the shares of the testator's personal estate, undisposed of by will, which their parents would have taken if they had survived.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Descent and Distribution, §§ 118–120.]

2. SAME—COUSINS.

Second and third cousins are entitled to share with first cousins, receiving the shares which their respective parents and grandparents would have received, if living, per stirpes.

In the matter of the settlement of the accounts of John G. Fleming and others, executors, and of the settlement of the accounts of Lucina B. Brown and another, administrators, of the estate of Lucina Miles. Decrees rendered.

Charles F. Southworth, for administrators.

Charles M. Hughson, special guardian for infants and attorney for next of kin.

Frank C. Ferguson, for Grant D. Carmer, as assignee, and others, objecting.

Elijah W. Holt, Thomas A. Sullivan, and William B. Frye, for next of kin.

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MARCUS, S. The questions involved upon the settlement of the accounts of the executors and administrators of the two above estates, respectively, present the right of certain collaterals to share in the decedent's estates by representation; and, as the questions in both estates are similar, and happen to come before me at the same time, they may be disposed of together.

In the O'Neill estate the testator died May 18, 1902, leaving a will, which, however, contained no residuary clause, and the result is that a large amount of the personal estate of the testator remains undisposed of by this will, and must be disposed of under the statute of distributions in like manner as if the testator had died intestate as to such property. The decedent left, him surviving, no descendants, father, mother, widow, brother, sister, uncles, or aunts. His nearest and only next of kin are nephews and nieces and children of deceased nephews and nieces. The only question before me is whether representation shall be allowed to the children of deceased nephews and nieces, and whether such grandnephews and grandnieces shall take the shares which their respective parents would have taken if living, or whether they shall be entirely excluded from participating in the personal estate, and the same divided equally among the surviving nephews and nieces. I have come to the conclusion that representation should be allowed to the grandnephews and grandnieces, and that they should take the shares which their respective parents would have taken if living, for the reasons which are briefly stated below.

In the estate of Lucina Miles the decedent died intestate on May 16, 1901, leaving no husband, descendants, ancestor, uncle, aunt, brother, sister, or descendant of a brother or a sister. Her only relatives were descendants of uncles and aunts, consisting of first cousins, second cousins, and third cousins. The question here presented is whether the second and third cousins are entitled to share with first cousins, receiving the shares which their respective parents and grandparents would receive if living. I have come to the conclusion in this case, likewise, that such representation should be allowed, and that the second and third cousins should share per stirpes, and for the same reasons.

Extremely able and exhaustive briefs have been submitted to me in both cases by the various counsel representing the conflicting interests, and the questions involved are not free from doubt. Those who object to the representation of grandnephews and grandnieces and second and third cousins rely upon the recent case of Matter of Davenport, 67 App. Div. 191, 73 N. Y. Supp. 653, affirmed in 172 N. Y. 454, 65 N. E. 275, where the testatrix left no husband, ancestor, descendant, brother, or sister, but was survived by a nephew and niece, two uncles, two aunts, and numerous first, second, and third cousins. The court there held that the estate should be divided into six equal parts, and distributed between the nephew and nieces and the two uncles and two aunts, to the exclusion of first, second, and third cousins. There were or grandnephews or grandnieces who survived the decedent. It would be interesting to analyze the Davenport decision, and to distinguish it from the two cases now before me for disposition; but this would be a mere work of supererogation, in view of the lucid and convincing opinions upon similar states of facts contained in the learned decisions

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of Surrogates Heaton, of Rensselaer county, in Matter of Hadley, 43 Misc. Rep. 579, 88 N. Y. Supp. 545, Church, of Kings county, in Matter of Ebbets, 45 Misc. Rep. 575, 89 N. Y. Supp. 544, and Silkman, of Westchester county, in Matter of Patrick McGovern (Sur.) 98 N. Y. Supp. 304. Each of the above decisions was handed down subsequent to the determination of the Davenport Case by the Court of Appeals, and the latter case was distinguished by each of the surrogates, and held not applicable to the particular case before the court.

As the McGovern Case is not as yet reported in the official reports, it may be stated that the facts in that case were identical with those in the O'Neill Case before me. The decedent, Patrick McGovern, died in March, 1902, leaving no wife, or children, ancestor, descendant, brother, or sister, but survived by a nephew, three nieces, and a grandnephew and grandniece; and Surrogate Silkman, in considering carefully the effect of the Davenport Case, decided that the grandnephew and grandniece should share in the estate with the nieces. In the Matter of Hadley, supra, the intestate died September 23, 1902, likewise leaving nephews, nieces, and a grandnephew and grandniece, and it was held that the grandnephew and grandniece were entitled to take, by representation, their parents' shares. In the Matter of Ebbets, supra, the intestate died between the years 1898 and 1903, and was survived by nephews and nieces and grandnephews, and it was held that the grandnephews were entitled to receive their parents' share of the personal estate. Attention may also be directed to the recent decision of the Appellate Division, Second Department (Matter of Martin, 95 App. Div. 626, 88 N. Y. Supp. 1108). The decedent died intestate September 9, 1901, leaving no lineal descendants, ancestors, widow, brother, sister, uncle, or aunt. There survived him only one grandnephew and four first cousins, all of whom were removed in the fourth degree, and the court there held that the four first cousins were entitled to share equally with the grandnephews in the distribution of the estate.

There appears to be no decision bearing as directly upon the questions involved in the Miles estate now before me as do the decisions above cited to the O'Neill Case; but I have reached the conclusion that the situation in the Miles Case falls within the same principles, and is also distinguishable from the Davenport Case. I am, moreover, loath to extend the doctrine of the Davenport Case beyond the precise facts and relationships of the parties there involved, as it seems to me any enlargement of the doctrine will work great injustice, and subvert the intention of section 2732 of the Code of Civil Procedure as amended in 1898. Laws 1898, p. 941, c. 319.

The questions presented in the cases before me, as well as those in the cases above cited before the other surrogates, will doubtless soon disappear from our courts, in view of the further amendment of the Code section above referred to, made by the Legislature in 1903, in view of the Davenport Case, and for the purpose of destroying the force of that decision; which outcome the Legislature, in all probability, sought to avoid by the earlier amendment of this section made in 1898.

For these reasons, I direct that the decrees upon the accountings in the two cases now before me provide for representation among all of the surviving next of kin, as above indicated.

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(49 Misc. Rep. 39.)

## In re VAN DECAR et al.

(Surrogate's Court, Saratoga County. December, 1905.)

1. WILLS—CONSTRUCTION—TRUST FUND—INCOME.
Testatrix bequeathed certain shares in trust, the quarterly dividends to be paid to her son as far as necessary, in the judgment of the trustee, for his support during life, with a provision that on his death the trustee should pay from the stock and the accumulations a legacy of $1,000; the remainder to be divided between two other sons. *Held*, that the income alone could be used for the support of the life beneficiary.

2. SAME—DISCRETION OF TRUSTEES.
It appeared that the beneficiary of a life estate was sick from injuries received in military service and unable to work, and had no income except a pension, which, together with the income derived from the trust estate, was inadequate for support. The income was to be expended in his behalf in the discretion of the trustee. *Held*, that it would be an abuse of discretion for the trustee to withhold from him any part of the income.

In the matter of the judicial settlement of the account of Bennett Van Decar and Anna B. Kilby, executors of Lucy Bates, deceased.

William Rooney, for accountants.
Burton D. Esmond, for Wallace M. Van Decar.

LESTER, S. The testatrix left, among the assets of her estate, 24 shares of the capital stock of the Delaware & Hudson Canal Company; and her executors have received, since her death, dividends upon this stock amounting to $378, and have paid to Wallace M. Van Decar for his support the sum of $147 therefrom. By her will the testatrix provided in reference to said stock and the dividends therefrom as follows:

"First. After all my lawful debts are paid and discharged, I give and bequeath to my son Bennett Van Decar of Syracuse, N. Y., my twenty-four shares of Delaware & Hudson Canal Company's stock, in trust, nevertheless, to receive the quarterly dividends thereon and pay over to my son Wallace M. Van Decar of Van Decar, Isabella county, Michigan, so much thereof as shall be necessary in the judgment of said Bennett Van Decar, as shall be necessary for the support of him, the said Wallace M. Van Decar during the term of his natural life; and I hereby give and bequeath to the said Wallace M. Van Decar so much of said quarterly dividends as shall be necessary in the judgment of said Bennett Van Decar for the support of him, the said Wallace M. Van Decar, during the term of his natural life. On the death of the said Wallace M. Van Decar, I give and bequeath, and the said trustee shall pay from said stock and the accumulation of dividends, if any, not used for the support of said Wallace M. Van Decar to my granddaughter, Mrs. Lucy McCullough, of Amsterdam, N. Y., one thousand dollars ($1,000) cash; but in case of the death of said Lucy McCullough before said Wallace M. Van Decar dies, then the above bequest shall revert to the said trustee; and all the rest, residue, and remainder of said Delaware & Hudson Canal Company's stock and accumulated dividends (and in case above provided of the death of said Lucy McCullough, then all of said stock and dividends) I give and bequeath to my son Bennett and my son Schuyler Van Decar, of Romeo, Mich., to be equally divided between them share and share alike."

Wallace M. Van Decar claims that, under the provisions of the first clause of the will of the testatrix, above quoted, he is entitled to receive so much of the stock and dividends as may be necessary for his support; that it is not within the discretion of the executor and

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trustee, Bennett Van Decar, to withhold from him any part of the principal or income of this fund which may be required for his support; and that, in the decree upon this accounting, the trustee should be ordered to pay over to him such portion of the principal, and balance of the dividends remaining in the hands of the trustee, as the court deems necessary for his present needs; and should direct the trustee as to the future application thereof. The trustee, on the other hand, claims that he is vested with an absolute discretion, which cannot be controlled by the court, and that as, in his judgment, nothing is necessary now to be paid to the said Wallace M. Van Decar for his support, no direction should be made in the decree for the payment to him of any sum whatever.

After carefully reading the will of the testatrix, my opinion is that it was not her intention to devote to the support of Wallace M. Van Decar any part of the 24 shares of stock mentioned in the first clause of her will, but that it was her intention to limit the provision which she made for his support to the quarterly dividends on said stock. In the clause, "to receive the quarterly dividends thereon and pay over to my son Wallace M. Van Decar so much thereof as shall be necessary," etc., the word "thereof," in my opinion, relates solely to the quarterly dividends; and this opinion is strengthened by the clause which immediately follows it, namely:

> "And I hereby give and bequeath to the said Wallace M. Van Decar so much of said quarterly dividends as shall be necessary in the judgment of the said Bennett Van Decar for the support of him," etc.

The subsequent language of the first clause is also in harmony with this construction, and the whole of the first clause, it seems to me, in its natural and obvious meaning, contemplates the application to the support of Wallace M. Van Decar of some portion, and perhaps all, of the dividends, but no part of the 24 shares of stock bequeathed to the trustee.

The next question which arises is as to the right of the court to direct the executors and trustee, upon this accounting, to pay over the balance of the dividends now in their hands to the said Wallace M. Van Decar. It would be difficult to find language that could more emphatically express the intention of the testatrix to confer upon Bennett Van Decar discretion as to what should be paid over for the support of Wallace. The direction to Bennett is to pay over to Wallace so much of the dividends as shall be necessary in his judgment for the support of Wallace; and the testatrix gives and bequeaths to Wallace so much of said quarterly dividends as shall be necessary in the judgment of Bennett for the former's support. Under such provisions as these it behooves the court to act with the utmost caution in interfering in any manner with the discretion which the testatrix has reposed in her trustee. And yet this trust, like all others, was designed by its creator to accomplish a purpose; and it is the duty of courts exercising equitable powers, so far as they can, to see that the beneficent purposes for which trusts are created are carried out in honesty and good faith. And when it appears that any trustee, no matter how broad the discretion which is bestowed upon him, is so

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administering his trust that it fails to accomplish the purpose for which it was created, then it seems to me that time has come for the court to intervene.

In the present case, it appears that Wallace M. Van Decar, for whose support his mother, the testatrix, sought to provide in the first clause of her will, resides at Myrtle Point, Or.; that he is sick and is unable to do any kind of manual labor. He is afflicted with grave diseases and suffering from serious injuries, received in early life, during military service as a soldier in the war of the Rebellion, and is a victim of epilepsy. Once he earned a good living and accumulated some property, but for more than two years he has been unable to work and most of his property has been dissipated in the payment of living expenses and for medical and surgical treatment and supplies. He requires the constant attention of a nurse and he describes himself as a "physical wreck." This description seems, by the testimony of credible witnesses, to be justified. He lives in a house that is estimated to be worth $600, but is out of repair and mortgaged for $250, and of the property which he owned less than three years ago not more than one-third remains, all of which is incumbered, the principal part of which consists of a farm in Michigan, and which amounts, all told, to $1,800 above the incumbrances, and he owes debts to a considerable amount. The property he still has produces no income, except as the house affords him an insufficient shelter; and his only income is a soldier's pension of $17 per month. The amount he requires annually for his support is, at the lowest estimate, $750; and this amount I am convinced from the evidence, is inadequate to cover the expenses of proper medical attendance and nursing. I am satisfied that the needs of this beneficiary require an amount considerably larger than the entire income from the trust fund in addition to all he receives or can obtain from his property, and that he is unable to earn anything. The evidence as to his condition and needs is not contradicted, and the trustee has made no suggestion as to how his necessities can be met. Under the circumstances disclosed by the evidence, I think it would be an abuse of discretion on the part of the trustee to withhold from him any part of the income arising from the trust fund.

A question has been raised as to the validity of the provision of the will under which an accumulation of income from the trust fund might be possible, and as to the disposition which should be made of surplus income. It seems unnecessary at present to discuss this question. An accumulation of income is not likely, in my view of the duty of the trustee, ever to arise. The question is one which, however interesting, is not now important and is not likely ever to become so.

My conclusion, therefore, is that the income now in the hands of the trustee should be paid over to the beneficiary, Wallace M. Van Decar, for his support. A decree accordingly may be submitted.

Decreed accordingly.

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(49 Misc. Rep. 44.)

## In re CUNNING.

(Surrogate's Court, Saratoga County. December, 1905.)

WILLS—CONSTRUCTION—LEGACIES.

Testatrix directed that, on the death of one to whom she had bequeathed certain money for life, it should be divided between "the above said nieces that has received no money." *Held*, that such division must be made between all the nieces mentioned as a class, and not between those only mentioned by name.

In the matter of the settlement of the accounts of George H. Cunning, executor and trustee under the will of Persis Dunning, deceased. Decree entered.

James L. Scott, for accountant.

LESTER, S. The will of Persis Dunning contains the following provision:

"Tenth. I hereby authorize my executor to execute the above bequests as soon as proper after my decease and my niece Melissa Van Vranken is to have the house and lot as stated above, also the use of the residue of money if there be any left over and above my expenses during her natural life then have the house and lot as stated above, also the use of the residue of money and if any of the above said nieces should not survive me to recieve their share of the estate it must be divided share and share alike between the surviving ones."

The testatrix had, in previous clauses of her will, made bequests to her nieces, Jane L. Brown, Persis Carroll, Persis Wagner, Melissa Van Vranken, and Mary Ann Cummings and to one of these nieces she had given a sum of money; and she had provided in the sixth clause of her will as follows:

"Sixth. I give, devise and bequeath to my niece Melissa Van Vranken of Burnt Hills, Saratoga county, N. Y., my house and lot situate at the village of Burnt Hills in the town of Burnt Hills, N. Y., where I now reside to her and her heirs forever. Also all of my household effects of every name, kind and description whatever for her use during her natural life providing she stays with me and takes care of me until my decease, but if she fails to stay she must be amply paid for all the services she has rendered me while she has been with me except the above named articles which I request shall be given as soon as convenient after my decease."

Her niece, Melissa Van Vranken, stayed with the testatrix and took care of her until the latter's decease, and has herself since died. The question now arises as to the persons entitled to share in the residue of the money of the estate under the tenth clause of the will, above quoted, which provides that "it must be divided between the above said nieces that has received no money."

It is conceded that Persis Wagner, to whom a sum of money was bequeathed, is not included among those to whom the residue of the money is given; and the question is whether the testatrix intended, by the words, "the above said nieces that has received no money," only the nieces she had previously mentioned by name, or whether she intended to include all her nieces, she having, in the eighth clause of her will, given her wearing apparel to "my nieces, my brother's and sister's daughters that survives me," several of whom she did not

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mention by name. It is to be noted that in the twelfth clause of her will she gives to Persis Carroll some silver spoons, upon the death of Melissa Van Vranken, such bequest having been, she states, "forgotten above"; and she then goes on to provide further for the disposition of personal property she had previously given to Melissa Van Vranken for life, as follows:

"Or if she [Melissa Van Vranken] should dispose of this place [the house and lot of the testatrix] in her lifetime the personal property must be divided between my brother's and sister's daughters that has received no money. It is my wish that my effects will be divided between my nieces when Melissa does not wish to stay here longer."

The testatrix seems to have contemplated the division of her personal estate (leaving out of account certain articles which she specifically bequeathed) into (1) "wearing apparel"; (2) "household effects"; and (3) "residue of money left over and above my expenses." The first she plainly gives to "my nieces, my brother's and sister's daughters that survive me." This description included the entire class, whether named in her will or not. The second she also directs in equally plain language to be divided "between by brother's and sister's daughters that has received no money"; and I am of the opinion that the testatrix, when she provided for the distribution of the third, "between the above said nieces that has received no money," intended that it should be divided among the same persons among whom she wished her household effects to be divided at Melissa Van Vranken's death—that is, among all her "brother's and sister's daughters that has received no money." I do not think by the words "above said nieces" she meant, only, above-named nieces, but that she meant above-mentioned nieces; and she had already mentioned "my nieces, my brother's and sister's daughters." She had already, by making certain specific bequests, preferred to that extent those nieces whom she had named; and further than this it is my opinion she did not intend to go. The words, "the above said nieces that has received no money," and the words, "my brother's and sister's daughters that has received no money," are similar phrases, and were employed, it seems to me, to denote the same persons. I think, if the testatrix had intended otherwise, she would have used language in the two cases that would have more plainly distinguished them from each other, and that by language so similar she would not have designated classes that were intended to be different.

My conclusion is that the residue of the money should be divided among all the surviving nieces, except Persis Wagner, and not among those only whom the testatrix had called by name in the earlier part of her will. Let a decree be entered accordingly.

Decreed accordingly.

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(49 Misc. Rep. 82.)

## PEOPLE v. DINSER.

(Court of General Sessions, New York County. December, 1905.)

1. WITNESSES—CREDIBILITY.

On trial for murder, an instruction that, if the witness willfully testifies falsely as to any fact, the jury are authorized, but not bound, to disbelieve his entire testimony, and that this rule applies to every witness called by the prosecution and the defense, as well as to the defendant himself, is not error.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 1080.]

2. CRIMINAL LAW—PRESUMPTION OF INNOCENCE.

An instruction that accused is presumed to be innocent until the contrary is proved, and that this presumption rests with the accused until the moment the jury are convinced from the evidence he is guilty, and then the presumption is destroyed, is not error, where from the remainder of the charge the jury could have had no doubt as to the amount of proof required to convict.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1846–1857.]

3. WITNESSES—TRIAL—EXAMINATION BY COURT.

That the court interrogated a witness is not error.

[Ed. Note.—For cases in point, see vol. 50. Cent. Dig. Witnesses, §§ 852–856.]

4. HOMICIDE—EVIDENCE.

On trial for murder, evidence of ill feeling on the part of the defendant towards the deceased is admissible.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 288–292.]

Gustav Dinser was convicted of murder in the second degree, and applies for a certificate of reasonable doubt pending the appeal. Motion denied.

Robert C. Taylor, Asst. Dist. Atty., for the People.
K. Henry Rosenberg, for defendant.

ROSALSKY, J. The defendant above named was indicted for the crime of murder in the first degree, and on the 21st day of November, 1905, was convicted of murder in the second degree, and thereafter sentenced to imprisonment for life. The defendant now applies for a certificate of reasonable doubt pending his appeal to the Appellate Division of the Supreme Court, First Department, from said judgment of conviction.

The defendant in support of his application assigns the following alleged grounds of error: (1) The court erred in its charge to the jury that they may disregard testimony of a witness where such witness willfully testified falsely to any fact. (2) The court erred in its charge to the jury on the question of the duration of the presumption of innocence, its application, and limitation. (3) The court committed prejudicial error in examining and cross-examining witnesses. (4) The court erred in permitting evidence to be introduced, proving the defendant guilty of a separate and distinct crime. Although many exceptions were taken to the admission and exclusion of testimony and to the charge to the jury, nevertheless, of the four grounds urged,

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exception was taken only to the third and fourth grounds herein indicated.

Section 527 of the Code of Criminal Procedure, among other things, provides as follows:

"And the appellate court may order a new trial if it be satisfied that the verdict against the prisoner was against the weight of evidence or against law, or that justice requires a new trial, whether any exception shall have been taken or not in the court below."

It will be observed that the above provisions of law were undoubtedly enacted by the Legislature for the purpose of safeguarding the interests of a defendant. In order that the defendant may avail himself of any of its provisions, it must appear from the record, although no exceptions were taken, that the verdict was (a) against the weight of evidence; (b) against the law; (c) that justice requires a new trial. People v. Spiegel, 75 Hun, 161, 26 N. Y. Supp. 1041. This application, however, will be determined as though exceptions were taken to all the grounds of error.

The evidence in this case discloses one of the most brutal crimes recorded in the annals of criminal justice. The defendant, on the morning of September 4, 1905, violently and brutally assaulted one Gertrude Hyland, an infant, aged two years, the illegitimate child of Agnes Renaud, with whom the defendant lived, by striking several blows upon the body of this babe which resulted in her death. Thereafter the defendant, in company with Agnes Renaud, carried the body of the deceased several blocks and placed it in the hallway of a tenement house, in the borough of Manhattan, city of New York. The defendant, upon being arrested, at first claimed that he had no knowledge of the whereabouts of the child, and thereafter said that the father took the babe away. Upon the trial, however, the defendant testified that he and Agnes Renaud removed the body of the child in the manner herein indicated. The defendant admitted that he struck the child and contended that the use of violence on his part was not unlawful, because of the provisions of section 223 of the Penal Code. This section of the Penal Code, among other things, provides as follows:

"To use or attempt, or offer to use, force or violence upon or towards the person of another is not unlawful in the following cases: * * * (4) When committed by a parent or the authorized agent of any parent, or by any guardian, master, or teacher, in the exercise of a lawful authority to restrain or correct his child, ward, apprentice or scholar, and the force or violence used is reasonable in manner and moderate in degree."

Although the defendant did not bear the relationship as provided in this section, supra, nevertheless the jury was charged these propositions of law, and by the verdict of the jury it must be assumed that the defendant used force or violence which was not reasonable in manner and moderate in degree.

The learned counsel for the defendant contends that error was committed in the following instruction to the jury: "If you believe that a witness has willfully testified falsely as to any fact, you are authorized but not bound to disbelieve the entire testimony of the witness. This rule applies to every witness called by the prosecution and the

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defense as well as to the defendant himself"—because the court failed to use the word "material." In People v. Petmecky, 99 N. Y. 421, 2 N. E. 145, the defendant was charged with the crime of murder in the first degree, and the charge objected to was similar to the language used in the case under consideration. This was the language of the court in that case:

"Whenever you find that a prisoner has made a statement not true, to establish a falsity instead of a truth, his testimony is not entitled to the credit of a witness who stands fairly before you uncontradicted. His testimony then is entitled to no weight or credit of itself, except so far as it is consistent with the known and established facts of the case or corroborated by other witnesses."

In passing upon this question the court said:

"That a jury are permitted to disbelieve the testimony of a witness who has willfully testified falsely before them as to any fact is not disputed, and the question here is whether the court below said anything more than this." People v. Petmecky, 99 N. Y. 421–423, 2 N. E. 149.

In People v. Reavey, 38 Hun, 418, the request was:

"If any witness has willfully perverted the truth, they could disregard the whole of the testimony of such witness."

This the judge charged, not as a matter of law, but that the jury had authority to disregard the witness' testimony. People v. Reavey, 38 Hun, 418. In neither of these instructions was the word "material" used. It must be assumed that, although the word "material" was not used, in effect it referred to any "material fact." The charge must be read as a whole, and, if the charge be so read, it cannot be successfully contended that the jury could have been misled.

In People v. Tobin, the learned trial justice charged that it was not necessary that "every circumstance" should be proved beyond a reasonable doubt. The Court of Appeals held that what the justice meant was not every "incidental circumstance," and that the justice in his charge referred only to material circumstances. People v. Tobin, 176 N. Y. 278, 68 N. E. 359.

The second ground assigned in error is found in the following instruction to the jury:

"The defendant in a criminal action is presumed to be innocent until the contrary is proved. The presumption rests with the accused throughout the case until the moment when the jury are convinced from the evidence that he is guilty; then the presumption is destroyed. The rule of the law which clothes every person accused of crime with the presumption of innocence, and puts upon the people the burden of establishing his guilt beyond a reasonable doubt, is not intended to aid any one who in fact is guilty of the crime; but it is a humane provision of the law intended so far as human agencies can be guarded against danger of any innocent person being unjustly convicted and punished."

It seems that objection is taken to this portion of the charge because the court amplified section 389 of the Code of Criminal Procedure, which provides:

"A defendant in a criminal action is presumed to be innocent, until the contrary be proved."

The learned counsel for the defendant, in support of this contention, cites the case of People v. Ray, 36 App. Div. 389, 55 N. Y. Supp. 410, in which the following instruction appears in the record:

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"In the first place a man charged with crime is entitled to the presumption that the law gives him of innocence until the proof given on the part of the prosecution overcomes that presumption and satisfies the jury beyond a reasonable doubt of his guilt of the crime with which he is charged."

That rule of law is applicable to all criminal cases and is applicable to this case. That is to say, the person accused of crime comes into court with the presumption accompanying him from time of the beginning of the trial, and throughout the trial, until by the testimony the jury are satisfied that the presumption has been overcome and beyond a reasonable doubt the prisoner is guilty of the offense charged. In addition to that rule, there is another rule of law which is applicable to all criminal cases and that the jury are the exclusive judges of every question of fact in the case. Presiding Justice Goodrich, who wrote the opinion says:

"It is a cardinal principle in criminal law that every man is presumed to be innocent of crime, and a person indicted for an offense is entitled to the benefit of this presumption until the case as submitted to the jury has established the contrary. The court would have correctly charged as to this presumption, and there would have been no error, if the cited sentence of the charge had ended with such statement of the law; but the court limited the effect of this presumption by saying that it lasts only until the proof given on the part of the prosecution overcomes that presumption and satisfies the jury beyond a reasonable doubt of his guilt of the crime with which he is charged. This, we think, was error. The presumption of innocence continues throughout the trial."

The quoted language of Mr. Justice Goodrich was not the expression of the court; for, on the contrary, in the prevailing opinion, concurred in by Justices Cullen and Bartlett, Mr. Justice Hatch says:

"I dissent from the doctrine announced by the Presiding Justice in his opinion in this case."

It seems that the Ray Case was reversed solely because of prejudicial remarks made by the district attorney. People v. Ray, 36 App. Div. 389, 55 N. Y. Supp. 410.

In case of People v. Pallister, 138 N. Y. 605, 33 N. E. 741, the Court of Appeals unanimously sustained the following instruction:

"The law gave the defendant 'the benefit of every reasonable doubt arising out of the evidence, and it gives him the benefit of the presumption that he is an innocent man, until that presumption is overcome by proof satisfactory to you.'"

In the case under consideration, the jury was instructed, fully and at length, that the burden of establishing the guilt of the accused rests upon the prosecution throughout the case; that the jury will only be justified in convicting the defendant, if the evidence satisfies them beyond a reasonable doubt of his guilt; and that the people are bound to establish every material fact necessary to a conviction before they can convict the defendant. A reading of the entire charge clearly shows that the jury could have no doubt as to the amount of proof required to convict.

With respect to the third alleged ground of error, that the court committed prejudicial error in examining Mr. Carl Fisher Hansen, it seems that the ground of objection is untenable. The authorities cited in support of the contention advanced by the learned counsel for the defendant are not applicable to this proposition. The presiding justice

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has a right to interrogate witnesses. An error can only be assigned where the judge abuses his discretion and assumes the role of a prosecutor; but, in this instance, no such role was assumed by the court. On the contrary, it appears from the record that the witness Carl Fisher Hansen made certain statements concerning which the court felt justified in interrogating him, and while so doing cautioned the jury not to prejudice the interests of the accused; but the questions were not put in a prejudicial form or in any manner indicating that the court held or entertained any opinion regarding the testimony of this witness and the court in his charge, instructed the jury accordingly. Gill v. People, 3 Hun, 187; People v. Hackett, 82 App. Div. 86–91, 81 N. Y. Supp. 718.

The defendant also claims that error was committed in permitting evidence to be introduced showing that the defendant had assaulted Agnes Renaud, his mistress, and Gertrude Hyland, the deceased, on several occasions prior to the alleged fatal assault and at the time of the commission of the crime for which the defendant was convicted. When the testimony is read as a whole, relative to these transactions, it is abundantly clear that the ill treatment toward the mother was incidental to the ill feeling which the defendant began to manifest toward the unfortunate child, that the ill feeling toward the mother plainly flowed from the ill feeling toward the child, and that these acts toward the mother clearly bore upon the state of mind of the defendant relative to the child. This evidence was received for this sole purpose; and the court repeatedly instructed the jury that such was the purpose for which the evidence was received, and that it was not admitted for the purpose of proving any independent crime.

All the acts of the defendant, within a reasonable time of the homicide, were properly provable, as showing the state of mind of the defendant, and this proposition was clearly laid down in the case of People v. Conklin, 175 N. Y. 333, 67 N. E. 624. In the Conklin Case it was held that a lapse of two years did not make the conduct too remote to be proved, and in the case at bar everything that was proved occurred within four weeks of the homicide. The Court of Appeals, in a succession of authorities, has held, time and again, that the people can prove every circumstance attendant upon the homicide, including assaults upon other people, and that the proof is admissible, as proof of "attendant circumstances." People v. Pallister, 138 N. Y. 601, 605, 33 N. E. 741; People v. Parker, 137 N. Y. 535, 32 N. E. 1013; People v. Johnson, 139 N. Y. 358, 34 N. E. 920; People v. Place, 157 N. Y. 584, 52 N. E. 576. In People v. Place, Mrs. Place murdered her stepdaughter. When her husband came home, she also made an assault upon him and nearly killed him. Her purpose was to kill him, so as to prevent the murder of the stepdaughter from being discovered. The Court of Appeals held that this evidence, although extremely prejudicial, was entirely competent, inasmuch as it bore upon her demeanor, etc., and that it was tantamount to evidence of flight and the like.

The defendant has the benefit of a fair and impartial trial, and, since no good reason is given for the granting of a certificate of reasonable doubt in this case, the motion is denied.

Motion denied.

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(49 Misc. Rep. 50.)

## WHITE v. CURTIS.

(Onondaga County Court. December, 1905.)

JUDGMENT—RES JUDICATA.

In an action on a note in a justice's court, where it appeared that by agreement the maker of the note was to be allowed on the note the value of services rendered, and judgment is taken by default, defendant is not precluded by Code Civ. Proc. §§ 2947, 2948, providing that where a defendant neglects to interpose a counterclaim he shall thereafter be precluded from maintaining an action to recover the same unless the counterclaim is for unliquidated damages, from thereafter maintaining an action to recover for such services; the value thereof being undetermined.

Appeal from Justice Court.

Action by William White against Milton A. Curtis. Judgment for plaintiff in a justice's court, and defendant appeals. Motion for nonsuit denied.

George H. Sears, for appellant.

McMahon & Murphy, for respondent.

ROSS, J. After the services alleged in the complaint were rendered, the defendant sued the plaintiff in Justice's Court upon a promissory note, and recovered judgment (upon default); and the defendant contends that the plaintiff herein is now precluded by the provisions of sections 2947 and 2948 of the Code of Civil Procedure from maintaining this action:

"Sec. 2947. Where the defendant, in an action to recover damages upon or for breach of a contract, neglects to interpose a counterclaim, consisting of a cause of action in his favor to recover damages for a like cause, which might have been allowed to him upon the trial of the action, he, and every person deriving title thereto through or from him, are forever thereafter precluded from maintaining an action to recover the same, or any part thereof.

"Sec. 2948. But the prohibition contained in the last section does not extend to either of the following cases: * * * (3) Where the counterclaim consists of a claim for unliquidated damages."

It appeared upon the trial, by the evidence of the plaintiff, that there was an arrangement between the parties that the value of the services rendered by the plaintiff (the claim in this action) should be applied upon the note held by the defendant, which was the only claim the plaintiff owed the defendant and was the note upon which the defendant recovered judgment. The defendant also invokes the well-known rule, so emphatically stated in the text-books and cases, that a judgment is conclusive of all matters essential to the adjudication; that in this case the judgment in favor of the present defendant upon a promissory note was in fact a determination that the same had not been paid, which is undoubtedly correct; and that it also necessarily determined that nothing was due the plaintiff in this action for services, which is the point in issue in this case. Binck v. Wood, 43 Barb. 315, states the doctrine advanced by the defendant, and with which I have no contention. In the Binck Case, the defendant, Wood, in a former action (which was not defended) recovered judgment for the full amount of a promissory note, and did not give credit for $100, which concededly had been paid thereon. Binck, a surety of the

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maker of the note, brought an action to recover the $100 so paid, which the court held could not be maintained.

We must bear in mind that the determination of the question whether the plaintiff is precluded from maintaining an action is to be determined solely by the provisions of sections 2947 and 2948, heretofore cited, and that a case which did not arise in Justice's Court under the same or a similar statute cannot be held to be a decisive authority, and also that, independent of the sections of the Code mentioned, many of the cases cited are not in point, because the defense, which might and should have been proved, related, not to the claim of the former defendant, but to the claim of the then plaintiff; in other words, went to the right of action, as the defense of payment (Loomis v. Pulver, 9 Johns. 244), or of usury (Newton v. Hook, 48 N. Y. 676), or as in Gates v. Preston, 41 N. Y. 113, the familiar case of an action by a physician for professional services, the recovery by the physician was necessarily an adjudication that the services sued for were skillfully performed. In many of the cases cited the claims sued upon in the second action, and which should have been allowed in payment or reduction of the amounts sued on in the first action, was concededly liquidated, as in Binck v. Wood, in which the amount paid was not disputed. So that the same question is presented whether, under the cases or the provisions of the statute, the plaintiff's claim is an unliquidated one. As stated in Binck v. Wood, 43 Barb. 321, 322:

"The true question is, I think, whether the defense afterwards arising by the act of the parties extinguishes the demand, like payment, accord and satisfaction, release, etc.; or whether it is merely in the nature of a set-off, which never extinguishes the demand until applied and adjudged by the court."

The courts have defined the meaning of liquidated demand in language so broad that almost any claim short of damages for an assault and battery might be embraced in the definitions given; but, upon principle and under the cases, it seems to me that the plaintiff's claim was unliquidated.

The number of days he worked for the defendant was the subject of serious dispute and of conflicting evidence. The value of his services was also in controversy. The claim, so far from being liquidated, varied from $75, which the jury might have determined from the plaintiff's evidence, to about $25, if they believed the evidence of the defendant and his witnesses (I only state from memory). In Nassoiy v. Tomlinson, 148 N. Y. 326, 330, 42 N. E. 715, 51 Am. St. Rep. 695, Mr. Judge Vann, used this language:

"A demand is not liquidated, even if it appears that something is due, unless it appears how much is due."

Motion for nonsuit denied.

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## LEFEVRE v. SILO.

(Supreme Court, Appellate Division, First Department. April 20, 1906.)

1. PARTNERSHIP—WHAT CONSTITUTES.

An arrangement between defendant, deceased, and another to establish what was know as an "uptown" art gallery in New York City, under which each of the parties were to draw $2,000 per year, to be charged as an expense of the business, and that two-thirds of the profits should be distributed to defendant and the other third divided between deceased and the other party, constituted a partnership.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Partnership, §§ 15-28.]

2. EVIDENCE—CONCLUSIONS—REBUTTAL.

In an action on a partnership contract between deceased, defendant, and B., the latter's entire testimony concerning the contract was to his conclusion as to the result of a conversation at which all three were present, without attempting to testify to what was said. *Held*, that it was improper to sustain an objection to a question asked of defendant as to whether he entered into a contract with B. on or about the date in question, because it called for the witness' conclusion.

3. WITNESSES—TRANSACTION WITH DECEASED PERSON.

Where, in an action on a partnership contract alleged to have been made between deceased, defendant and B., the latter did not testify to anything that deceased had said at the interview at which the contract was made, except that he had acquiesced in a proposal made by defendant, to which B. also acquiesced, defendant was not precluded from denying the making of contract with B., similar to that testified to by him, by Code Civ. Proc. § 829, precluding a witness from testifying to a personal transaction had with a deceased person in an action by the latter's administrator.

4. EVIDENCE—ADMISSIONS.

Where, in an action on a partnership contract between decedent, defendant, and B., B. testified that under such contract decedent and B. were each to have one-sixth of the profits of a certain business, and that after decedent's death witness had left the business and obtained a final settlement with defendant, it was error to permit witness to testify that such settlement was on the basis that he was entitled to one-sixth of the profits as an admission by defendant to prove the original contract.

5. SAME.

In an action by an administrator on a partnership contract, I. O. U.'s produced by defendant and conceded to be in decedent's handwriting were competent evidence of the admission by decedent that he had received the sums of money mentioned and had promised to repay the same, in support of a counterclaim therefor.

Houghton, J., dissenting.

Appeal from Trial Term, New York County.

Action by Ellen A. Lefevre, as administratrix, etc., of the estate of Alfred M. Lefevre, deceased, against James P. Silo. From a judgment in favor of plaintiff, and from an order denying defendant's motion for a new trial, he appeals. Reversed.

Argued before O'BRIEN, P. J., and INGRAHAM, McLAUGHLIN, LAUGHLIN, and HOUGHTON, JJ.

J. Noble Hayes, for appellant.

William J. Martin, for respondent.

INGRAHAM, J. The complaint alleges that in the month of September, 1898, the plaintiff's intestate and the defendant entered into an



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agreement, terminable by either on 60 days' notice to the other, whereby it was agreed between them that the plaintiff's intestate should perform and render certain work, labor and services for the defendant in his business, known as "Fifth Avenue Art Gallery," in New York City, from and after October 1, 1898, and until May 1, 1903, unless sooner terminated by either, at an agreed compensation to be paid by defendant to plaintiff's intestate of one-sixth of the net profits of said business; that the plaintiff's intestate did perform and render to said Silo certain work, labor, and services from October 1, 1898, until on or about March 9, 1900, the date of his decease; that one-sixth of the net profits of the said business during the said period of time were at least the sum of $4,418.57, of which there was a balance due and payable from the defendant to the plaintiff of at least the sum of $2,140.50; and the complaint demands judgment for that amount. The defendant admitted the death of the plaintiff's intestate, denied the other allegations of the complaint, and set up a counterclaim for money loaned by the defendant to the plaintiff's intestate, amounting to $1,451.93, and demanded an affirmative judgment against the plaintiff. The court dismissed this counterclaim, and held that the plaintiff was entitled to recover, leaving it to the jury to determine the amount.

To prove the cause of action alleged in the complaint, the plaintiff called one O'Brien, who testified that he took part in an interview between himself, the defendant, and the plaintiff's intestate some time in October, 1899; that an arrangement was then made by which each of the parties should draw $2,000 a year, which should be an expense of the business, and that two-thirds of the profits was to go to the defendant, and the other one-third was to be divided between the plaintiff's intestate and the witness; that this agreement was not reduced to writing; that prior to this time the plaintiff's intestate had been an employé of the defendant at 43 Liberty street, and that this arrangement contemplated the leasing of an uptown store; that the plaintiff's intestate and the witness were to do the work incident to the gathering together and cataloguing and general details of the business, and the defendant was to do the selling; that this business would be started immediately on the securing of the lease, and it was started shortly after that. The witness was then asked: "When Mr. Silo said that he would take two-thirds and the other one-third to be divided between you two, was anything said by either of you or Mr. Lefevre in regard to that?" To which the witness answered: "It was understood that we were to get each one-sixth; divide that one-third equally between us. That was agreed upon by all three; yes. The words were: "The one-third is to be divided between you two boys.' Yes; one-third of the profits. The $2,000 annually was an expense of the business, which we were to draw for our living expenses, and was to be considered as an expense, charged to salary account." That he was subsequently present at a conversation in the uptown store between the plaintiff's intestate and the defendant. That "Mr. Silo came in one morning and said that— This was after the books had been balanced and the amount of profit for the preceding year determined. This was in either the latter part of September or the first part of October, 1899. Mr. Silo came into the office and said that the amount of the profits that would

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be apportioned to us each would be one-eighth. Mr. Lefevre objected to that. Well, Mr. Silo said, that would be the amount that he was going to allow, no matter what he said, and if he did not like it he could do the other thing. Mr. Lefevre said: 'I will not take that or accept that as a settlement.'" That the nature of the business carried on as this store was a general auction business, selling goods on commission. That there was besides that a line of business consisting of the purchasing of goods and selling them, a sort of general merchandising in connection with the auction business. That it was further understood that on 60 days' notice from either one of the parties to the other the contract could be terminated. The witness further testified that from that time on the parties drew what money they wanted and left the question of settlement until the final accounting was had. It further appeared that the bookkeeper who kept the books of this business, in consequence of the instructions received from the defendant after this conversation between the plaintiff's intestate and the defendant, had divided the profits of the business by crediting one-eighth to O'Brien, one-eighth to plaintiff's intestate, and the other six-eighths to the defendant, and that this method proceeded without further objection by either of the parties down to the death of the plaintiff's intestate.

The first question arising is whether this was a copartnership, in which case an action at law could not be maintained for the amount due to either of those interested until an accounting had been had. This point was raised by the defendant when he made his motion to dismiss upon the ground that the action was a common-law action to recover for money due to the plaintiff's intestate as an employé. Just what is sufficient to constitute a copartnership is a question about which there has been considerable confusion; but the prevailing opinion now is that any contract by which the parties to the contract are entitled to share in the profits or business as owners thereof is a copartnership, rather than an employment. Thus it is said in Am. & Eng. Enc. of Law, vol. 22 (2d Ed.) p. 14:

"There are two essential elements present in every partnership: First, a contract between the partners; and, second, that the contract must be for the sharing as common owners of the profits of the business."

On page 27 it is said that the ultimate and conclusive test of partnership is simply co-ownership of the profits of a business; that, where the intention of the parties to a contract is to carry on a business and share the profits between them as common owners or joint proprietors of the business, such parties are partners. On page 24 it is said that, nothing appearing but the rendition of services and the sharing of profits, the presumption is that the parties are partners; and on page 41 it is said that proof merely of a sharing in the profits of a business raises a prima facie presumption of the existence of a copartnership, because the most natural inference, where nothing else appears, is that the persons sharing the profits do so because they jointly own them; that this presumption is not conclusive, but may be overthrown by proof of other circumstances showing that the profits are shared on some other basis than as common owners; but that, in the absence of any such explanation as to the basis upon which the profits are shared,

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mere proof of profit sharing is sufficient to establish the fact of ownership.

In Leggett v. Hyde, 58 N. Y. 272, 17 Am. Rep. 244, it was held that the contribution by a party of a sum of money to a firm to be employed as capital in its business, by reason of which he was entitled to have and demand from it one-third of the profits of its business every half year, constituted him a partner; citing with approval what was said in Everett v. Coe, 5 Denio, 182: "If he is to be paid out of the profits made, then he has a direct interest in them." And the rule would be the same where the parties were to contribute those services to the joint enterprise.

The evidence of the agreement in this case is confined entirely to the statement of O'Brien of what he understood the arrangement to be. He nowhere gives the words that were used, the proposition made by the defendant, the answer of the plaintiff's intestate, or the witness. He says:

"I understand that the arrangement then to be all three will draw $2,000 a year each and that two-thirds of the profits go to me and the other one-third will be divided between both of you."

Again, when asked about the agreement, he said:

"It was understood that we were to get each one-sixth; divide that one-third equally between us. That was agreed upon by all three; yes. The words were: 'The one-third is to be divided between you two boys.' Yes; one-third of the profits."

Upon cross-examination he testified:

"To repeat what was said in relation to the divisions of the profits of the business, the profits were to be divided on the basis of two-thirds to Mr. Silo and the other third divided between Mr. Lefevre and myself, after we had each taken out $2,000 a piece for what I say I call expenses. This arrangement continued, I understand, until it expired with Mr. Lefevre's death. In my case it continued until the January 1st following."

The proposition was to establish a new business in an uptown store, to be conducted by the three persons who entered into this arrangement. No capital was contributed by either, and it did not appear that capital was necessary in the conduct of this business. There was simply a joint adventure by these three persons, the profits of the business to be divided between them; no question of employment of one by the other; nothing said, so far as appears, by which either one of the three was to have the management or control of the business. Nothing could be plainer from this testimony than that the business to be established was to be managed and controlled by the three contracting parties, who were each to have a proportion of the profits. There was every element of a copartnership interest in the profits as such, and a division of such profits among the contracting parties. I think, therefore, that the cause of action alleged in the complaint was not proved, and that the defendant was entitled to a dismissal of the complaint.

I also think that there was error committed in rulings upon evidence to which exceptions were taken which requires a reversal of the judgment. The evidence of the agreement which was made between the plaintiff's intestate, O'Brien, and the defendant was given by

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O'Brien, one of the parties who was present at the interviews. After O'Brien had testified the defendant was called as a witness, and was asked: "Did you enter into a contract with Mr. Lefevre on or about in 1898, about September?" That was objected to, the objection was sustained, and an exception taken. He was then asked: "Did you enter into a contract with Mr. O'Brien on or about September 1, 1898?" That was objected to, "as Mr. Lefevre was present at it, and the proof already shown that, and if he took part in it, consequently he cannot testify to it at all, and it calls for a conclusion besides." That objection was sustained, and the defendant excepted.

As to the objection that this was a conclusion, in view of the form that the testimony of O'Brien had taken, it should not have been sustained. O'Brien's whole testimony had been that an arrangement was made. He had not testified as to what was said by the defendant, what was said by the plaintiff's intestate, or by himself. All of his testimony would have been subject to an objection that he was not testifying as to what was said, but as to his conclusion; but when it came to rebutting his testimony, it being nothing but his understanding of the result of a conversation, I do not see how it could have been controverted, except by a denial that such a contract had been made as he testified to. The plaintiff had adopted the method of proving a case by the testimony of O'Brien's conclusion as to the result of a conversation at which he was present, and it certainly was not incompetent to call another party to that conversation and allow him to testify that no such arrangement as testified to by O'Brien had in fact been made. It was the plaintiff's adopting this method of proving the agreement that rendered it competent for the defendant to meet that testimony by a denial of the making of such an agreement.

Nor do I think that this testimony was incompetent under section 829 of the Code of Civil Procedure. O'Brien had not testified to anything that the plaintiff's intestate had said at that interview, except that he had acquiesced in the proposal made by the defendant. O'Brien had testified that he had also acquiesced in such an agreement and that under that agreement the business had been carried on. If it was competent for the plaintiff to prove that O'Brien had acquiesced in that agreement, and the agreement had become thus complete, under which the business was to be carried on, it was certainly competent for the defendant to deny that such an arrangement had been made between himself and O'Brien. Whether the plaintiff's intestate took part in the conversation seems to me immaterial. What the Code makes incompetent is a personal transaction between the witness and a deceased person; and this question did not purport to ask the result of any personal transactions between the defendant and the plaintiff's intestate. What the defendant had a right to do was to deny O'Brien's testimony as to the arrangement that he had made with O'Brien, and it was for the jury to say whether the defendant's or O'Brien's testimony was to be believed.

As to this refusal to allow the defendant to contradict O'Brien's testimony, attention should be called to the testimony of O'Brien that was allowed over the objection and exception of the defendant, which I also think incompetent, but which, if competent, certainly made it

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competent for the defendant to deny his agreement with O'Brien. O'Brien, at the instance of the plaintiff, was allowed to testify that he left the business about January 1, 1901, after the death of plaintiff's intestate, and that a final settlement was had about that time. This was objected to by the defendant as immaterial and irrelevant, when counsel for the plaintiff said:

"It is evidence offered to prove that this witness received his one-sixth and thus to show that the other man—to sustain our claim. It is some evidence of the agreement and of the rights of the parties. It is offered for that purpose."

The question was then repeated, and counsel for the defendant said, "I wish to except on the ground that it is immaterial and irrelevant," to which the court replied, "You may except if you think that that was immaterial and irrelevant." O'Brien was then asked whether up to this time there had been any change in the agreement that each should receive one-sixth as testified to. This was objected to as incompetent, immaterial, and irrelevant. The objection was overruled, to which there was an exception. He was then asked to state what conversation took place at that time, to which counsel for the defendant objected. This objection was overruled, and the defendant excepted; the court saying, "I will allow it on the question of this original contract." The witness was then allowed to testify that, after he discontinued connection with the business, he figured that upon the basis of one-sixth he was entitled to $1,050; that he was offered $1,000 by the defendant, and accepted that sum in settlement; that this amount figured on a one-sixth basis. Here the court allowed a settlement made with O'Brien after the plaintiff's intestate's death, by which O'Brien was paid his percentage of the business, calculated upon his right to receive one-sixth of the profits. It was received by the court as having relation to the original contract by which he was to receive one-sixth of the profits. It could only be evidence of an admission by the defendant that he had made a contract with O'Brien by which O'Brien was to receive one-sixth of the profits, and that, as the plaintiff's intestate was to receive the same that O'Brien was to receive, it was evidence of an admission by the defendant that the plaintiff's intestate was to receive one-sixth of the profits. This certainly made a question as to the agreement made between the defendant and O'Brien, and it was then certainly competent for the defendant to testify that he had no contract with O'Brien as to one-sixth of the profits, and that therefore this settlement with O'Brien, whatever it was, was not an admission that the contract allowed to O'Brien and the plaintiff's intestate one-sixth of the profits. It can easily be seen how important this testimony, that in the absence of any denial by the defendant that his contract with O'Brien was for one-sixth of the profits, was with the jury. I think, therefore, that this testimony of O'Brien was incompetent, but that, if for any reason it could be held to be competent, it was error to refuse to allow the defendant to deny that he had any contract with O'Brien by which he was entitled to one-sixth of the profits, or had made any settlement with him based upon such a contract.

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There is one other question as to which I think the learned trial judge fell into error. The answer set up a counterclaim for money loaned by the defendant to the plaintiff's intestate. In support of this counterclaim he offered in evidence certain writings which it was conceded were in the handwriting of the plaintiff's intestate. These consisted of 103 separate instruments, which were dated in the years 1896 and 1897. They were for varying amounts, 15 of which were as follows:

"July 24/97.
"I. O. U. thirteen dollars. A. M. Lefevre."

The court seems to have at first admitted these in evidence, and afterwards, upon reconsideration, excluded them, and then dismissed the counterclaim. The papers were produced by the defendant, were conceded to be in the handwriting of the plaintiff's intestate, and I think they were competent evidence of an admission by the intestate that he had received the sums of money mentioned and had promised to repay the same. In the absence of some evidence to whom they were delivered, or by whom they were received from the plaintiff's intestate, it may be that, standing alone, they were not competent evidence to prove the counterclaim; but I think they were admissible evidence. But, as the judgment must be reversed for the other errors stated, it is not necessary to further consider these instruments, as upon the new trial they may be so connected as to remove any question as to their legal effect.

It follows that the judgment and order appealed from should be reversed, and a new trial ordered, with costs to the appellant to abide the event.

O'BRIEN, P. J., and McLAUGHLIN, J., concur.

LAUGHLIN, J. I concur with Judge INGRAHAM in all excepting that I am of opinion that the court properly precluded defendant from testifying concerning the contract alleged to have been made at an interview between the decedent, the witness O'Brien, and the defendant; but I think defendant should have been permitted to deny the subsequent settlement with O'Brien on the basis thereof.

HOUGHTON, J. (dissenting). I cannot concur in the reasons advanced for reversing this judgment. I do not interpret the evidence as showing that O'Brien and defendant and the plaintiff's intestate, as between themselves, entered into a copartnership agreement. The defendant called as a witness his own bookkeeper, Anthony, and he testified that the defendant told him that plaintiff's intestate and O'Brien were coming to work for him, and that they were to receive a salary of $40 per week and a portion of the profits at the end of the year. The defendant was sworn as a witness in his own behalf, and, while it was perfectly competent for him to say that his bookkeeper was mistaken, and that he made no such declaration to him, he did not so testify, and said nothing upon the subject. The controversy on the trial was whether O'Brien and plaintiff's intestate were to have one-

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sixth each of the profits, as claimed by plaintiff, or only one-eighth each, as claimed and admitted by defendant.

There is a wide difference between a partnership as against third persons and one inter sese. The case of Leggett v. Hyde, 58 N. Y. 272, 17 Am. Rep. 244, cited as authority in the prevailing opinion, deals with the question as to whether the parties had made themselves partners as to third persons only, and expressly recognizes the rule that a partnership may exist as to such third persons, and not as between the contracting parties themselves. That one may be employed and remunerated by a share of the profits, in lieu of or in addition to a stated salary, without becoming a partner as between himself and his employer, has been frequently held, and is not disputed. The conditions under which no partnership exists as between the parties themselves, and frequently even as against third parties, are illustrated by the cases of Smith v. Bodine, 74 N. Y. 30, Richardson v. Hughitt, 76 N. Y. 55, 32 Am. Rep. 267, Cassidy v. Hall, 97 N. Y. 159, Bickford v. Searles, 9 App. Div. 158, 41 N. Y. Supp. 148, and Merchants' Nat. Bank v. Barnes, 32 App. Div. 92, 52 N. Y. Supp. 786. Indeed, the practice of adding to a servant's salary a portion of the profits of the business, even in large enterprises, is quite common, and is very properly supposed to exert a salutary effect in stimulating activity in and devotion to the employer's interests. The rule of law should not be so narrowed as to make a servant so paid in whole or in part a general partner in the business itself, with rights of general accounting, aside from such profits as he may have an interest in, and with right to termination of the business and the placing of it in the hands of a receiver.

Nor do I think there was any error in excluding the testimony of defendant as to whether he made any such contract with O'Brien as had been testified to by him. Assuming the question to be proper in form, and not plainly calling for a conclusion as to what the arrangement was, the defendant could not testify, because, if it was material at all, it manifestly called for a personal transaction between the defendant himself and plaintiff's intestate. O'Brien testified that at one time and in one conversation the defendant made a bargain with himself and the deceased to pay each of them $40 per week for their services, and, in addition, one-sixth of the net profits of the business. The bargain between defendant and O'Brien was not material, except as it involved one made in the same conversation in behalf of the deceased. Surely the defendant could not testify against the plaintiff administratrix—if the question was properly objected to as calling for a personal transaction between himself and the dead man—that he made no such bargain, or what the bargain actually was. That a living witness, who was present and heard the bargain, had given his version of what took place, did not open the door for the defendant to testify on the same subject. If this were so, section 829 of the Code of Civil Procedure would be a nullity; for the estate of a deceased person can only prove a verbal contract by some witness who was present, and the calling of that witness should not and does not permit the party himself to testify and give his version of what took place. Under the situation presented, O'Brien's contract being interwoven with that of the deceased, and made by the same conversation, to permit the defendant

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to testify that he had made no such bargain as O'Brien had testified he did would be in direct violation of the provisions of the Code prohibiting a living party from testifying to transactions had with a deceased person whose representatives are seeking to enforce an obligation against him. If O'Brien's contract was not connected with that of the deceased, then the testimony excluded was immaterial. If it was material, then it involved the contract made with the deceased, and defendant's testimony was properly excluded.

With respect to the so-called "I. O. U.'s" I do not think any error was committed in excluding them. The ground upon which the defendant's counsel claimed they were admissible, and that they proved his counterclaim, was that they were negotiable instruments. They were clearly not of such a character, and he should be held to the ground he took upon the trial with respect to them.

I think the judgment was right, and that no reversible error was committed.

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## In re DWYER.

(Supreme Court, Appellate Division, First Department. April 6, 1906.)

ADMINISTRATORS—ACCOUNTING—TRUST FUNDS.

Intestate deposited certain funds in a bank to the credit of himself, in trust for S. He, however, drew out the accrued interest yearly and retained the bank book in his possession. S. died before the intestate. Accountant, having been appointed administrator of both her estate and that of intestate, withdrew the fund from the bank as intestate's administrator. *Held* that, accountant having received the fund as administrator of intestate, he was bound to account therefor to his successor as such administrator, leaving the ownership of the fund for determination on final accounting, as provided by Code Civ. Proc. § 2731.

Appeal from Surrogate's Court, New York County.

Judicial accounting by James A. Dwyer, as administrator of the estate of Patrick Sheedy, deceased. From a surrogate's decree settling the accounts, the administrator appeals. Affirmed.

Argued before O'BRIEN, P. J., and INGRAHAM, McLAUGHLIN, CLARKE, and HOUGHTON, JJ.

Leonidas Dennis, for appellant United States Fidelity & Guaranty Co.

Edward J. McGuire, for appellant Garveys.

Charles Goldzier, for respondent.

INGRAHAM, J. One Patrick Sheedy died intestate, and letters of administration upon his estate were issued to James A. Dwyer on the 22d day of January, 1903, by the surrogate of the county of New York. On the 27th day of June, 1903, these letters were revoked by the surrogate, and letters of administration were issued to Michael J. Clifford. In August, 1903, Clifford commenced proceedings to compel Dwyer to account, and on the 3d day of December, 1903, a decree of the surrogate was entered granting that application. Subsequently the administrator filed his accounts, to which objections were filed, whereupon the surrogate sent the account to a referee to hear and determine all questions arising upon the settlement thereof. The referee reported,

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settling the accounts. He found that there was a balance of $34,324.-44 in the hands of the administrator. To this report the administrator filed exceptions, and, these exceptions coming on to be heard, the surrogate modified the report by charging the accounting administrator with the sum of $3,105 deposited in the Bowery Savings Bank to the credit of Patrick Sheedy, in trust for Johanna Sheedy, and in other particulars, by which it appeared that there was a balance in the hands of the accounting administrator of $41,181.65; and from that decree the accounting administrator appeals.

The question raised upon this appeal relates solely to charging the accounting administrator with the sum of $3,105 deposited in the Bowery Savings Bank to the credit of Patrick Sheedy, in trust for Johanna Sheedy. It appeared that on February 13, 1890, the intestate deposited in the Bowery Savings Bank the sum of $3,000 in his own name, in trust for Johanna Sheedy. In each year after this deposit the intestate drew out the interest of this amount down to February 6, 1902, the total drafts for that period amounting to $1,410, and there was credited upon that account during that period this exact amount as interest, so that down to January 1902, all the interest on this account had been withdrawn by the plaintiff's intestate. In January, 1903, there was credited as interest for that year the sum of $105, which, with the amount of deposit, made $3,105. On January 28, 1903, this amount was withdrawn from the bank by drafts signed by James A. Dwyer, as administrator, and the account closed. The money thus withdrawn seems to have been redeposited in the bank in an account in the name of James A. Dwyer personally. Dwyer withdrew from this account on February 9, 1903, $605, and on February 26, 1903, $1,500, and subsequently withdrew the balance of the account, and the account was closed. It was then admitted that Johanna Dwyer, formerly Johanna Sheedy, died on the 3d of August, 1898, before the death of Patrick Sheedy, and that letters of administration were issued out of the Surrogate's Court to James A. Dwyer, as administrator of the goods, chattels, and credits of Johanna Dwyer, formerly Johanna Sheedy, deceased, on the 22d day of October, 1903; that he qualified as such administrator, and was at the hearing duly qualified, appointed, and was acting as administrator of that estate. It was further conceded that the bank book of the Bowery Savings Bank showing this account was found among the effects of Patrick Sheedy after his death; that the accounting administrator did not know of the existence of the bank book until it was found after the death of the decedent, and did not know of any account in trust for Johanna Dwyer, or Johanna Sheedy; that the said Johanna Dwyer was the mother of the accounting administrator and the sister of Patrick Sheedy; that the intestate was well acquainted with his sister, and was in the habit of visiting her after she became a widow; and that they were on friendly terms up to the time of her death.

The referee found as a conclusion of law that the funds, money, and accounts remaining on deposit in the Bowery Savings Bank at the time of the death of the decedent in the name and form of Patrick Sheedy, in trust for Johanna Sheedy, "were and are a trust fund, and moneys subject to a valid trust in favor of said Johanna Sheedy, her administrators, heirs, and next of kin, and were and are not property or assets

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of the estate of Patrick Sheedy, deceased, and said James A. Dwyer, as administrator of his estate, is not required to account for the same herein." This conclusion of law was excepted to by the substituted administrator, and was disapproved of by the surrogate, and he held that the right of the representative of Johanna Sheedy, afterwards Johanna Dwyer, to this fund, was not at issue in this accounting, and that no adjudication would now be made as to the ownership of that fund, but that it should be included in the amount received by the accounting administrator and passed over to his successor, so that any person interested could commence proper proceedings to determine its ownership. With this view we concur.

The deposit was made under circumstances which at least raise the question whether an irrevocable trust was created in favor of the intestate's sister, at one time know as Johanna Sheedy, but for many years prior to this deposit known as Johanna Dwyer. The accounting administrator had collected this fund as administrator of Patrick Sheedy. It was in his hands as part of the estate for which he was accountable. If he, as administrator of Johanna Dwyer, had made a claim to this fund, he being at the same time administrator of Patrick Sheedy, it could not be determined by his simply abstracting the fund that he collected as administrator of Patrick Sheedy. The letters of administration having been revoked, he was bound to account for all the property that came into his hands as administrator, and the question as to the ownership of the funds thus received was to be determined upon the final accounting. Section 2731, Code Civ. Proc. We think, therefore, that the surrogate was clearly right in holding the former administrator accountable to his successor for the amount of moneys collected from the Bowery Savings Bank as administrator of Patrick Sheedy, leaving it to the court to determine in a proper proceeding to whom this amount should ultimately be distributed.

As this is the only question presented upon this appeal, the conclusion follows that the decree of the surrogate should be affirmed, with costs against the accounting administrator personally. All concur.

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## In re AMSTERDAM AVE.

### BAKER v. CITY OF NEW YORK.

(Supreme Court, Appellate Division, First Department. April 6, 1906.)

1. EMINENT DOMAIN—LANDS FOR STREETS—COSTS—EXTRA ALLOWANCE—STATUTES.

The Greater New York Charter (Laws 1901, p. 1, c. 466) authorizes the condemnation of land for street purposes, and section 1436c (page 609) provides that if the owner, at any time before proof of value is submitted to the commissioners, submits a written offer to the board of estimate and apportionment to sell his interest in the land at a specified price, and such offer is not accepted before proof of value is submitted, and the compensation awarded exceeds the offer, the owner making the same shall be entitled to his taxable costs and disbursements as in an action, and in the discretion of the Supreme Court to an extra allowance of 5 per cent. *Held*, that an offer made under such section by one purporting to act as attorney for the owner, unaccompanied by proof that he was in fact the attorney of the owner and was authorized by him to make the offer, did not constitute a compliance with such section, and did not entitle the owner to costs and extra allowance thereunder.

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2. ATTORNEY AND CLIENT—ATTORNEY—IMPLIED AUTHORITY.

An attorney under a general retainer ordinarily has no implied authority to bind his client by a contract to sell land.

[Ed. Note.—For cases in point, see vol. 5, Cent. Dig. Attorney and Client, § 141.]

3. EMINENT DOMAIN—LANDS FOR STREETS—CONDEMNATION—OFFER OF SALE—REJECTION.

Pending proceedings to condemn land for street purposes under the Greater New York charter, an attorney served on the corporation counsel a notice of appearance in the proceeding as attorney for another, who claimed to own certain lands, including the parcel for which an award was subsequently made to B. Several days after the filing of such notice the same attorney, as alleged attorney for B., filed an offer, unaccompanied by proof of his authority, to sell the land to the city for a specified price. *Held*, that such offer was properly rejected by the commissioners of estimate and apportionment, as the attorney's notice of appearance operated, at least so far as he was concerned, as notice to the city that B.'s land was claimed by another whom the attorney represented.

Appeal from Special Term, New York County.

Proceedings by the city of New York to acquire title to certain lands on the easterly side of Amsterdam avenue, between 139th and 140th streets, alleged to belong to one John O. Baker. An award was made in favor of Baker. From an order taxing costs and granting an extra allowance in his favor, the city appeals. Reversed.

Argued before INGRAHAM, McLAUGHLIN, LAUGHLIN, CLARKE, and HOUGHTON, JJ.

Theodore Connoly, for appellant.

Joseph A. Flannery, for respondent.

McLAUGHLIN, J. Proceedings were instituted by the city of New York to acquire title to certain lands on Amsterdam avenue, between 139th and 140th streets, owned by the respondent, Baker. After the commencement of such proceedings, an offer was made under section 1436c of the Greater New York charter (Laws 1901, p. 609, c. 466) to sell this land to the city for the sum of $110,000. The offer was dated January 9, 1905, and was signed, "John O. Baker, by Joseph A. Flannery, His Attorney." The offer was rejected, and title subsequently acquired by the city, for which an award was made to Baker of $111,000. Thereafter a motion was made on behalf of Baker, under section 1436c of the Greater New York charter, to tax his costs in the proceeding and for an extra allowance. This section provides, among other things, that:

"In all cases where the owner of lands selected as aforesaid, or any part thereof, is not under legal disability to convey title to real property, such owner may, at any time before proof of value is submitted to the commissioners * * * submit a written offer to the board of estimate and apportionment to sell and convey such owner's land or interest therein at a specified price. * * * If such written offer is not accepted before proof of value is submitted * * * and the compensation awarded thereafter * * * exceeds the price specified in such offer, such owner making such offer shall be entitled to his taxable costs and disbursements as in action and in the discretion of the Supreme Court, upon application made at Special Term thereof, to an additional allowance of a sum of money not exceeding five per centum upon the amount of such offer, but in no event more than $2,000."

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The motion was granted, and the costs directed to be taxed as in an action, together with an extra allowance of $500, and the city has appealed.

To entitle the owner of land, which is proposed to be taken by the city, to costs under the section of the charter referred to, he must make an offer to sell before proof is given as to the value of the land, and then the amount awarded must be in excess of his offer. Here the award, it is true, was in excess of the offer; but the offer did not comply with the section of the charter, nor come within its provisions. It was not made by Baker, the owner, but by one who represented himself to be his attorney. The section does not provide for an offer by an attorney; but by the owner of the land; and, while I am of the opinion that an attorney can make a valid offer under this section, he can only do so by presenting proof at the time the offer is made that he is in fact the attorney of, and has been authorized by, the owner to make the offer. The section clearly contemplates that an offer, when made, shall be in such form that, if accepted by the city, it can be enforced by specific performance or otherwise; and this offer could not have been enforced, because there was no proof presented that Flannery had any authority to make it. An attorney ordinarily has no implied power to bind his client by contract (Bogart v. De Bussy, 6 Johns. 94), and a general retainer does not authorize him either to sell or purchase property (Averill v. Williams, 4 Denio, 295, 47 Am. Dec. 252, or release, compromise, or settle a cause of action (Barrett v. Third Ave. R. R. Co., 45 N. Y. 628), or to satisfy a judgment without full payment (Mandeville v. Reynolds, 68 N. Y. 528; Arthur v. Homestead Fire Ins. Co., 78 N. Y. 462, 34 Am. Rep. 550), or to make an offer of judgment (Bush v. O'Brien, 164 N. Y. 205, 58 N. E. 106; Riggs v. Waydell, 78 N. Y. 586; Stone v. Bank of Commerce, 174 U. S. 412, 19 Sup. Ct. 747, 43 L. Ed. 1028). In the Bush Case it was held that the corporation counsel of the city of New York had no power, either by virtue of his retainer or under the charter, to make an offer of judgment in an action against the city. In the Riggs Case it was held that an offer of judgment, signed by the defendant's attorney, to which no affidavit showing his authority to make it was annexed, was invalid. If an attorney in an action cannot make an offer of judgment without proof of his authority, much less can he make a valid offer, without proof of his authority, to transfer the title to land. Here, as we have already seen, there was no proof accompanying the offer that Flannery had authority to make it, and upon this ground alone the offer was properly rejected.

The commissioners were also justified in rejecting the offer, because Flannery, several days prior to the time the offer was made, had served upon the corporation counsel a notice of appearance in the proceeding as the attorney for one Barney, who claimed to own certain lands, which included the parcel for which an award was subsequently made to Baker, so that at the time the offer was made, not only was there nc proof that Flannery had authority to make it, but there was a least notice, so far as Flannery was concerned, that title to Baker's land was claimed by another person whom he represented.

If the foregoing views be correct, then it follows that the order appealed from must be reversed, with $10 costs and disbursements, and the motion denied, with $10 costs. All concur.

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## In re AMSTERDAM AVE.
## HERB v. CITY OF NEW YORK.

(Supreme Court, Appellate Division, First Department. April 6, 1906.)

Appeal from Special Term, New York County.

Proceedings by the city of New York to acquire title to certain lands on the easterly side of Amsterdam avenue, between 139th and 140th streets, alleged to belong to one Jacob Herb. An award was made in favor of Herb. From an order taxing costs and granting an extra allowance in his favor, the city appeals. Reversed.

Argued before INGRAHAM, McLAUGHLIN, LAUGHLIN, CLARKE, and HOUGHTON, JJ.

Theodore Connoly, for appellant.

Joseph A. Flannery, for respondent.

McLAUGHLIN, J. Proceedings were instituted by the city of New York to acquire title to certain lands on Amsterdam avenue, between 139th and 140th streets, owned by the respondent, Herb. After the commencement of such proceedings an offer was made under section 1436c of the Greater New York charter (Laws 1901, p. 609, c. 466) to sell this land to the city for the sum of $56,000. The offer was dated January 9, 1905, and was signed, "Jacob Herb, by Joseph A. Flannery, Attorney." The offer was rejected, and title subsequently acquired by the city, for which an award was made to Herb of $62,500. Thereafter a motion was made on behalf of Herb, under section 1436c of the Greater New York charter, to tax his costs in the proceeding and for an extra allowance. The motion was granted, and his costs were directed to be taxed as in an action, together with an extra allowance of $500, and the city has appealed.

For the reasons assigned in the opinion delivered on the appeal from an order in a similar proceeding, in which costs and an extra allowance were allowed to John O. Baker, decided herewith (98 N. Y. Supp. 331), the order appealed from must be reversed, with $10 costs and disbursements, and the motion denied, with $10 costs. All concur.

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## In re AMSTERDAM AVE.
## HAY v. CITY OF NEW YORK.

(Supreme Court, Appellate Division, First Department. April 6, 1906.)

Appeal from Special Term, New York County.

Proceedings by the city of New York to acquire title to certain lands on the easterly side of Amsterdam avenue, between 139th and 140th streets, alleged to belong to James R. Hay. An award was made in favor of Hay. From an order taxing costs and granting an extra allowance in his favor, the city appeals. Reversed.

Argued before INGRAHAM, McLAUGHLIN, LAUGHLIN, CLARKE, and HOUGHTON, JJ.

Theodore Connoly, for appellant.

Joseph Flannery, for respondent.

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McLAUGHLIN, J. Proceedings were instituted by the city of New York to acquire title to certain lands on Amsterdam avenue, between 139th and 140th streets, owned by the respondent, Hay. After the commencement of such proceedings an offer was made under section 1436 of the Greater New York charter to sell this land to the city for the sum of $60,000. The offer was made January 9, 1905, and was signed, "James R. Hay, by Joseph A. Flannery, His Attorney." The offer was rejected, and title subsequently acquired by the city, for which an award was made to Hay of $69,183. Thereafter a motion was made on behalf of Hay, under section 1436c of the Greater New York charter (Laws 1901, p. 609, c. 466), to tax his costs in the proceeding and for an extra allowance. The motion was granted, and his costs were directed to be taxed as in an action, together with an extra allowance of $500, and the city has appealed.

For the reasons assigned in the opinion delivered on the appeal from an order in a similar proceeding, in which costs and an extra allowance were allowed to John O. Baker, decided herewith (98 N. Y. Supp. 331), the order appealed from must be reversed, with $10 costs and disbursements, and the motion denied, with $10 costs. All concur.

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## LUCKEY v. MOCKRIDGE et al.

(Supreme Court, Appellate Division, First Department. April 6, 1906.)

1. PLEADING—AMENDMENT—NECESSITY OF NOTICE.
   After defendants have appeared and filed and served their answers, no order allowing an amendment of the complaint can be granted, except upon notice to defendants.
2. SAME—ORDER ALLOWING AMENDMENT—FORM.
   An order allowing the amendment of a summons and complaint is irregular, where there was not annexed to it a copy of the amended pleading.
3. SAME—ERRONEOUS ORDER—CONFIRMATION.
   An order which is irregular, as allowing an amendment of the summons and complaint without notice to defendant, cannot be confirmed nunc pro tunc.
4. SAME—"AMENDED AND SUPPLEMENTAL COMPLAINT."
   An order authorizing the service of an "amended and supplemental complaint" is irregular, because no such pleading as an "amended and supplemental pleading" is known to the Code.

Appeal from Special Term, New York County.

Action by David B. Luckey, as trustee in bankruptcy of the estate of Frank N. Mockridge, against Grace A. Mockridge and others. From an order affirming and confirming an ex parte order authorizing and allowing the amendment of the summons and the service of an amended and supplemental complaint, defendants appeal. Reversed.

Argued before McLAUGHLIN, INGRAHAM, LAUGHLIN, CLARKE, and HOUGHTON, JJ.

Bernard G. Heyn, for appellants.

Horace E. Parker, for respondent.

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INGRAHAM, J. It appeared that this action was originally brought against the defendants Frank N. Mockridge and Grace A. Mockridge to set aside a transfer of real estate by the defendant Frank N. Mockridge to his wife, the defendant Grace A. Mockridge, alleged to be fraudulent as to creditors. The summons and complaint was served upon these two defendants, who appeared, and on the 1st of February, 1905, the defendants severally answered the complaint and served their amended answer to the complaint on February 21, 1905. Subsequently the plaintiff ascertained that the defendant Grace A. Mockridge had executed a mortgage upon the real property in question to secure a bond for the payment of $300 to her attorneys, of which fact the plaintiff's attorneys were ignorant when the original complaint was served. The plaintiff thereupon, upon an affidavit setting forth these facts, including the appearance of the defendants in the action, obtained, on March 13, 1905, an ex parte order from the Special Term allowing them to amend the summons by adding as parties defendants to the action the mortgagees, and by amending the complaint alleging that this mortgage was also fraudulent and void as against creditors, and amending the prayer for relief by asking that this mortgage be so held to be void and that the mortgagees be required to discharge it of record. This order having been obtained, the defendant moved to vacate it upon the ground that it was obtained ex parte and without notice to them. The plaintiff then made a motion, returnable on the same day on which the motion made by the defendants to vacate this ex parte order was returnable, for an order "denying the motion to be made herein on the 27th day of March, 1905, by Frank N. Mockridge and Grace A. Mockridge, defendants, for the purpose of securing an order herein vacating and setting aside the said order made herein March 13, 1905, providing for and authorizing the amendment of the summons and complaint herein and as therein provided, and that the undersigned will also on said papers and proceedings herein move this court for an order herein affirming and confirming nunc pro tunc the order herein of March 13, 1905, and in all respects authorizing and allowing the amendment of the summons herein by the addition of the names of Herbert A. Heyn and George B. Covington as two additional parties defendant, and authorizing and allowing the isusance herein of a supplemental summons to said Herbert A. Heyn and George B. Covington as two additional parties defendant herein, and amending the complaint herein by the addition in the caption of said cause of the additional names as two parties defendant herein of said Herbert A. Heyn and George B. Covington, and by the amendment of said complaint filed herein December 12, 1904, by the addition therto of the allegations provided for in the said order made herein March 13, 1905." These two motions, one to vacate the ex parte order, and the other for this general affirming and confirming nunc pro tunc the ex parte order, coming on to be heard, the court denied the motion to vacate the ex parte order, and granted the plaintiff's motion to affirm and confirm nunc pro tunc the said ex parte order and allowing the amendment, and from that order the defendants appeal.

It is quite clear that the ex parte order was irregular. The defendants had appeared in the action, had filed and served their answers to the complaint, and no order amending the summons or the complaint

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could be granted, except upon notice to the defendants who had thus appeared. This ex parte order was also irregular in that there was not annexed to it a copy of the amended pleading, leave to serve which was applied for; and, if this motion had been on notice, it should have been denied on that ground. We know of no practice which justifies the court in affirming and confirming, nunc pro tunc, such an irregular order. The pleading which this ex parte order authorized was a pleading unknown in the Code. There is no such pleading as an amended and supplemental pleading. In this case it is quite probable that the court would, on proper application, have allowed the plaintiff to amend the summons and complaint by making these mortgagees defendants and inserting the proper allegation to show that the mortgages were obtained from the fraudulent transferee of the property after notice that the transfer was in fraud of the plaintiff's creditors; but that would be simply an amended summons and complaint. But it was quite irregular to obtain an ex parte order, without notice to the defendants who had appeared in the action, allowing the plaintiff to serve such a complaint.

We think, therefore, that as the practice adopted was irregular, the order appealed from should be reversed, with $10 costs and disbursements, and the motion denied, with $10 costs, without prejudice, however, to an application by the plaintiff, upon proper notice, for leave to amend the summons and to serve an amended complaint. All concur.

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## LUCKEY v. MOCKRIDGE et al.

**(Supreme Court, Appellate Division, First Department. April 6, 1906.)**

Appeal from Special Term, New York County.

Action by David B. Luckey, as trustee in bankruptcy of the estate of Frank N. Mockridge, against Grace A. Mockridge and others. From an order denying a motion to vacate an ex parte order allowing plaintiff to serve an amended summons and a supplemental and amended complaint, defendants appeal. Reversed.

Argued before McLAUGHLIN, INGRAHAM, LAUGHLIN, CLARKE, and HOUGHTON, JJ.

Bernard G. Heyn, for appellants.

Horace E. Parker, for respondent.

INGRAHAM, J. This motion should have been granted. The plaintiff obtained an order by which he was allowed to amend the summons in this action and to serve an amended complaint without notice to the defendants who had appeared in the action. As stated in the opinion on another appeal in this case, decided herewith (98 N. Y. Supp. 335), that motion was irregular, as obtained without notice to the defendants who had appeared in the action, and also because there was not annexed to the moving papers a copy of the proposed amended complaint.

It follows that the order appealed from must be reversed, with $10 costs and disbursements, and the motion granted, with $10 costs. All concur.



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## FOX et al. v. NEW YORK CITY INTERBOROUGH RY. CO.

(Supreme Court, Appellate Division, First Department. April 6, 1906.)

STREET RAILROADS—CONSTRUCTION IN STREET—CONSENT—VALUE OF PROPERTY.

**Under Railroad Law, Heydecker's Gen. Laws, p. 3308, c. 39, § 91, providing that a street surface railroad shall not be built without the consent of one-half in value of the property "bounded on" that portion of the street on which it is proposed to build the railroad, the value of an entire tract abutting on the street, with buildings thereon, is to be considered, though it extends back to another street; it having no interior boundaries, natural or artificial, and being used as an entirety for a single purpose.**

Appeal from Special Term, New York County.

Action by Frederick P. Fox and another against the New York City Interborough Railway Company. From an order (95 N. Y. Supp. 251) continuing an injunction pendente lite, defendant appeals. Reversed.

Argued before INGRAHAM, McLAUGHLIN, LAUGHLIN, CLARKE, and HOUGHTON, JJ.

George W. Wickersham (Noel Gale, on the brief), for appellant.

William W. Niles and Niles & Johnson, for respondents.

CLARKE, J. This is an appeal from an order continuing, during the pendency of the action, an injunction restraining the appellant from constructing its street surface railroad in 200th street, between Jerome avenue and the Southern Boulevard, in the borough of the Bronx. The respondents, alleging themselves to be owners of two pieces of property situate on the portion of 200th street mentioned, brought this action for the purpose of permanently restraining the appellant from so constructing its railroad upon this street, and of compelling the removal of such part of the road as had been already built. The action is based upon the alleged failure of the appellant to obtain the consents of the owners of one-half in value of the property bounded upon this part of 200th street, as required by section 91 of the railroad law. The only question litigated and determined upon the motion was as to the value to be placed upon a somewhat extensive parcel of land owned by the Ursuline Convent and occupied by it for the purposes of the Ursuline Academy. The convent property lies on the south side of 200th street, and consists of one compact parcel, somewhat oblong in shape, bounded on the north by 200th street, 534 feet; on the west by Bainbridge avenue, 928 feet; on the south by East 198th street, 528 feet; and on the east by Marion avenue, 816 feet. The plot is not intersected by any streets. It has no interior boundaries or divisions, natural or artificial. It is situated in a suburban neighborhood, and is used as an entirety for a single purpose—that of the convent school. The academy building, situated near the centre of the lot, is an integral part of the property. This building is situate 325 feet from the north line of 200th street, and the main entrance for both carriages and foot passengers opens from that street. The appellant has obtained the consent of the convent to the construction of its road.

The determination of the proper valuation of this property is essential, both in ascertaining the total valuation of the property bounded

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on 200th street, and in computing the value of the property as to which consents have been given. The Constitution provides, in article 3, § 18, that:

"The Legislature shall not pass a private or local bill in any of the following cases: * * * Granting to any corporation, association or individual the right to lay down railroad tracks * * * The Legislature shall pass general laws providing for the cases enumerated in this section * * * But no law shall authorize the construction or operation of a street railroad except upon the condition that the consent of the owners of one-half in value of the property bounded on * * * that portion of a street or highway upon which it is proposed to construct or operate such railroad be first obtained * * *."

In accordance with that mandate of the Constitution, a general law has been passed, known as the "Railroad Law." Heydecker's Gen. Laws, p. 3308, c. 39. Section 91 thereof is as follows:

"Consent of property owners and local authorities. A street surface railroad, or extensions or branches thereof, shall not be built, extended or operated unless the consent in writing, acknowledged or proved as are deeds entitled to be recorded of the owners in cities and villages, of one-half in value, * * * of the property bounded on * * * that portion of a street or highway upon which it is proposed to build or operate such railroad, extension or branch shall have been first obtained. * * * The value of the property above specified shall be ascertained and determined by the assessment roll of the city, village or town in which it is situated, completed last before the local authorities shall have given their consent."

The franchise from the city of New York was perfected on March 31, 1903, so that the assessment which must govern is that of the year 1902. Upon the basis of that assessment, the toal value of the property bounded on that portion of 200th street upon which it is proposed to build appellant's railroad is $525,000. The convent property was assessed as one parcel at $175,000. The appellant had, at the time the action was brought, obtained the consents of the owners of property bounded on said street of the aggregate assessed value of $302,000, and hence, upon those valuations so made, had the consent of the owners of property of more than one-half of the assessed value. The appellant claimed in the court below that this convent property should be valued at the amount found upon the assessment roll. The respondents claimed that such portion of the property as was contiguous to 200th street and for a depth of 100 feet only should be taken. The learned court declined to take either view, but proceeded to make an arbitrary division of the property and valuation of such division of its own, saying:

"In the present case the figures are such that it is not necessary to enter into any niceties of valuation or computation in making an apportionment. An approximation can be made, somewhat arbitrarily and roughly it may be, but one that will err, if at all, in favor of the defendant, and yet give a result in favor of the plaintiffs."

The court then fixed the value of the land it considered entitled to exercise the power of consent at $120,000, and, subtracting the remaining $55,000 from the assessed total valuation and from the total consents, by this process determined that the defendant did not have the necessary consents of the owners of one-half of the property. Thereupon, as appears upon the appeal from the second order herein, argued at the same time, the appellant proceeded to obtain the consent of an additional property owner, the assessed valuation of whose property

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brought the consents above one-half of the amount indicated by the court. Thereupon the court said that it had no intention, "in the decision heretofore made in this case, to hold that $120,000 of the total assessment should be counted as having a voting power in the street in question. On the contrary, I think that $100,000 would be excessive." And it is not impossible that if the appellant, accepting this figure as correct, should proceed to obtain additional consents, another valuation would be indulged in to defeat its attempt to build this road.

The appellant asks this court to lay down a rule in accordance with which the rights of the railroad and the rights of the property holders can be clearly ascertained. The mere statement of the facts in the case at bar shows how desirable it is that there should be such a rule. The situation is further illustrated by the facts set forth in Ebling Brewing Company against New York City Interborough Railway Company, argued upon the same day as the case at bar. In that case the positions of the property holders and the railroad company were reversed; the property holders endeavoring to induce the court to consider a large parcel of land with the buildings thereon, used for one purpose and held in one ownership, as an entirety, to defeat the construction of the road, and the railroad endeavoring to have the court arbitrarily divide the property in order to enable it to show the necessary consents. There should be no such uncertainty in the law, if it be possible to avoid it. There should be one rule to be applied in all cases to each party. Sometimes its application will make for the supposed advantage of one, and sometimes of the other. Such a question should not be left in nubibus, depending for its decision on the length of the chancellor's foot, or throwing a question of fact difficult of correct determination into every case. This question has not been decided in any case which has been called to our attention or which our own researches have discovered; but we find in the Constitution and the statute satisfactory ground for the proper rule.

The Constitution says (article 3, § 18):

"The consent of the owners of one half in value of the property bounded on * * * that portion of a street or highway upon which it is proposed to construct * * * such railroad."

The statute (section 91 of the railroad law) says:

"The consent * * * of the owners * * * of one half in value * * * of the property bounded on * * * that portion of the street or highway upon which it is proposed to build * * * such railroad. * * * The value of the property above specified shall be ascertained and determined by the assessment roll of the city * * * completed last before the local authorities shall have given their assent."

It is evident that it was the intention of the Legislature to remove this question of valuation from the realm of uncertainty into that of certainty. It fixed the assessment made prior to the consent of the local authorities—an assessment made by public officers for other purposes, to wit, taxation—as the fairest and surest standard. The consent was of the owner of property bounded on the street, with no limitation as to size, location, or use. The provisions apply to cities, towns, and villages, to city streets and country highways, to 25 by 100 city lots, and to suburban estates and country farms, if they are held

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in one ownership and are bounded by the street or highway. We believe it to have been the intention of the Legislature, and we announce it as the rule of law, that in considering the question of the valuation of property for the purpose of determining whether the necessary consents have been obtained, the value of each entire parcel of land, with the buildings thereon, as appearing upon the assessment roll for the appropriate year, is final and conclusive.

It follows that the order appealed from should be reversed, with $10 costs and disbursements, and the motion denied, with $10 costs. All concur.

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## FOX et al. v. NEW YORK CITY INTERBOROUGH RY. CO.

(Supreme Court, Appellate Division, First Department. April 6, 1906.)

Appeal from Special Term, New York County.

Action by Frederick P. Fox and another against the New York City Interborough Railway Company. From an order denying motion for reargument, defendant appeals. Affirmed.

See 95 N. Y. Supp. 251.

Argued before INGRAHAM, McLAUGHLIN, LAUGHLIN, CLARKE, and HOUGHTON, JJ.

George W. Wickersham, for appellant.

William W. Niles, for respondents.

CLARKE, J. This was an appeal from an order denying a motion for a reargument of the motion for the continuance of an injunction pendente lite herein. As upon appeal the original order continuing the injunction has been reversed by the order of this court, handed down with an opinion this day (98 N. Y. Supp. 338), it is only necessary to affirm the order herein appealed from, without costs. All concur.

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## HUDSON & M. R. CO. v. WENDEL et al.

(Supreme Court, Appellate Division, First Department. April 6, 1906.)

EMINENT DOMAIN—CONDEMNATION FOR RAILROAD—LAND SUBJECT.

Under Laws 1891, p. 14, c. 4, § 23, declaring that rapid transit railways in cities of over 1,000,000 inhabitants shall have the right to acquire and hold such real estate or easement or other interest therein as may be necessary to enable them to construct, maintain, and operate such railways, stations, depots, etc., the fact that the franchise granted to such a railroad by the rapid transit board, and the plan of route and terminals with reference to which the franchise was granted, did not mention or include lands subsequently sought to be condemned for a terminal, does not necessarily prevent such condemnation, if it is shown that the land is necessary for the operation of the road.

Houghton and McLaughlin, JJ., dissenting.

Appeal from Special Term, New York County.

Condemnation proceeding by the Hudson & Manhattan Railroad Company against Josephine J. S. Wendel and others. From an order

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overruling preliminary motions and objections by the defendants, and appointing a referee to hear and determine the issues, defendants appeal. Affirmed.

Argued before INGRAHAM, McLAUGHLIN, LAUGHLIN, CLARKE, and HOUGHTON, JJ.

Lewis L. Delafield, for appellant Wendel.
John K. Creevey for appellants Rankin and others.
F. B. Jennings, for respondent.

INGRAHAM, J. The Hudson & Manhattan Railroad Company presented a petition to the Supreme Court for the condemnation of certain property, particularly described, for the use of its road and terminal station. The petition alleges that the company was organized under the general railroad law of the state of New York for the construction and operation of a railroad in the city of New York, to be connected with a railroad or railroads in the state of New Jersey; that the railroad to be built and operated is to be an underground tunnel railroad, with approach to the surface in the two blocks of ground situated on the westerly side of Church street, between Cortlandt and Fulton streets, in the city of New York; that the board of rapid transit railroad commissioners for the city of New York issued a certificate or franchise to the petitioners, a copy of which is annexed to the petition, which franchise was duly accepted by the petition; that the board of aldermen of the city of New York have also consented to the construction and operation of the railroad by resolution duly approved by the mayor of the city of New York; that the department of docks and ferries of the city of New York have consented to the construction and operation of the petitioner's railroad, and the petitioner has also applied for and has obtained the consent of the commissioners of the sinking fund of the city of New York for the construction, maintenance, and operation of the petitioner's railroad, and in lieu of the consent of the property owners the petitioner had obtained the confirmation of a determination by commissioners appointed by the Appellate Division of the Supreme Court in this department that the said railroad ought to be constructed and operated; that a map and profile of the route adopted by the petitioners, duly certified by its president and engineer, was duly filed in the office of the clerk of the county of New York, and the petitioner has given written notice to the actual occupants of the land through which the route of the road is designated by said map and profile; and the certain specific property desired to be condemned is then described by metes and bounds, which includes property owned by these appellants. It is further alleged that the property is necessary for the construction, operation, and maintenance of a tunnel railroad and a suitable terminal station and depot for said railroad, that it is the intention of the petitioner to complete the work for which said property is to be condemned, and that all preliminary steps required by law have been taken to entitle the petitioner to institute this proceeding.

Notice was thereupon given to the owners of the property that this petition would be presented to the Supreme Court of the state of New York on Monday, January 8, 1906, and that the petitioner would then

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and there apply to the court for a direction that the issues, if any, raised by the pleadings, be forthwith tried, and that, if no issue be raised, the petitioner and the plaintiff have judgment for the relief demanded in the petition. Upon the return of this notice the appellants herein appeared and made certain preliminary motions and objections to such action and proceeding: First, because it does not appear upon the face of the petition that the petitioner has the right or power to acquire in this proceeding the property of these appellants. This objection was overruled. Several of the parties who appeared in the proceeding filed their answers therein, certain other of the parties appeared, but did not answer, and certain other of the parties interested neither appeared nor answered. Whereupon the court entered an order overruling the preliminary motions and objections, and ordered that the issues raised by the petition and answer be referred to a referee to hear and determine the same; and from this order the appellants appeal.

The objections which were taken and which were insisted upon by the appellants are based upon the fact that there is not included on the plans of the routes, stations, and terminals authorized by the board of rapid transit commissioners the lands of the appellants which are specifically described in the petition. Section 3360, subd. 3, of the Code of Civil Procedure provides that the petition shall contain a concise statement of the facts showing the necessity for the acquisition of the lands sought to be condemned. To meet this allegation the petition alleges:

"Sixth. The public use for which the said parcels of property are required is for the construction, operation, and maintenance in perpetuity of a tunnel railroad and a suitable terminal station and depot for said railroad. The said property is necessary for said use, because it forms a part of the route of said road and the terminal point thereof, as the same are established by the certificate granted by the board of rapid transit railroad commissioners for the city of New York, and also because the tract of land of which it forms a part is necessary as a part of said route and for a terminal station for said railroad."

It seems to be conceded by the appellants that, standing alone, this allegation would be a compliance with the requirements of the statute; but the appellants claim that as the petitioner has incorporated into its petition the franchise granted to it by the rapid transit board, with the plan annexed thereto, and that from these certificates and plans it appears that the appellants' property is not a part of the route of any railroad or terminal station, as established by the rapid transit board, the property sought to be condemned is not a part of the said route and terminal station for said railroad, and therefore the court had no jurisdiction to proceed—the appellants claiming that the allegation of fact showing the necessity of the taking is nullified and destroyed so far as the appellants' property is concerned, by the other facts, also appearing upon the face of the petition, which show the grounds of necessity alleged are untrue so far as the appellants' property is concerned.

The board of rapid transit commissioners authorized the petitioners to lay down, construct, and operate a railway, including two tracks, on a route beginning at the boundary line between the states of New York and New Jersey under the Hudson river at a point nearly opposite the foot of Cortlandt street in the borough of Manhattan, thence running easterly under the Hudson river and dock or bulkhead property on

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the easterly bank thereof to the westerly side of West street at a point opposite or nearly opposite or at the foot of Cortlandt street, and thence crossing under various streets to a point in Cortlandt street west of and at or near the westerly line of Church street, and thence curving northwardly and crossing under Dey street, and thence to Fulton street west of and at or near the westerly line of Church street, thence curving to the west into Fulton street, thence westerly under Fulton street crossing under various streets to the westerly side of West street, and thence under dock or bulkhead property on the easterly bank of the Hudson river, whether belonging to the city or to other owners, and thence under the Hudson river to a point in the boundary line between the states of New York and New Jersey nearly opposite the foot of Fulton street; and "to acquire and maintain a terminal station in the easterly portion of the blocks bounded by Greenwich street, Cortlandt street, Church street, and Fulton street, in Manhattan borough, the same being private property, or so much thereof as the tunnel company may find necessary and be able to acquire"; and also "to build and operate a subway for foot passengers under Dey street from the said terminal and station at the westerly side of Church street to Broadway, and thence crossing under Broadway to John street to connect the terminal and station of said company with the station of the rapid transit subway at Dey street and John street and Broadway, and there connecting with the stairways leading from such subway station to the surface of Dey and John streets"; and also "to acquire and use, for stations or station extensions, power plants, pumping stations, shafts for access to the surface, and other necessary purposes of the railroad, private property as the same may be lawfully acquired within the scope of the corporate rights and powers of the tunnel company."

The plans annexed to this certificate designate the route of the road and the location of the stations. Under the general power given to the petitioner they have power to apply for the condemnation of such real property as was necessary to construct the routes and stations thus authorized. The question presented to the board of rapid transit commissioners was the location of the railroad and its stations. Whether the property that the petitioners seek to acquire is necessary for the construction of these roads and terminal station as authorized by the board of rapid transit commissioners is a question to be determined by the referee upon the trial of the issues raised by the answers. It certainly does not conclusively appear from the petition that this property is not necessary for that purpose; and, although the property sought to be acquired is not directly within the plans of the route and station as approved by the board of rapid transit commissioners, it does not follow that the adjoining property may not be necessary for the proper construction of the route, foundations, walls, and approaches, so as to enable the petitioner to connect its road with the underground railroad in the city of New York and with the surface of the streets.

It is unnecessary in this discussion to analyze the rapid transit act and its relation to the general railroad act under which the petitioner was incorporated; but we think that, where the railroad company has acquired from the board of rapid transit commissioners authority to construct a road underground, with certain terminal stations, then un-

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der section 23 of the rapid transit act (chapter 4, p. 14, of the Laws of 1891) the corporation has authority to acquire and hold such real estate or easements, or other interests therein, as may be necessary to construct, maintain, and operate such railroad, and such as may be necessary for its stations and other terminal facilities, and that there is presented, therefore, by this petition, the question as to whether the real estate therein described is necessary to construct, maintain, and operate the road as authorized, with its necessary stations and terminal facilities. Such necessity must be established as a fact before the appointment of commissioners to determine the value of the property; but we think there was nothing in the certificate of the rapid transit commissioners that limited the property that the petitioner should acquire to such as was indicated on the plans as terminal and stations, and, the board having authorized the construction of the road and stations by the petitioner, the petitioner then had authority to condemn such adjoining property as was necessary for the proper construction of the road and terminal and stations authorized, and the question of such necessity was one to be determined in the proceeding to condemn the property.

Without, therefore, intimating an opinion upon the question as to whether or not this property sought to be condemned is actually necessary for the proper and convenient construction of the road, terminal, and stations, we affirm this order, leaving that question to be determined by the referee.

The order appealed from is affirmed, with $10 costs and disbursements.

LAUGHLIN and CLARKE, JJ., concur.

HOUGHTON, J. (dissenting). It seems to me that by fair construction the rapid transit act (Laws 1891, p. 3, c. 4, as amended by Laws 1895, p. 895, c. 519) requires that any corporation desiring to construct an underground railway shall obtain from the board of rapid transit commissioners a certificate approving, not only of its route, but of its terminal stations, and that any map approved by that board shall embrace such private lands as it is proposed to take for terminals and other necessary facilities of operation before the corporation can institute condemnation proceedings therefor. Certainly such a road cannot be constructed without the consent of the board of rapid transit commissioners, and section 32 of that act provides that "said board shall fix and determine the locations and plans of construction of the railways upon such route or routes, and of such tracks and facilities" connected therewith, and shall prepare and file a certificate "setting forth in detail the action taken by the said board." Power is further given to modify or to add to such certificate. The whole scheme of the act is to vest supervisory control of such a road in the board of rapid transit commissioners. The size of terminal stations and their precise location is as important as the direction of the route. I do not think it can be that a corporation can obtain consent of that board to a particular terminal station, and then roam at will in condemnation of private lands

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not embraced within the map certified by the board of rapid transit commissioners.

This is what the petitioner attempts to do, and I think the preliminary objection should have been sustained, and that the order should be reversed.

McLAUGHLIN, J., concurs.

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## NICHOLS et al. v. RILEY et al.

(Supreme Court, Appellate Division, First Department. April 6, 1906.)

1. APPEAL—REVIEW—ESTOPPEL TO ALLEGE ERROR—WAIVER OF OBJECTIONS.
   Where plaintiffs waived all technical objections to a motion for change of place of trial on the ground that the action was not brought in the proper county, and consented that it be heard on the merits as one to change the place of trial for the convenience of witnesses, and afterwards the original order on the motion was resettled on their motion, they cannot urge as a ground for sustaining the order denying the motion that one of the defendants not in default was not made a party to the motion.
2. VENUE—GROUNDS OF CHANGE—CONVENIENCE OF WITNESSES.
   Where a party shows a larger number of witnesses necessary and material to the matters in controversy residing in another county than that in which the action is brought, he is entitled to a change of place of trial for the convenience of witnesses.
   [Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Venue, §§ 76, 77.]
3. SAME—CONDITIONS OF ORDER.
   A condition, imposed by an order denying defendants' motion for a change of place of trial for the convenience of witnesses, that the plaintiffs should admit the signatures to certain documents held by the defendants, is not effective to destroy the necessity of witnesses, since a party should not be compelled before trial to disclose his evidence.

Appeal from Special Term, New York County.

Action by William W. Nichols and another against John B. Riley and others. From an order denying a motion to change the place of trial for the convenience of witnesses, defendants Riley and another appeal. Reversed.

Argued before INGRAHAM, McLAUGHLIN, LAUGHLIN, CLARKE, and HOUGHTON, JJ.

Thomas F. Conway, for appellants.

Charles K. Allen, for respondents.

PER CURIAM. There were several fatal objections to defendants' original motion to change the place of trial of this action, amongst them being the fact that the defendants' notice stated that the motion was on the ground that the county of New York was not the proper county, and the further one that the codefendant the Mutual Life Insurance Company of New York, not in default, was not served with notice of the application. On the motion coming on for hearing, however, as a condition for adjournment, as the order recites, the plaintiffs waived all technical objections, and consented that the motion be heard upon the merits as one to change the place of trial for the convenience of

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witnesses. In addition to this waiver the plaintiffs moved to resettle the original order, which was done on their motion, and the same was entered by them. In view of these acts and stipulations of the plaintiffs, we think they are not now in position to urge, for the purpose of sustaining their order of denial, that the appellants' codefendant, not in default, was not made a party to the motion, or to invoke any other technical objection which might have been remedied had the defects been pointed out.

No affirmative relief is demanded against the defendant insurance companies, but it is alleged that they hold the moneys in their hands until the controversy between the respondents and appellants shall be determined. On the merits, as a motion to change the place of trial for the convenience of witnesses, we think the motion should have been granted. The defendants show a larger number of witnesses necessary and material to the matters in controversy, all residing in the county of Clinton. The condition imposed by the order, that the plaintiffs should admit the signatures to certain documents held by appellants, is not effective to destroy the necessity of witnesses, because a party should not be compelled, before trial, on a motion of this character, to disclose his evidence to his adversary.

While the sale of the policies took place in the state of Minnesota, the proceeds of which it is alleged the appellants wrongfully claim or hold in trust for the plaintiffs, yet the transactions out of which the issues between the plaintiffs and the contesting defendants arise took place in the county of Clinton. In that sense, therefore, the cause of action arose in that county, and such fact is always entitled to weight in determining the place of trial. If plaintiffs' claims are true, they can be established in that county in a much shorter time than to await the course of litigation in the county of New York.

The order appealed from should be reversed, with $10 costs and disbursements, and the motion to change the place of trial from New York to the county of Clinton, on the ground of convenience of witnesses, granted, without costs.

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## AGRICULTURAL INS. CO. v. SMITH et al.

(Supreme Court, Appellate Division, First Department. April 6, 1906.)

1. ATTORNEY AND CLIENT—ATTORNEY'S LIEN.

**Code Civ. Proc. § 66, provides that from the commencement of an action or the service of an answer containing a counterclaim the attorney who appears for a party has a lien upon the cause of action, claim, or counterclaim, which attaches to a judgment in his client's favor. *Held* that, although an answer contained no counterclaim, a judgment for costs having been rendered in favor of defendant, the lien of his attorney attached thereto.**

2. APPEAL—PARTIES ENTITLED TO APPEAL.

**Where a motion for an order setting off costs awarded to defendant against a judgment in favor of plaintiff in another action was opposed by defendant, through his attorney, on an appeal by defendant, a contention that the objection that the order setting off costs was erroneous as against the attorney's lien could not be considered, because the defendant, and not the attorney, had appealed, was untenable.**

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Appeal from Special Term, New York County.

Action by the Agricultural Insurance Company against Leonardo D. V. Smith and others. From an order setting off costs, defendant Smith appeals. Reversed.

Argued before McLAUGHLIN, INGRAHAM, LAUGHLIN, CLARKE, and HOUGHTON, JJ.

William L. Marshall, for appellant.

William W. Pellet and Roswell S. Nichols, for respondent.

CLARKE, J. The plaintiff recovered a judgment against the defendant Smith in the Supreme Court, Onondaga county, for $884.38, on December 7, 1900. On June 4, 1904, the plaintiff commenced this judgment creditors' action against Smith and others, alleging certain fraudulent acts on the part of Smith, and asking for a judgment that certain real property, of which the Hillsdale Realty Company was owner of record, be adjudged to be the property of Smith, and that it be sold to pay the aforesaid judgment, and for costs against Smith. Smith interposed an answer by William L. Marshall, his attorney. At the time of retaining Marshall, Smith agreed to pay him a reasonable compensation for his services, which should equal the costs and such additional amount as should be reasonable, none of which has been paid. It is claimed that the reasonable value of the services rendered was $200. The complaint herein was dismissed, with costs to the defendant Smith against the plaintiff, and judgment was thereafter rendered for $108.28 therefor. Subsequently, upon motion, the Special Term made an order that the judgment obtained by the plaintiff against the defendant Smith in the county of Onondaga for $884.38 "shall be offset against the judgment obtained in this action"; that the judgment of Smith against the plaintiff, obtained on this action, "shall be, and the same hereby is, satisfied by said offset, and the clerk of this court is hereby directed to satisfy said judgment accordingly"; and the clerk of Onondaga county was directed to note upon his docket that the judgment there entered for plaintiff against the defendant is satisfied to the extent of $108.28. Upon the proceedings leading up to said order, the attorney for Smith interposed an affidavit setting up the facts so far as he was concerned, and opposed the motion upon the ground that he had an attorney's lien upon said judgment in his client's favor for costs; that that lien was superior to plaintiff's claim of offset and could not be defeated by such order.

It seems clear that the attorney had a lien which attached to said judgment. It is true that section 66 of the Code of Civil Procedure does say:

> "From the commencement of an action or special proceeding, or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action, claim or counterclaim, which attaches to a verdict, report, decision, judgment or final order in his client's favor, and the proceeds thereof in whosesoever hands they may come."

It is also true that there was no counterclaim set up in the answer herein. But it has been held:

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"An attorney has a lien for his costs and compensation upon the judgment recovered by him. Such a lien existed before the Code, and is not affected by any provision of the Code. * * * To the amount of such lien, the attorney is to be deemed an equitable assignee of the judgment. To the extent of the taxed costs entered in the judgment, the judgment itself is legal notice of the lien, and this lien cannot be discharged by payment to anyone but the attorney. The judgment debtor pays these costs to the party at his peril." Marshall v. Meech, 51 N. Y., at page 143, 10 Am. Rep. 572; Remington Paper Co. v. O'Dougherty, 36 Hun, at page 87; Bevins v. Albro, 86 Hun, 590, 33 N. Y. Supp. 1079.

In the latter case it was said:

"Distinction is sought to be made between an attorney for a plaintiff and an attorney for a defendant where no counterclaim is contained in the answer: and it is claimed, under section 66 of the Code, attorneys for a defendant only have liens for costs or are entitled thereto, when the answer contains a counterclaim. Section 66 of the Code was not intended as a limitation upon liens of attorneys for costs, but as an extension. It was intended as additional security to them. * * * Here a judgment had been obtained by the defendant for costs. The lien of the attorney attaches upon its rendition."

The Court of Appeals, before the Code had been amended by inserting the words "or special proceeding" in section 66 thereof, had said in a proceeding in the Surrogate's Court (Matter of Regan, 167 N. Y. 342, 60 N. E. 659):

"It must be regarded as settled law in this state that an attorney who has procured for his client a judgment or decree has a lien upon the same for his compensation; and this lien is not confined to mere taxable costs, but to such sum as he is entitled to receive under his retainer, or under an agreement, express or implied."

In Ennis v. Curry, 22 Hun, 587, the court said:

"What has been sometimes called the equity of a statute ought, it seems to us, to extend the provisions of this section of the Code to a recovery merely of costs upon the dismissal of a complaint, in which case the attorney not only has a lien under the well-settled rules of the court, but is not bound to give notice of his lien for the purpose of protecting his rights."

It seems to me that the attorney had a lien upon this judgment for costs, of which the plaintiff was bound to take notice. It appears in the case that written notice of such claim of lien was actually given.

In Barry v. Third Ave. R. Co., 87 App. Div. 543, 84 N. Y. Supp. 830, plaintiff commenced an action for malicious prosecution, which resulted in a dismissal, a judgment for costs of $109.42, and an affirmance on appeal, with a further judgment for defendant for $135.85. Executions were issued thereon and returned unsatisfied. Thereafter plaintiff commenced an action for false imprisonment upon the same facts, recovered a verdict for $50, and entered up judgment, including costs, for $201.36. Execution was issued and the sheriff collected the amount; but while still in his hands the defendant made a motion to offset the judgments. Upon that motion plaintiff's attorneys appeared and claimed a lien on the judgment for their fees, which were unpaid, and that such lien was paramount to defendant's right of offset. The motion to offset was denied. Mr. Justice Ingraham, in an opinion which exhaustively discussed the question of the relative rights of the attorney and the client to costs as such, holding them, in the absence of an agreement, to belong to the client, and saying, "As between the

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plaintiff and the defendant, there can be no question but that the defendant would be entitled to this relief," nevertheless held that "it is apparent that this lien of the plaintiff's attorney for the amount due him from his client for the services rendered in the action which resulted in a judgment in his favor attached to the judgment and the proceeds of the judgment in the hands of the sheriff, and was superior to any equity in favor of the defendant to have the money thus due applied to the payment of his other judgment against the plaintiff," and affirmed the order. So that it follows that the attorney here had a lien upon the judgment paramount to the equities of the plaintiff, that the satisfaction of that judgment by the order of offset destroyed the lien, and that, if the court deemed it right in the Barry Case to direct the sheriff to pay the money collected on the judgment to the attorneys in satisfaction of their lien, so here the court ought not to have destroyed the power to enforce the lien by issuing an execution on the judgment by the satisfaction thereof.

The respondent makes the point that the matter is not before us, because the appeal is taken in the name of the defendant, and not in that of the attorney, and cites Pomeranz v. Marcus, 86 App. Div. 321, 83 N. Y. Supp. 711. An inspection of that case discloses the facts there considered to be as follows: After the action was at issue, the defendant, without the intervention of his attorney, made a settlement with the plaintiff and exchanged general releases and consents to a discontinuance. The defendant's attorney, alleging that the settlement was made without his knowledge or consent, and collusively, for the purpose of defrauding him of his costs, thereafter moved in Trial Term to restore the case to the calendar for trial, "for the purpose of protecting the rights of the defendant's attorney herein, and for the purpose of determining his right to the taxable costs of this action to date," which motion was denied. The Appellate Division in the Second Department held that, the notice of appeal having been in the name of the client and not of the attorney, it must dismiss the appeal, because the notice of an appeal in such a case taken by the attorney would have to be served upon his client, and upon such an appeal the client, instead of being appellant, would be a respondent. But there, it will be perceived, the attorney and his client were acting in hostility to each other. It was the act of the client in settling and discontinuing the case behind the attorney's back which was the very matter complained of. The client wanted the action discontinued, and wanted it to stay so, and the attorney was moving to set aside said order against the client's will; and it was quite proper in such a case to hold that after discontinuance a motion ostensibly made by the client, but really by the attorney and for his benefit, would not lie, as not being made by the real party in interest. No such condition exists in the case at bar. The attorney had obtained the judgment in his client's favor, and was still his attorney. As such attorney he opposed the motion for offset; the order to show cause on said motion having been directed to be served upon him as such attorney. There was no hostility between client and attorney. No proceedings had been taken adversely to him by his client, but a motion which the client resisted through his attorney had been granted

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against him, and over his opposition, in favor of the plaintiff. It does not seem a sound proposition that the order made under such circumstances and binding upon the defendant, and which he had a right to oppose and did oppose, may not be appealed from by him.

The order appealed from should be reversed, with $10 costs and disbursements, and the motion for an offset denied, with $10 costs. All concur.

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## CHUMAR v. MELVIN et al.

(Supreme Court, Appellate Division, First Department. April 6, 1906.)

TRIAL—PREFERRED CAUSES—EXECUTRIX AS PLAINTIFF.

Where, after commencement of an action, plaintiff died, and his executrix was substituted, and filed a supplemental summons and complaint, showing her appointment as executrix and stating the same cause of action originally set up by deceased, the fact that in the title to the summons and complaint the executrix did not describe herself as such, so that the action appeared to have been brought by her individually, did not deprive her of the right to a preference which she would otherwise have had under the direct provisions of Code Civ. Proc. § 791, subd. 5.

Appeal from Special Term, New York County.

Action by Rose M. Chumar against Eugene Melvin and others. From an order denying a motion for a preference, plaintiff appeals. Reversed.

Argued before McLAUGHLIN, INGRAHAM, LAUGHLIN, CLARKE, and HOUGHTON, JJ.

Charles Goldzier and House, Grossman & Vorhaus, for appellant.

Joseph S. Frank and John C. Shaw, for respondent.

CLARKE, J. One Charles H. Chumar commenced this action against the defendants for the foreclosure of a mortgage upon a lease. Thereafter the plaintiff died, and in proper proceedings an order was duly entered reviving and continuing the action in the name of Rose M. Chumar, as executrix of Charles H. Chumar, deceased, and she was authorized to interpose a supplemental complaint showing her succession to the right, title, and interest of the said Charles H. Chumar in and to the said cause of action, and she was further authorized to issue a supplemental summons against additional defendants. Thereafter she served supplemental summons and complaint. Said complaint, after setting forth the facts which constituted the cause of action, proceeded:

"Seventh. That after the commencement of this action, to wit, on the 13th day of September, 1905, the said Charles H. Chumar departed this life, and that thereupon a last will and testament, duly made and executed by him, in and whereby this plaintiff was appointed executrix thereof, was duly proved and admitted to probate in the Surrogate's Court of the county of New York, to which court such jurisdiction belonged, and letters testamentary thereon were duly issued by said court to this plaintiff, who duly qualified as such executrix.

"Eighth. That thereafter, upon the application made by this plaintiff, this action was revived, and is continued in her name by an order of this court duly made and entered herein."

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Subsequently plaintiff served her notice of trial, and with it a notice that, on the summons, pleadings, and annexed affidavit, she would on February 5, 1906, move the court for a preference as provided for by subdivision 5 of section 791 of the Code of Civil Procedure, on the ground and for the reason that the sole plaintiff was an executrix, and on the further ground that this was a foreclosure action. The accompanying affidavit set up the history of the action, the death of the original plaintiff, the appointment of plaintiff as executrix, and the entry of the order of revivor, and a summary of the pleadings, and, as a reason for the preference asked, that the sole plaintiff was an executrix, "and for the further reason that the ground rent has not been paid and that dispossess proceedings have been threatened, because of the failure to pay the said ground rent." The learned court denied the preference, and in its memorandum stated that while, under the order of revivor, the plaintiff was authorized to interpose a supplemental complaint as executrix of Charles H. Chumar, deceased, despite this she sues in her individual name. In other words, a substantial right is denied her because the title of her summons and complaint sets forth, "Rose M. Chumar, plaintiff," instead—as would have been proper—of "Rose M. Chumar, as executrix of the last will and testament of Charles H. Chumar, deceased." A substantial right, because being a sole executrix, plaintiff is entitled as matter of right to have her action preferred upon the trial calendar over other issues noticed for trial for the same term; the discretion of the court only extending to the determination as to whether she should be preferred over all other cases on the calendar.

A question is raised that her action has been improperly revived; for if, by the alleged defect in the title, it is held she is not entitled to a preference, it would seem to follow that upon her case being reached for trial it would be urged that for the same reason she was not entitled to a trial; and it is for this reason that we have considered the question with care. The question is, where the pleadings clearly set forth the representative character of the action, is the omission in the title of the words "as executrix," etc., a fatal defect? In Beers v. Shannon, 73 N. Y. 292, Judge Folger said:

"The first point made by the defendant is this: That the action is not brought by the plaintiff in a character representative of the deceased obligee. This is based mainly upon the omission of the word 'as' between the name of the plaintiff, John L. Beers, and the description of him 'executor of,' etc., 'of John Beers, deceased,' in the title of the summons, and in the body of the summons, and in the title to the complaint. It is true that without that word, in that position, it has been sometimes held that the addition to the name of the party is but a descriptio personæ, and does not give to him other than a personal or individual character in the action. But it has been held, on the other hand, that though there be nought in the title of the process or the complaint to give a representative character to the plaintiff, the frame and averments and scope of the complaint may be such as to affix to him such character and standing in the litigation. In the case in hand * * * it was plain from the complaint that the cause of action, if any, devolved upon the plaintiff as a representative of the deceased obligee, by the creation of a representative relation by the will."

The converse of the proposition was held in Litchfield v. Flint, 104 N. Y. 543, 11 N. E. 58, where the title did add the words, "executor," etc. Judge Earl said:

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"In such a case, where the complaint shows a cause of action in favor of the plaintiff, not in his representative, but in his individual, character, the descriptive words may be rejected, leaving the action to stand as one in the individual capacity of the plaintiff."

The rule "that the title and pleadings may be considered together to ascertain the true nature of the action, and the action will be treated as an individual or representative one as disclosed upon an inspection of the whole record," was restated by Chief Judge Andrews in First National Bank v. Shuler, 153 N. Y. 165, 47 N. E. 262, 60 Am. St. Rep. 601, and by Mr. Justice McLaughlin in United Press v. Abell Co., 73 App. Div. 243, 76 N. Y. Supp. 692.

The case at bar was not an action commenced by the plaintiff, but was revived and continued by order after it had abated by the death of the original plaintiff. Her sole right was as his representative. She alleges and asserts none of her own. It has been held many times in this department that a preference would not be granted upon the title alone showing representative capacity, but that proof by pleading or affidavit establishing the fact must be submitted on the motion; and so we hold the converse that, when the complaint does clearly show that fact, the mere omission in the title of the words "as executor," etc. will not defeat the motion.

The order appealed from should be reversed, with $10 costs and disbursements, and the motion for a preference granted over issues noticed for the February, 1906, term. All concur.

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## HIBBS v. BROWN et al.

(Supreme Court, Appellate Division, First Department. April 6, 1906.)

1. JOINT-STOCK COMPANIES—LIABILITY OF SHAREHOLDERS.

The shareholders of a joint-stock association are partners, and may be ultimately held liable as such for the debts and obligations of the association; but the members thereof may, nevertheless, legally have contracts drawn so as to confine liability to the assets of the association and thus create the same situation as to their rights and liabilities as if the joint-stock association were a corporation and the members were stockholders.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Joint-Stock Companies, § 12.]

2. SAME—STIPULATION AGAINST PERSONAL LIABILITY—BONDS—VALIDITY.

The issue of bonds and coupons by a joint-stock association, secured by its assets, even with a stipulation against personal liability of the shareholders, is legitimate, and contravenes no statute or rule of public policy.

3. BONDS—NEGOTIABILITY.

Under Negotiable Instruments Law, Laws 1897, p. 722, c. 612, § 20, providing that an instrument, to be negotiable, must contain an unconditional promise or order to pay a sum certain in money, and must be payable on demand or at a fixed or determinable future time, and section 22, defining an unconditional promise as therein used as follows: "An unqualified promise or order to pay is unconditional within the meaning of this act, though coupled with: (1) An indication of a particular fund out of which reimbursement is to be made, in a particular account to be debited with the amount; or (2) a statement of the transaction which gives rise to the instrument. But an order or promise to pay out of a particular fund is not unconditional" bonds issued by a joint-stock association, secured by trust deed and payable to bearer, are negotiable, although by



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the express terms thereof the stockholders of the association are exonerated from individual liability for payment of the bonds and interest; liability being confined to the security and to the assets of the association, and such limitation not restricting the liability to a particular fund.

4. SAME—INTEREST COUPONS—NEGOTIABILITY—EFFECT ON BONDS.

Under Laws 1897, p. 722, c. 612, § 20, subd. 3, providing that a negotiable instrument must be payable on demand at a fixed or determinable time, the negotiability of bonds payable absolutely at a specified time is not affected by a provision of the deed of trust securing the bonds reserving to the majority of the bondholders the right to authorize the trustees to waive default in the payment of coupons representing interest on the bonds.

5. SAME.

Such interest coupons are mere incidents to bonds, and, whether attached or detached, so long as they are not matured and are held and owned with the bonds, their effect is the same as the promise in the bond to pay interest, and as if coupons therefor had not been attached. Hence, the negotiability of the coupons depends on and is controlled by the negotiability of the bonds.

6. SAME—HOLDERS IN DUE COURSE—WHO ARE.

Under Negotiable Instruments Law, Laws 1897, p. 732, c. 612, § 97, providing that a holder of a negotiable instrument who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect to parties prior to the latter, where defendants negotiated through brokers a sale of a bond, paying the party presenting the bond the proceeds of the sale, and thereafter, on return of the same to them by the purchaser thereof because payment of interest thereon was refused on the ground that the bond and coupons had been stolen, transmitted to such purchaser another bond of the same issue and tenor, in lieu of the one returned, they were holders in due course, having in legal effect repurchased the bond and coupons by trading therefor one the title to which was not disputed.

7. BILLS AND NOTES—BONA FIDE HOLDERS—PURCHASERS—NOTICE.

Mere surmise or suspicion is not sufficient to put a purchaser of negotiable paper on inquiry, and the facts or circumstances must be such as to show dishonesty or bad faith on his part in refraining from making the inquiry.

Clarke, J., dissenting.

**Appeal from Appellate Term.**

Action by William B. Hibbs against Alexander Brown and others. Judgment for plaintiff. Defendants appeal. Reversed.

Argued before O'BRIEN, P. J., and INGRAHAM, LAUGHLIN, CLARKE, and HOUGHTON, JJ.

Scott McLanahan, for appellants.

Herbert R. Limburger, for respondent.

LAUGHLIN, J. This is an action to recover the coupons. Both parties claim title to the bonds and coupons. The decision of the question depends upon whether or not they are negotiable. In January, 1902, the plaintiff was conducting a banking and brokerage business at Washington, D. C., and owned and held in the safe deposit vault in his banking house this bond, with the coupons, then unmatured, attached thereto. The evidence indicates that they were removed without his consent or knowledge by some person whose identity has not been discovered; that on April 23, 1902, the bond, with the coupons at-

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tached, was presented by an individual whose name is not known, and whom the defendants were unable to describe, at the office of the defendants, who were conducting a brokerage business at Baltimore, Md., with a request that they buy it, which was declined; that the person who presented the bond then requested that defendant sell it for him; that they thereupon wired Brown Bros. in New York to sell it, and it was sold on the floor of the Stock Exchange to Joseph Walkin & Sons, brokers acting for an undisclosed principal, at the market price, that Brown Bros. then wired the defendants that the sale had been made and its terms, and the defendants accepted the bond and coupons and paid the vendor thereof in cash the entire proceeds of the sale which they were to receive from Brown Bros. without any deduction for their own services. The defendants made no record of the transaction or of the seller's name, although ordinarily a record was made of such transactions by using a check in payment. The defendants then forwarded the bond and coupons to Brown Bros. in New York, and they were delivered to the brokers who purchased the same, and they delivered them to Erico Bros., their client, for whom they were purchased, whom it is conceded were innocent purchasers for full value before maturity. The plaintiff did not discover the loss of the bond and coupons until July, 1902, and then he notified every bank and trust company in Washington, and he also notified the epress company and the Mercantile Trust Company of New York, the trustee at whose office the coupons were payable, to stop payment of the coupons and to identify any person presenting any of them for payment. Erico Bros., through the Bank of the Metropolis, presented the coupons for September, 1902, and March, 1903, to the Mercantile Trust Company for payment, and the same were paid, notwithstanding the previous notice from the plaintiff. In March, 1904, Erico Bros. also presented to the trust company, through the same bank, the coupons for September, 1903, and for March, 1904, for payment, and payment was refused. Erico Bros. then, through their brokers, through whom they had made the purchase, demanded of the brokers who had sold them for Brown Bros. that they take back the bond and unpaid coupons and refund the purchase price. Brown Bros. made a similar claim on the defendants, who by purchasing and delivering another bond of the same issue settled the claim and received back the bond and unused coupons. When the plaintiff ascertained these facts, he demanded the bond and coupons, on the ground that they had been stolen from him; and on defendants' refusing to deliver he brought this action to recover three of the coupons which had been detached from the bond. The parties stipulated that the decision of the court with respect to the title to the coupons should determine their rights with respect to the bond and coupons remaining attached.

The learned counsel for the respondent contends that the recovery should be sustained upon one of two theories—either (1) that the bond and coupons were not negotiable, in which event defendants could not obtain good title as against him; or (2) that, even if negotiable, the defendant was not a holder in due course. The learned counsel for the appellants concedes that these are the questions upon which the ownership of the property depends. He claims that the bonds and cou-

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pons were negotiable and that his client is a holder in due course. This was one of a series of bonds issued in the name of "The Adams Express Company," signed "The Adams Express Company," by its president, and attested by its treasurer, and sealed with the seal of the company, and certified by the trustee. The issue aggregated $12,000,000. The bonds were secured by a deed of trust executed by the company to said Mercantile Trust Company. They were drawn payable to bearer, unless the holder preferred to have them registered, and, if he did, they were not to be transferable except on the books of the company. The coupons were also drawn payable to bearer. In form, therefore, both bonds and coupons were negotiable; and, like similar securities of corporations, which they resemble, it was doubtless intended that they should be negotiable. Similar corporate bonds similarly secured are deemed negotiable, and the rights of a holder are the same as those of a holder of a bill of exchange. Williamsburg Sav. Bank v. Town of Solon, 136 N. Y. 465, 32 N. E. 1058; Brainerd v. N. Y. & H. R. R. Co., 25 N. Y. 496; White v. Vt. & Mass. R. R. Co., 21 How. (U. S.) 575, 16 L. Ed. 221; Shul's Law of Ry. Bonds and Mtgs. § 70.

The Adams Express Company, however, is not a corporation. It is a joint-stock association. The stockholders of such an association are partners, and may be ultimately held liable as such for the debts and obligations of the association. By the express terms of the bonds in question, and of all bonds of the same issue, the stockholders are exonerated from individual liability for payment of the bonds and interest, and liability is confined to the security and to the assets of the association. It is claimed that this restricts the liability to a "particular fund" and deprives the bond of negotiability by virtue of the provisions of sections 20 and 23 of Negotiable Inst. Law (Laws 1897, p. 722, c. 612). Said section 20, so far as material, provides that "an instrument to be negotiable * * * must contain an unconditional promise or order to pay a sum certain in money" and "must be payable on demand, or at a fixed or determinable future time." Section 22 defines an unconditional promise as therein used as follows:

> "An unqualified promise or order to pay is unconditional within the meaning of this act, though coupled with: (1) An indication of a particular fund out of which reimbursement is to be made, in a particular account to be debited with the amount; or (2) a statement of the transaction which gives rise to the instrument. But an order or promise to pay out of a particular fund is not unconditional."

It is quite clear that the bond and coupons answer all the requirements of negotiability contained in the statute, unless they are excluded from its operation by virtue of the last sentence. The learned counsel for the respondents contends that the provision exonerating the stockholders from personal liability makes the bonds and coupons payable out of a particular fund, and therefore nonnegotiable. They are not expressly payable out of a particular fund, and therefore they do not, literally, at least, fall within the exception made in the statute. It is claimed, however, that the statute is but a codification of the former law, and that it was always the rule that it was essential to negotiability that the "general credit" of the maker be pledged to the payment of the

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obligation. Many decisions and text-books are cited in support of this contention; and it must be conceded that they contain general broad statements of the rule and definitions tending to sustain it. The facts upon which the adjudications were had, however, were not analogous to those now before the court; and it will, we think, be found in all of them that the expressions "general credit" and "personal credit" were used, not as indicating that the entire general or personal credit of the maker must be pledged to the obligation, but rather to show that general or personal credit must be pledged, as contradistinguished from limiting the liability to a particular or specific fund, which would make the obligation in effect an assignment pro tanto of the fund, and not a negotiable bill of obligation of the maker. See Munger v. Shannon, 61 N. Y. 251; Schmittler v. Simon, 101 N. Y. 554, 5 N. E. 452, 54 Am. Rep. 737; Brill v. Tuttle, 81 N. Y. 454, 37 Am. Rep. 515.

Joint-stock associations are now in all essential aspects, except the personal liability of the stockholders, like corporations. Chapter 235, p. 412, Laws 1894; Code Civ. Proc. §§ 1919–1924; Matter of Jones, 172 N. Y. 575, 65 N. E. 570, 60 L. R. A. 476; Westcott v. Fargo, 61 N. Y. 542, 19 Am. Rep. 300; People ex rel. Winchester v. Coleman, 133 N. Y. 279, 31 N. E. 96, 16 L. R. A. 183. They have an artificial name, in which their contracts are made and their business is transacted. They have a seal. They have officers. The interests of the partners are represented by shares of stock. They survive the death of their shareholders, and, quite like corporations, they have for all practicable purposes an existence apart from the shareholders and thereby may have perpetual succession. The interests of the stockholders in the assets of the association are analogous to that of the stockholders in a corporation. The practicable difference is that ordinarily the creditor of a corporation can only have recourse to the corporate property for the satisfaction of his claim, while the creditor of the joint-stock association, after first exhausting his remedy against the association and its assets, may recover any deficiency of the shareholders; but in many instances there is a qualified statutory personal liability of stockholders of corporations. There can be no doubt, however, that it is competent for the members of a joint-stock association to have the contracts so drawn as to confine the liability to the assets, and thus create the same situation as to their rights and liabilities as if the joint-stock association were a corporation and they were stockholders.

It is not and cannot be questioned that these bonds are valid obligations. The company might lawfully make and issue its promissory notes, and on the face thereof expressly provide that the shareholders would not be personally liable thereon. No one would be deceived. Those only would discount such paper who regarded the assets of the company as sufficient security for the payment. If both the maker and party discounting such paper desired it to have the advantages of negotiability, why should it not? Payment would not be limited to a particular account or fund. All of the funds of the company could be reached, if necessary, and they would change from time to time. The assets of this association were evidently considered by investors sufficient security for the payment of these bonds and coupons to enable the association to negotiate them, notwithstanding the express stipu-

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lation that the shareholders should not be personally liable therefor. Although a particular fund is set apart as security for the payment of these bonds and coupons, their payment is not limited thereto. All of the assets and earnings of the company are liable. Therefore some general credit—in fact all the general credit—of the company is pledged to the payment of the bonds and coupons, and only the individual credit of the shareholders is excluded. It is manifest that both the company in issuing these securities and those who from time to time invested in them intended and expected that they should and would be negotiable the same as similar securities of corporations. We have a case, therefore, where the maker intended negotiability, and where manifestly it was for its interest to have the rule of negotiability apply, for the securities would then be more marketable. It is manifest, also, that it is to the interest of all holders of such securities, except those who lose them or from whom they are stolen, that they should be declared negotiable. If not negotiable, the holders thereof cannot readily realize thereon, because purchasers would in that event be obliged to rely on the liability of the seller. The issue of such bonds and coupons by joint-stock associations, even with a stipulation against the personal liability of the shareholders, is perfectly legitimate; and it contravenes no statute on rule of public policy. Public policy requires that innocent purchasers of such securities should be protected if this may be done. We think it does not even require a strict construction of the negotiable instruments law to hold that they are negotiable.

The learned counsel for the respondent bases a further argument against the negotiability of the bonds or coupons upon article 7 of the trust deed, which provides, among other things, as follows:

"The action of the trustees in enforcing and protecting the rights of the bondholders hereunder shall at all times be subject to the direction and control of the holders of a majority in amount of the bonds hereby secured and then outstanding; and such holders of a majority in amount of said bonds shall at all times have power by an instrument in writing, executed, and delivered to the trustee, to direct the trustee to waive any default of the company hereunder (except in the payment of the principal of said bonds or any of them when due at maturity), and any or all rights resulting therefrom, upon such terms as may be directed by the majority in such writing, and any such writing, shall be binding upon the trustee and all the bondholders."

It is claimed that this provision of the deed of trust reserves to the majority of the bondholders the right to authorize the trustees to waive a default in the payment of the coupons representing the interest on the bonds, and that the coupons, thus not being payable on demand at a fixed and ascertainable time, are not negotiable. Subdivision 3, § 20, Neg. Inst. Law, Laws 1897, p. 722, c. 612; McClelland v. N. S. R. R. Co., 110 N. Y. 469, 18 N. E. 237, 1 L. R. A. 299, 6 Am. St. Rep. 397. Even if that be so, it does not affect the negotiability of the bonds, which are payable absolutely at a specified time and concerning which it is not suggested that the time of payment can be altered without the consent of each and every bondholder. It is further claimed, as we understand the argument, that, even though the bonds may be negotiable, the interest coupons, owing to this provision, are not. It is possible that the provision of the deed of trust herein quoted should

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be construed as authorizing a waiver of default in the payment of interest (see Hollister v. Stewart et al., 111 N. Y. 644, 19 N. E. 782); and it may be that it should be construed as empowering a majority of the bondholders to authorize the trustees to waive a particular default in the payment of interest in so far as the trustees have any duty to perform with respect to enforcing payment out of the pledged property; but it is doubtful whether it should be so construed as to authorize the trustees to waive the default generally, so that a nonconsenting bondholder could not maintain an action upon the coupon and bond and enforce his judgment against the assets of the company other than those held by the trustees in trust for all the bondholders.

No case cited appears to be precisely in point. The argument of the learned Circuit Court Judge in Manning v. Norfolk R. R. Co 29 Fed. 838, that such a construction of the deed of trust would contradict the obligation itself, which has been put in circulation, has considerable force. See, also, Railway Co. v. Sprague, 103 U. S. 756, 26 L. Ed. 554; Hollister v. Stewart, 111 N. Y. 644, 19 N. E. 782. The bonds and coupons contain unqualified obligations to pay the principal and interest at specified times. The bond refers to the trust deed, but it might well be held that such reference was with respect to the security and to render the bond more marketable, and not less, by a provision under which the specific undertaking might be modified without the consent of the bondholder. The case of McClelland v. Norfolk & Southern R. R. Co., 110 N. Y. 469, 18 N. E. 237, 1 L. R. A. 299, 6 Am. St. Rep. 397, is not decisive of the question. There the bond made express reference to the deed of trust for the effect of default, and the court say that the case was "argued upon the assumption" by both parties that the mortgage did provide for a postponement of the time of payment of both the principal sum and interest, by the action of a majority of the bondholders; and the court proceeds to decide the case on that assumption.

The obligation on the face of the bond and coupons in the case at bar is unqualified. There is reference to the deed of trust "for a statement of the securities * * * and the nature and extent of the security and the rights of the holders of the bonds issued thereunder and secured thereby"; but this might be construed as referring to the rights of the holders of the bonds with respect to the securities, and as not qualifying the obligation to pay. It seems unnecessary, however, to decide this interesting point. The defendants are either purchasers deriving their rights through Erico Bros., or pledgees deriving their rights through the advancement made on the security of the bond at the time it was brought to them. At the time it was brought to them, and when it was delivered to Erico Bros., the coupons were all attached. The coupons are mere incidents to the bonds, and, whether attached or detached, so long as they have not matured and are held and owned with the bonds, their effect is the same as the promise in the bond to pay interest, and as if coupons therefor had not been attached, and therefore the negotiability of the coupons depends upon and is controlled by the negotiability of the bonds. Cromwell v. County of Sac, 96 U. S. 59, 24 L. Ed. 681; Kenosha v. Lamson, 9 Wall.

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478, 19 L. Ed. 725; Ry. Co. v. Sprague, 103 U. S. 756, 26 L. Ed. 554; Bailey v. County of Buchanan, 115 N. Y. 279, 22 N. E. 155, 6 L. R. A. 562; Dinsmore v. Duncan et al., 57 N. Y. 573, 15 Am. Rep. 534; Evertson v. Nat. Bank, 66 N. Y. 14, 23 Am. Rep. 9. See, also, McClelland v. Norfolk & S. R. R. Co., 110 N. Y. 469–476, 18 N. E. 237, 1 L. R. A. 299, 6 Am. St. Rep. 397.

In Cromwell v. County of Sac, and Railway v. Sprague, supra, it was held that the fact that an interest coupon had matured, and payment thereof had been refused, and the coupon remained unpaid and attached to the bond, did not make the bond dishonored paper or affect its negotiability or the rights of a holder thereof receiving it in these circumstances. It would seem upon principle that the negotiability of the bond cannot depend upon the question of whether it draws interest, or when the interest is payable, or whether there be a provision by which a default in the payment of interest may be waived or the time of payment thereof extended with or without the consent of the holder. The interest being a mere incident to the principal, the holder, whose title as to the bond is within the protection of the law merchant, is entitled to the same protection as to unmatured interest or interest coupons. Of course, the time of payment of the interest depends upon the contract, and if the default be waived or the time extended by virtue of a provision of the contract authorizing it, if any such there be, then the right to enforce payment thereof would be postponed accordingly; but as against any prior holder of the bond I see no escape from the conclusion that, if good title to the principal is obtained, good title to the unmatured interest passes with it.

There is no force in the contention that the defendants are not holders in due course. It is conceded that Erico Bros. were innocent purchasers of the bond in due course and for full value. The appellant attempts to make this argument by claiming that the sale to Erico Bros. was rescinded, and that defendants have only such rights as they acquired by advancing the money at the time the bond was delivered to them, as if they were the purchasers. The form of the transaction does not affect their title. How could the sale be rescinded without the consent of the seller? The defendants no longer had authority to represent him. They did not assume to do so, but acted in their own right, perhaps to avoid litigation, and perhaps to prevent any question arising that might affect their reputation as bankers and ability to dispose of securities through the Stock Exchange in the future, and in legal effect repurchased the bonds and coupons by trading one therefor the title to which was not disputed. There is no evidence that they were parties "to any fraud affecting the instrument," and therefore their title in the right of Erico Bros. is perfect. Section 97, Neg. Inst. Law, Laws 1897, p. 732, c. 612; Northampton Nat. Bank v. Kidder, 106 N. Y. 221, 12 N. E. 577, 60 Am. Rep. 443.

But, even if their only rights are those derived from the original transaction, still they would be protected, either as bona fide purchasers, or as purchasers or pledgees. Mere surmise or suspicion is no longer sufficient to put a purchaser of negotiable paper upon inquiry. The facts or circumstances to put him upon inquiry must be such as to show dishonesty or bad faith on his part in refraining from making the in-

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quiry. Cheever v. Pittsburgh, S. & L. E. R. Co., 150 N. Y. 59, 44 N. E. 701, 34 L. R. A. 69, 55 Am. St. Rep. 646; Manhattan Sav. Inst. v. N. Y. Nat. Exch. Bank, 170 N Y. 58, 62 N. E. 1079, 88 Am. St. Rep. 640; Bank of Monongahela Valley v. Weston, 172 N. Y. 259, 64 N. E. 946; Perth Amboy Mut. Loan Ass'n v. Chapman, 80 App. Div. 556, 81 N. Y. Supp. 38, affirmed on opinion below, 178 N. Y. 558, 70 N. E. 1104; Murray v. Lardner, 2 Wall. 110, 17 L. Ed. 857; Cromwell v. County of Sac, supra; Daniel on Neg. Inst. (5th Ed.) § 1503. We hold, therefore, that both bond and coupons were negotiable, and that the defendants are bona fide holders for value.

It follows, therefore, that the determination of the Appellate Term and the judgment of the Municipal Court should be reversed, and a new trial granted in the Municipal Court, with costs to the appellants to abide the event. All concur, except CLARKE, J., who dissents.

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## PEOPLE v. BIGLIZEN.

**(Supreme Court, Appellate Division, First Department. April 6, 1906.)**

1. RAPE—CORROBORATION OF FEMALE—INSTRUCTIONS—NECESSITY.
   Pen. Code, § 283, providing that no conviction can be had for rape on the testimony of the female unsupported by other evidence, does not require the court, on a trial for rape, to instruct that a conviction cannot be had on the testimony of the female, unless corroborated.
2. SAME.
   Failure to charge that a conviction for rape cannot be had on the testimony of the female, unless corroborated, is not reversible error, where no request therefor is made, and it is not clear that the failure was prejudicial.
   [Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Rape, § 89.]
3. SAME—EVIDENCE—SUFFICIENCY.
   On a trial for rape, evidence examined, and *held* to support a conviction.
   Ingraham, J., dissenting.

Appeal from Court of General Sessions, New York County.

Jacob Biglizen was convicted of rape, and he appeals. Affirmed.

Argued before O'BRIEN, P. J., and PATTERSON, INGRAHAM, LAUGHLIN, and CLARKE, JJ.

Lewis S. Chanler (Lorlys E. Rogers, on the brief), for appellant.

E. Crosby Kindleberger, for the People.

LAUGHLIN, J. The indictment charges that the crime was committed on the 21st day of July, 1904. The trial was had on the 24th day of October thereafter. The complaining witness, Jennie Herzog, was only 9 years of age. She lived with her parents and three brothers and three sisters on the upper floor of a tenement building known as Nos. 57 and 59 Pitt street, in the city of New York. Two of the brothers were aged 16 and 14 or 12 years, respectively, and the other brother and all the sisters were younger than Jennie. The defendant was born in Russia, had been in this country 13 or 14 years, spoke English, was 28 years of age, had boarded with the Herzogs the year before 6 months and at this time 4 months, and was employed as a

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furrier, earning from $8 to $10 per week "sometimes" "in the season." On the night of the 20th of July, Mrs. Herzog and some of her children slept on pillows and blankets on the roof. The defendant also slept on the roof, within 10 feet of them. The father slept below in the apartment. About 4 o'clock in the morning the mother arose and went below. Next to Jennie on one side slept her brother of six years, and on the other her sister of 4 years. On the preliminary examination of the court, Jennie said that she attended the Jewish Church every Sunday, attended public school every day, was in the fourth class, and able to read books. She was then permitted to be sworn, and testified that she awoke about 5 o'clock in the morning, after her mother had gone below, and found that the defendant had come over and got under the cover that was over her and was having intercourse with her, and it was then light; that defendant hurt her "very much" and she "cried very loud"; that defendant put the bed cover in her mouth, and held his left hand over her mouth, and held her little brother with his right, and told him not to tell his mother, and had given him money; that she did not "have a chance to cry out loud" until defendant left her and went downstairs, and then she cried out real loud and woke up her eldest brother, and sent her youngest brother down to tell her mother; that her mother came up and saw blood on her clothes—the clothes, a petticoat and nightdress, were introduced in evidence—and her father came up and took her downstairs and into defendant's room, and asked what he had done to her, and defendant said "he should pay money"; and that defendant was held, and her brother was sent to call a policeman. Her youngest brother was not accepted by the court as a witness. Her father testified that he and his eldest son slept down stairs; that in the morning, as he was about to go to his work, after his wife went upstairs "to see what the children were doing," she spoke or called him, and he ran upstairs, lifted Jennie's clothes, and saw "blood, blood, all over blood," and he took her down, and, pushing in the door of defendant's room and grabbing him by the throat, asked, "What did you do to my daughter Jennie?" to which defendant replied: "Keep quiet. Keep silent. I pay you for that"—and that then he sent for a policeman and had defendant arrested. On cross-examination, the father testified that when he first confronted defendant and asked, "How could you do these things to my child?" the defendant replied: "Well, I did it; but keep quiet. I'll pay for it." Jennie's mother testified that she left the roof about 4 o'clock, and returned about 5, and saw bloodstains on Jennie's clothes and summoned her husband. She further testified that defendant left the roof about 2 or 2:30, and was in his room when she went down; but this may be accounted for on the theory that he came in about 2 or 2:30, and, seeing him about, she thought he was getting up. She also testified to the interview between her husband and the defendant under circumstances practically the same as those narrated by her husband; but her version of the conversation is that the greeting to defendant was, "You murderer, you have ruined my daughter," and that his answer was: "Sh! I did it. I will pay you for it."

It is undisputed that a policeman was summoned by the eldest boy, and that on the arrival of the officer Jennie's father charged defendant

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in the presence of the officer with having assaulted and ruined his child, and that, on being placed under arrest and charged by the officer with the crime of assaulting the child, defendant denied it. After the arrest of the defendant, and some time on the same day—the hour does not appear—Jennie was taken to the office of the Society for the Prevention of Cruelty to Children and examined by Dr. Brown. He was called by the prosecution, and testified from memory as to what he found, although he admitted having made a memorandum concerning the examination, and that during six or seven years he had examined the private parts of over 500 children for the Society. He said that the parts had been lacerated by the penetration of a blunt instrument, which ruptured the hymen, and that the conditions he found indicated that the penetration had occurred about two weeks before, causing acute inflammation; and yet he testified that "the mucous membrane of the internal genitals was rubbed off and bleeding." His testimony was not consistent. The jury were not obliged to believe that bleeding would continue two weeks. Other evidence in the case, relating to the weather and lack of cleanliness, tends to account for the conditions narrated by the physician as having been found by him and on which he expressed the opinion that the penetration took place two weeks before, assuming his testimony in that regard to be accurate. The jury, however, might have found that he was mistaken in some of his facts or that his opinion was not well founded.

The defendant testified that he came in that night at 2 o'clock and took pillows, a sheet, and a quilt, and slept on the roof until 5, when he arose and went to his room and lay down again and fell asleep; that he was awakened by people running and holloing, and went to the door to see what was the matter, just as "they opened it on me"; that Jennie's father said, "What did you do to my girl?" to which he replied, "I didn't done nothing to the kind"; and then he testified that the father said nothing to him, but the mother asked, "What did you done to my child?" and that he made answer, "I didn't done nothing," but that he didn't know what she meant, and had to say something. He testified on his direct examination that a week or ten days before he was arrested he saw Jennie's brother, 12 years old, having intercourse with her twice, and admitted on cross-examination that he knew it was not right, but that he neither remonstrated with the children nor informed their parents; that he considered it none of his business, and never spoke of it, even to his lawyer or anybody, until upon the witness stand, and then says the reason he did not tell it when charged by the parents and when before the police court was that he forgot it. Three witnesses testified that defendant's reputation for "peace and quietness and orderliness" was good.

The court, in instructing the jury, spoke of the blood found on the child as being fresh; and counsel for defendant excepted. The court thereupon assured the jury that any expression of opinion by the court upon the facts was inadvertent and should be disregarded, and that they were the exclusive judges of the facts. No other exception to the charge was taken.

If the jury believed the testimony of Jennie, the defendant committed the crime of which he has been found guilty. It is claimed that her

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testimony is utterly improbable. Stress is laid on the fact that it was light or just getting light, that she says she made an outcry, and that there were many others on the roof, none of whom were called as witnesses. The defendant says that he was sleeping only 10 feet distant. She says that he got under the cover over her. Such a change of position might not be noticed at that hour, even if there were others on the roof; for they would likely be asleep. However, they would regard him as a member of the Herzog family, and would not be apt to pay attention to his movements. Jennie's testimony is susceptible of the construction that she did not and could not cry out until after the defendant went away. Furthermore, the jury were justified in finding that there was no one on the roof at the time, with the exception of her brothers and sisters, all younger than herself. Jennie testified that there were 14 people sleeping on the roof, consisting of her 3 brothers and 2 of her sisters, herself, defendant, another woman from the same floor and her three small children, and a woman and her little girl and husband from the fourth floor. Earlier in her testimony, she said she went up on the roof to sleep with her mother, eldest brother, and two sisters. Her father places the eldest brother with him in the apartment. The defendant, after saying the he could not tell how many people were "laying on the roof" when he left, "about 20," testified as follows: "There was nobody else on that roof besides the Herzog children and Mrs. Herzog; only me and Mrs. Herzog and the children." This being the testimony of the defendant, and the last given on the point, he cannot complain if the jury accepted it.

The learned counsel for the appellant urges a reversal on account of the omission of the court to instruct the jury that they could not convict on the testimony of the complaining witness, unless corroborated. The defendant was represented by counsel, and no suggestion was made that the jury might disbelieve the corroborating witnesses and at the same time believe the complaining witness, which is the only thing on which there was necessity for such instructions. The statute does not require the court to instruct the jury on this point. It merely declares, as a rule of law, that "no conviction can be had * * * for rape * * * upon the testimony of the female * * * unsupported by other evidence." Pen. Code, § 283. While it would be well for the court in all such cases to fully instruct the jury on this point, yet failure to do so should not be considered reversible error, when no request for such instruction is presented and it is not clear that such failure was prejudicial. It is scarcely conceivable that the jury would have convicted the defendant on the little girl's testimony, if they disbelieved the corroborating testimony of her parents. Any reasonable man of average intelligence would, I think, accept the testimony of the girl and her parents, or reject it all. The corroboration was complete. The parents saw the evidences of the recent assault by some one. The child accused the defendant. He was there and had the opportunity, and when confronted he admitted it.

Such a crime committed on a child is unnatural and most revolting under any circumstances. One hesitates to believe that an industrious young man, while apparently sober, could be guilty of such a horrible crime. But, when we recall the testimony of this defendant that he dis-

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covered improper relations between this little girl and her older brother a week or ten days before, and watched with morbid curiosity to see them repeat it, and failed to inform the parents, with whom he was living and had lived for nearly a year and was on terms of friendship, it is not so difficult to believe that he would himself endeavor to have intercourse with the little girl. This is a case depending on the credibility of witnesses, and where the truth was to be detected more from the appearances of the witnesses and their manner of testifying than from the words they uttered. It was, therefore, peculiarly within the province of the jury, and their verdict should not be disturbed.

It follows that the conviction should be affirmed.

O'BRIEN, P. J., and PATTERSON and CLARKE, JJ., concur.

INGRAHAM, J. In view of the testimony of the physician called for the prosecution, together with the unsatisfactory character of the testimony of the principal witness for the prosecution, and the fact that her testimony was uncorroborated, I do not think this judgment should be allowed to stand. The jury were not instructed that the testimony of the child must be corroborated before they were justified in convicting the defendant, and, while there seems to have been no request for such instruction, in view of the character of this evidence, taken in connection with the failure of the court to instruct the jury as to the necessity of such corroboration, justice requires that there should be a new trial.

I therefore dissent.

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## SMITH v. BARBER.

(Supreme Court, Appellate Division, First Department. April 6, 1906.)

1. LANDLORD AND TENANT—LEASES—POSSESSION—OBLIGATION TO PAY RENT.

The obligation of a tenant to pay rent after the beginning of the term does not depend on his possession of the demised premises. If he acquired perfect title thereto by virtue of the lease, which would include the right of possession, he is liable for rent under his covenant to pay the same, regardless of whether or not he actually obtained possession.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Landlord and Tenant, §§ 751–754.]

2. SAME—POSSESSION BY THIRD PERSON.

Where at the beginning of the term of a lease a third person is in possession of the premises, claiming under title paramount to that of the lessor, a tenant thereby excluded from possession is not liable for rent under a covenant in the lease.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Landlord and Tenant, §§ 751–754.]

Exceptions from Trial Term, New York County.

Action by William Wheeler Smith against Amzi L. Barber. Motion for new trial on exceptions. Exceptions sustained, and new trial ordered.

See 89 N. Y. Supp. 317.

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Argued before O'BRIEN, P. J., and McLAUGHLIN, INGRAHAM, CLARKE, and HOUGHTON, JJ.

Austin G. Fox, for plaintiff.
W. W. Niles, for defendant.

INGRAHAM, J. The action was brought to recover the rent reserved by a lease, whereby the plaintiff leased certain premises to the defendant, together with the costs of certain improvements on the premises, which was, under the lease, to be paid by the tenant. On the trial the court excluded evidence offered by the defendant to sustain the defense set up in the answer, and directed a verdict for the plaintiff. Exceptions were taken to these rulings and they were ordered to be heard here in the first instance. The lease is annexed to the complaint. By it the plaintiff leased to the defendant the office on the first floor fronting on Wall and New streets, and a portion of the second floor fronting on Wall and New streets, in a building in course of erection at the corner of Wall and New streets in the city of New York, to be used as offices for the business of the Equitable Trust Company, and for no other purpose, "beginning February 1, 1900, and expiring May 1, 1910, at a yearly rental of thirty-seven thousand five hundred (37,500) dollars," payable in equal monthly payments in advance. The lease provided:

"No compensation or claim shall be made by the tenant by reason of inconvenience or annoyance arising from the necessity of repairing any portion of the building, however the necessity may occur. * * * And it is further understood and agreed that the landlord will fit up the herein demised premises in a proper and suitable manner for the transaction of a banking and trust company business, the cost of which in excess of the sum of four thousand (4,000) dollars is to be paid by the tenant. * * * And it is further understood and agreed that the landlord gives the tenant the option of renting the balance of the said second floor at the rate of seven (7) dollars per foot for a term running concurrently with that hereby granted, on receiving notice from the said tenant of such desire to hire on or before the first day of January, 1900; it being understood and agreed, however, that should the firm of Seligsberg & Company, now occupying a portion of the first floor, desire to rent said balance of the second floor prior to January 1, 1900, the option shall become null and void without recourse against said landlord. And it is further understood and agreed that the tenant shall have the privilege of occupying that portion of the second floor which is now tenantable at the rate of seven (7) dollars per foot, until such time as the hereinbefore mentioned premises are completed, and occupation tendered to the tenant by the landlord."

This lease was dated September 27, 1899, and the term was to commence on February 1, 1900. The action was brought to recover the rent from February 1, 1900, to September 1, 1900, and also for the cost of fitting up the demised premises in excess of the sum of $4,000, to wit, $11,068.73.

The answer admits the making of the lease, that the defendant had paid no part of the rent, denies knowledge or information as to the cost of fitting up the premises, and alleges that at the time of the execution of the lease the building referred to in said agreement was a new building in process of construction, and was not ready for occupancy; alleges that on the 1st day of February, 1900, and for a long time thereafter, the plaintiff was in possession of the said premises by his tenants,

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agents, servants, contractors, and employés, engaged in the construction, completion, and fitting up of the same, and that the said premises were not completed or fitted up in the manner covenanted in the lease, or at all, on the 1st day of February, nor until long after, to wit, after the 1st day of June, 1900, and that the plaintiff did not tender to the defendant possession of said premises on the 1st day of February, nor until long after, to wit, after the 1st day of June, 1900, and that the defendant did not accept or take possession of said premises at any time. For a separate defense the defendant denies that the plaintiff did fit up the said demised premises in a proper and suitable manner for the transaction of a banking and trust company business, and as a counterclaim the defendant alleges a breach of the plaintiff's covenants, and a failure to furnish and fit up the said demised premises according to said agreement, or to give possession of the same to the defendant on the 1st day of February, 1900, and that the defendant has been greatly injured, to his damage in the sum of $100,000, and demands judgment for that amount.

The plaintiff served a reply to this counterclaim, but on the trial the counterclaim was withdrawn. On the trial the plaintiff was allowed to amend his complaint, and subsequently the defendant was allowed to amend paragraph 11 of his answer so as to read as follows:

"That the plaintiff wholly failed and neglected and refused to perform each and every of his covenants and agreements above alleged in subdivisions 7, 8, 9, and 10 of this amended answer."

—And paragraph 12 of his answer so that the same read:

"That on the first day of February, 1900, and for a long time thereafter, plaintiff was in possession of said premises by his tenants, agents, servants, contractors, and employés, engaged in the construction, completion, and fitting up of the same. That said tenants in possession of said premises held the same under a lease made by the plaintiff to them prior to the making of the lease annexed to the complaint herein, and said tenants were holding such possession under title paramount to the defendant herein, and the plaintiff thereby excluded the defendant from possession of a portion of the demised premises."

On the trial the defendant admitted that the rent sued for had been demanded and not paid. The following facts were then stipulated by counsel:

"At the time the parties to this action entered into the lease, a portion of the first floor of the premises covered by the lease was occupied by Seligsberg & Company. Said lease had been made by the plaintiff to Seligsberg & Company on or about May 1, 1899, for a term expiring May 1, 1900. The lease was an oral lease. The plaintiff was notified that the defendant would require Seligsberg & Company to vacate the premises on the 1st of February, 1900. The occupancy of the premises by Seligsberg & Company delayed the completion of the improvements in the premises, and some of the work could not be finished until they vacated on that date. The improvements made by the plaintiff in fitting up the premises pursuant to the lease herein were not completed on February 1, 1900, and not until about the 1st of June, 1900, when they were completed."

The plaintiff, while conceding these facts, objected to their competency under the answer, and this objection was sustained, and defendant excepted. The plaintiff then proved that the total cost of fitting up the offices for a trust company business was $15,723.48. The

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defendant, on cross-examination, sought to prove by the plaintiff that Seligsberg & Co. were in occupation of the premises from February 1st to May 1st under a lease made by plaintiff prior to the execution of the lease to defendant, and that the occupation of the said premises prevented the completion of the premises on the 1st of February, 1900. This was objected to, the court sustaining the objection upon the ground that there was no defense set up in the answer which justified the evidence. This evidence being excluded, the defendant rested, and moved to dismiss the complaint, which motion was denied, and the court then, on motion of the plaintiff, directed a verdict for the plaintiff for the full amount, including the amount from February 1st to September 1st, being seven months, and the cost of fitting up the building for a banking office, and to this the defendant excepted.

The real question presented on this appeal is whether the defendant was entitled to prove as a defense to the action that the improvements upon the premises were not completed prior to February 1, 1900, and that from February to May, 1900, other tenants were in possession of the premises leased to the defendant under an oral lease made by the plaintiff prior to the execution of the lease in question for one year from May 1, 1899. This case was before this court upon a former appeal from an order setting aside a verdict in favor of the plaintiff, and granting a new trial. 96 App. Div. 236, 89 N. Y. Supp. 317. Although there was some discussion in the opinion as to the rights of the plaintiff and the defendant under this lease, it does not seem that that question was decided. The court held that certain evidence which was admitted had no bearing upon the question of whether the defendant on February 1, 1900, waived his right to rescind the contract, or thereafter acted with reference to the premises so that the jury could have inferred, by assuming dominion over the premises, he elected to continue in possession under the lease; that, in view of the course which the trial took, the evidence which was improperly admitted, and the erroneous theory upon which the case was submitted to the jury, the conclusion was that the trial judge was justified in setting aside the verdict, and granting a new trial, and that order was therefore affirmed. The court, however, in discussing the question as to the liability of the defendant for this rent, said:

"The acceptance of the lease, therefore, under which the defendant obtained the right to the use of the entire premises from the first of February, did not render him liable for the rent, where a substantial portion thereof was held by another tenant under a valid lease from the plaintiff, and where, as here, the defendant never went into actual occupancy of any portion of the premises. Having notified the plaintiff of the obligation resting upon him of getting Seligsberg & Company out, and no action having been taken, so far as appears, by the plaintiff to that end, the defendant, had he so elected, would have had the legal right on the first of February to notify the plaintiff that he regarded the lease as terminated and canceled. Upon that date, when the term was to begin, the defendant was legally put to his election, and it was entirely competent for the plaintiff to show, as was attempted to be shown, that not only had the defendant not elected to terminate the lease, but that his acts were such that they are to be legally construed into a waiver of the condition precedent to his liability for rent, namely, his obtaining complete possession."

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The court then says:

"Where a person enters into possession of a portion of the premises, he is liable for the rent of the whole; and if he has not full possession he cannot refuse to pay the rent, but his remedy for his damages arising from the failure to receive full possession is either by way of counterclaim to the original action for rent, or by way of an independent action."

The observation here would seem to indicate that it was the opinion of the court that the defendant would be liable for rent for the period, unless he proved that he elected to terminate the lease. The law in this state in relation to the obligation of the tenant to pay rent after the beginning of the term does not depend upon the possession by the tenant of the demised premises. If the tenant acquire a perfect title to the premises by virtue of the lease, which would include the right of possession, then he is bound under his covenant to pay rent, regardless of the question whether or not he actually obtained possession of the premises. Gardner v. Keteltas, 3 Hill, 330, 38 Am. Dec. 637, where Nelson, Chief Justice, says:

"All that either of the covenants mentioned exact of the lessor is that he shall have such a title to the premises at the time as shall enable him to give a free, unincumbered lease for the term demised. There is no warranty, express or implied, against the acts of strangers. Hence, if the lessee be ousted by one who has no title, the law leaves him to his remedy against the wrongdoer, and will not judge that the lessor covenanted against the wrongful acts of strangers, unless the covenant be full and express to the purpose. * * * I admit the covenant of quiet enjoyment means to insure the lessee a legal right to enter and enjoy the premises, and if he is prevented from entering into the possession by a person already in under a paramount title the action may be sustained. That was decided in Ludwell v. Newman, 6 T. R. 458. In such a case no ouster or expulsion is necessary on which to predicate a suit, as the lessee is not bound to enter and commit a trespass."

This rule is further explained by first Judge Daly in Mechanics' & Traders' Fire Insurance Company v. Scott, 2 Hilt. 550, where the learned judge says:

"The fourth answer sets up no defense. The complaint avers that the plaintiffs leased the premises to the defendant on the 6th day of March, 1858, for one year, to commence on the 1st of May following. This vested in the defendant an interest in the term on the 1st of May, and rendered him liable, after that date, for the payment of the rent. Whitney v. Allaire, 1 N. Y. 311. It is no answer that he never had possession. Bellasis v. Burbriche, Lord Ray, 170, Holt. 199; Eaton v. Jaques, 1 Doug. 461. He avers that at the time of the agreement there was a tenant in possession, and that the same tenant is still in possession. This is no answer. It may be a tenant under a demise from some person having no claim or title to the premises. To render an occupancy of a tenant an answer to the demand for rent the defendant must aver that the tenant is in possession under a title paramount to that of the plaintiff."

In Trull v. Granger, 8 N. Y. 115, the defendant gave the tenant a lease of certain premises on the 6th day of September, 1849, the term to commence on the 1st day of May, 1850. The defendants leased the premises to another person for five years, and he went into possession. On the 1st day of May the plaintiff called on the defendants, tendered them the rent for one quarter in advance, and required the possession of the premises. He thereupon brought action for damages, and it was held that that action could be maintained. The court said:



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"In the present one the lessors themselves denied the right, and refused to permit the plaintiff to occupy, in accordance with their own lease. In such cases it seems to me very obvious that the lessee should not be driven to his ejectment, but should be allowed to bring his action for the damages sustained."

It is quite evident, under such circumstances, that the action by the landlord for rent under the lease would not lie. In Harris v. Greenberger, 50 App. Div. 439, 64 N. Y. Supp. 136, this court in the Second Department held in a proceeding to dispossess a tenant that where the former tenant of the landlord was in possession of the premises, and insisted in holding over after the expiration of the tenancy, and thus prevented the landlord from putting the tenant in possession, the tenant was relieved from further liability under the lease. That decision rested on the peculiar language of the lessee, which provided for the payment for rent before the possession of the premises were delivered to the tenant; and the court said:

"We think that this language imported an undertaking on the part of the landlords to deliver actual possession at the time when the tenant handed them his check for the rent. The evidence demonstrates their inability to do so, and their failure in this respect relieved the respondent from further liability upon the lease for any purpose. This result is only just. The proof indicates that the landlords themselves were concerned in preventing the respondent from storing his goods on the premises before the beginning of the term, as provided for in the lease; and the evidence in regard to their presence and conduct on the premises when the respondent was kept out goes far towards creating the impression that they co-operated in the exclusion of the respondent, or at least tacitly gave it their sanction."

In 18 Amer. & Eng. Encyclopedia of Law (2d Ed.) 615, it is said:

"The lessor impliedly covenants to give possession to the lessee at the commencement of the term, * * * and, if the premises are wrongfully withheld by a third person, it is the duty of the lessor to oust him; or, which amounts to the same thing, the failure to give possession has been held a breach of the lessor's covenant of quiet enjoyment. Same volume, p. 325. Where the landlord delivering possession of part only of the premises, and tenant does not accept such part as a full performance by the landlord, * * * a landlord cannot recover upon the express agreement to pay rent." 1 McAdam, L. & T. p. 340.

These cases all recognize the rule that where a third party is in possession of the demised premises, claiming possession under a title paramount to the title of the lessor, and the tenant is thereby excluded from possession of the premises, there can be no recovery for rent under the covenant in the lease. The amendment of the defendant's answer, whereby the defendant as a defense alleged that the tenants in possession of the premises held the same under a lease made by the plaintiff to them prior to the making of the lease to the defendant, and that the said tenants were holding such possession under a title paramount to the defendant herein, and plaintiff thereby excluded the defendant from a portion of the premises, was a good answer for a demand for rent of the premises during the period that the defendant was excluded from the premises. It was, therefore, competent for the defendant to prove under this answer that at the time the term commenced the premises were occupied by Seligsberg & Co. under a lease from the plaintiff which extended to the 1st of May, three months after the defend-

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ant's term commenced, and that the defendant never occupied these leased premises.

I think, therefore, that the exceptions should be sustained, and a new trial ordered, with costs to the defendant to abide the event. All concur.

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## HIRSCH v. AMERICAN DISTRICT TELEGRAPH CO.

(Supreme Court, Appellate Division, First Department. April 6, 1906.)

1. CARRIERS—WHAT CONSTITUTE—CORPORATION FURNISHING MESSENGERS.
   A telegraph company which maintains a staff of messenger boys, which it furnishes to its patrons, is not a common carrier as to the services rendered by the messengers.
2. CONTRACTS—CONSTRUCTION—SERVICES.
   Where a telegraph company maintained a staff of messenger boys, which it furnished to persons needing their services, making a charge based upon the time employed, and plaintiff told the manager of one of the offices that he wanted a boy, and accepted one who was offered to him, and delivered to the boy a package, with instructions to deliver it at a certain place, such facts did not show a contract between plaintiff and the company for the delivery of the package, rendering it liable on failure of the boy to deliver the package.

Appeal from Special Term, New York County.

Action by Morris J. Hirsch against the American District Telegraph Company. From a judgment of the Appellate Term (95 N. Y. Supp. 562), affirming a judgment of the City Court of the City of New York in favor of plaintiff, and from an order denying a motion for a new trial, defendant appeals. Reversed.

Argued before O'BRIEN, P. J., and INGRAHAM, McLAUGHLIN, CLARKE, and HOUGHTON, JJ.

Henry D. Estabrook (Francis Raymond Stark, on the brief), for appellant.

Benjamin N. Cardozo, for respondent.

INGRAHAM, J. The complaint alleges that in the city of New York, on or about the 16th day of January, 1904, the defendant, for a good and valuable consideration, through its lawful and authorized representatives received from one Joseph S. Jantzen a package or envelope containing the sum of $500, lawful money of the United States, to be delivered by the defendant and deposited to the credit of the said Jantzen in the Rutherford National Bank at Rutherford, N. J.; that thereupon, in consideration thereof, the defendant undertook, promised, and agreed with the said Jantzen to transport and deliver the said package containing the said sum of money to the Rutherford National Bank at Rutherford, N. J.; that the defendant has failed and omitted to deliver said sum of money to the Rutherford National Bank at Rutherford, N. J., and has failed and refused to pay the said sum of money to the said Jantzen, although the same has been duly demanded. The defendant admitted its incorporation, and that it refused to pay the sum of money to Jantzen, and denied each and every other allegation of the complaint.

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The plaintiff's cause of action is thus based upon its receipt of this package containing $500, and an express contract to deliver it to the bank at Rutherford, a violation by the defendant of that contract, and a refusal of the defendant to return the package or money to the plaintiff. The court charges the jury:

"So that you will find whether or not there was $500 in the envelope; whether it is a fact that it contained a large amount of money, as claimed by Jantzen. If you find that to be so, I charge you that was sufficient to put them on their inquiry, even though the exact amount was not stated. If it was stated it contained a large amount of money, the amount not being fixed, they were put upon their inquiry, and there was knowledge to them of a valuable package, and if they accepted it without knowing its exact contents, that would be their own negligence; and if after that they gave it to their servant for delivery, they are responsible for its delivery. If, however, Mr. Jantzen handed it to one of the boys without notice of its valuable contents, then I charge you you find for the defendant."

At the request of counsel for the defendant, the court subsequently charged the jury that, unless the defendant's manager was notified by Jantzen that the envelope tendered by him contained money, and he expressly assented on behalf of the company to carry it to the bank at Rutherford, and unless the jury found from this evidence that Hegel, the defendant's manager, agreed on behalf of the defendant, not only to carry a package of money, but to carry it to a specific place, namely, the Rutherford National Bank, at Rutherford, N. J., the plaintiff had not established a contract on the part of the defendant, and their verdict should be for the defendant. The jury found a verdict for the plaintiff, which has been affirmed by the Appellate Term. So that, considering the pleading and these instructions to the jury, the only question is whether the evidence was sufficient to justify the jury in finding that a contract was made by the defendant to carry this sum of money to Rutherford, N. J.

The plaintiff's assignor testified that on the morning of February 16, 1904, he visited the branch office of the American District Telegraph Company at 845 Broadway. That he had $500 in bills with him in an envelope addressed to "J. Jantzen, care of the Rutherford National Bank, Rutherford, N. J." That there was also a deposit slip in the envelope. That at this branch office of the defendant corporation he saw a Mr. Hegel, who had always been in charge when he had been there. That he told Hegel that he wanted a boy to take a package to the bank at Rutherford, and Hegel called up a boy from the back of the office, "Here, you have got to go to Rutherford." That the witness looked at the boy, spoke a few words to him, and said to Hegel, "He won't do." That Hegel called up another boy, to whom Jantzen also objected, and then said, "Hegel, look here. You know there is a lot of money in this package, and it is going to the bank; have you no other boys?" To which Hegel replied, "No; I have no other boys." To which the witness replied, "I will have to go to some other office, and try to get a boy there." That, as Jantzen turned from the counter, a tall boy came in, and then Hegel said, "Here, here is the sergeant, and he is all right." Jantzen spoke to this boy, and asked him whether he had ever been to Rutherford for him before, and the boy said he had, to the bank. Jantzen then handed the boy the envelope, saying, "Hurry

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up and catch that train 9:30 from Chambers street," and the boy took the package and started. That he delivered the package to the boy in the presence of Hegel in the office. Subsequently it was ascertained that the boy had never arrived at the bank, and neither Jantzen nor the defendant has since seen him or the $500. Hegel, the manager of the defendant's branch office, was called for the plaintiff, and testified that he was a clerk in the employ of the defendant at the Morton House branch. That he sent out calls, and kept a record of them. That Jantzen called thereon February 16th. That when he called the witness was in charge of the office in the line of the messenger service. That he remembered getting the boy for Jantzen. Upon cross-examination he testified that the charges of the defendant are based upon the service of the boy by the length of time that he is employed; that is to say, by the hour, regardless of the value of anything intrusted to him. That when a boy is called, the witness does not know what he is called to do. That the boys are called upon to do anything and everything within their strength and capacity. Plaintiff then rested, and the defendant moved to dismiss the complaint, which was denied, and defendant excepted. On behalf of the defendant, Hegel was recalled, and testified that Jantzen never told him that there was any money in the envelope; that he never saw the envelope; that he had sent boys for Jantzen to Rutherford before, and remembered Jantzen on that day telling the witness he wanted a boy to catch a train; that Jantzen did not say that he wanted a boy to go to the bank. He testified that he had sent messengers for Jantzen to Rutherford four or five times, but not to the bank. The plaintiff having rested, the defendant renewed the motion to dismiss the complaint, which was again denied, and defendant excepted. The court submitted the case to the jury, who found a verdict for the plaintiff. The learned Appellate Term in affirming this judgment said:

"It was competent for the jury to find from the proofs that a special contract had been made for the carriage and delivery of this package, and that the defendant's agent, Hegel, was acting within the apparent scope of his authority when making this contract."

That upon the conceded facts the plaintiff's judgment was consistent simply with the defendant's failure to perform a special contract for the transportation of this parcel.

I agree with the learned counsel for the defendant that the defendant is not a common carrier, and neither the learned Appellate Term nor counsel for the plaintiff seeks to sustain this judgment upon the liability imposed upon a common carrier. The defendant was incorporated as a telegraph company, and by the certificate of incorporation the defendants associated themselves for the purpose of owning, constructing, using, and maintaining lines of wires of electric telegraph in the state of New York. The route of their telegraph lines was through and along the streets of the city of New York, connecting offices and dwelling houses and any other buildings by means of said telegraphs with the police stations; the object of establishing said line being to have an alarm telegraph from any building to any station desired, to notify a proper officer that their services are needed at the point from which said telegraph gives a signal. In addition to the telegraph service thus

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established, the company maintains a staff of messenger boys, which it furnishes to its patrons or others needing their services, for which a charge is made based upon the time employed. There is no evidence that the defendant was incorporated to or assumed to carry or deliver packages or other property; that it was incorporated to or actually exercised any of the duties of a common carrier. Jantzen went to the defendant's office, and told its manager that he wanted a boy. He rejected two boys offered by the defendant as unfit for the service that he required, and finally accepted the third boy who appeared and was offered to him. He delivered a package containing money to the boy, with instructions to catch a particular train, and to deliver the package at a particular place, and for that he promised to pay to the defendant their usual charge for the services of a messenger boy. There was no request of the defendant to deliver the package, no delivery of the package itself into the possession of the defendant or its manager after the boy had been accepted by Jantzen as fit for the work he desired him to do. Jantzen delivered the envelope, not to the manager of the defendant, but to the boy that he had accepted, and gave directions as to what the boy was to do. If this package had been delivered to an express company, or to any corporation whose business it was to transport articles, or who were common carriers, a different question would be presented; but here a corporation organized to maintain a line of telegraph wires, who, in addition thereto, provides for its patrons messenger boys, that it hires out for a stipulated price, based upon the time occupied, is asked to furnish a messenger boy to perform a particular service, furnishes such a messenger, whose services are accepted by a patron, and who is intrusted with a particular duty by the patron, which he fails to perform. The jury were instructed by the trial judge that if Jantzen had failed to inform the manager of the defendant as to the value of the package that was intrusted to the boy, the defendant would not be liable; but I do not think that liability can be predicated upon a knowledge by the defendant of the particular service that the boy was expected to perform. If the defendant is responsible, it would be because it had undertaken by special contract to deliver this package to the bank at Rutherford, N. J. Whether it knew the contents of the package or not, if it made such a contract and failed to perform it, the company would be responsible for damages; but it seems to me that there is no evidence that justified a finding that the defendant made any such contract, or undertook to deliver any package for the plaintiff. What the defendant undertook to do was to furnish Jantzen a messenger. It furnished him a messenger whom Jantzen accepted, and a failure of the messenger to perform the service required of him was not the breach of a contract or engagement made by the defendant. The plaintiff, however, claims that the defendant became liable for the loss of this money based upon the principle that, it being the employer of the boy to whom was intrusted this money, and whose larceny resulted in its loss, it was liable for his negligence or malfeasance; and a line of cases of which Howard v. Ludwig, 171 N. Y. 507, 64 N. E. 172, is the latest, is relied on. These were cases where a defendant was sued by a third person for injuries sustained by the negligence of one who it was claimed was the servant of the defendant, and for whose act in

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the performance of the duties imposed upon him the defendant was liable; a ground of liability which would be inconsistent with that alleged in the complaint. Under this complaint the liability of the defendant can be predicated only upon an express contract between Jantzen and the defendant by which the defendant undertook to deliver the package. In Howard v. Ludwig, supra, it is stated in the prevailing opinion:

"If, as claimed by the defendants, the contract was that the express company was to deliver all of the goods sold by the defendants on Staten Island each week for thirty dollars, and the company was to be responsible for the goods, if lost, then unquestionably the defendants would not be liable in this action. But if, instead thereof, the arrangement was that the defendant should pay thirty dollars a week for the team, truck, and driver, and they took charge of the delivery of the goods, sending the team to Staten Island or around New York making deliveries, as the exigency of their business required, then the relation of master and servant was created between them and the driver, and they became liable for his negligent acts."

The dissent was based upon the fact that it was established that the defendants did not employ the driver, did not pay him, and could not discharge him; that the express company

—"had the right to discharge the driver at will. to send him, or some one else in his place, on any day; for the express company, and not the defendants, were responsible for losses which occurred in the delivery of the goods. just as other express companies are liable in the absence of special agreement. So the right of selection of employés necessarily rested with the express company, and was exercised by them. With such facts established by undisputed evidence given by disinterested witnesses, there was no possible basis upon which the jury could rest a finding that this driver was the servant of these defendants, and hence there was no question which the court could submit to the jury, and an attempt to submit such a question was without legal authority."

Baldwin v. Abraham, 57 App. Div. 67, 67 N. Y. Supp. 1079, affirmed on appeal, 171 N. Y. 677, 64 N. E. 1118, discusses the same question. There the defendants engaged six two-horse vans for ten days at the rate of eight dollars per day per van. The owners of the vans agreed to furnish the defendants with the six two-horse vans, driver, and helper, to be responsible for the proper collection and prompt return of all C. O. D. moneys, and for the safe delivery of all goods intrusted to their charge. Under this contract the vans thus hired were engaged in delivering goods from the defendant's store to the purchasers, and it was held that the driver of one of these vans was an employé of the defendants, who was responsible for his negligence. So that in this case it was held that the employé who caused the accident was the servant of the employer, which would be equal to holding that this telegraph boy was the servant of the defendant, and this case was affirmed by the Court of Appeals at the same term that decided the case of Howard v. Ludwig, supra; the memorandum of the court being, "Judgment affirmed, with costs, on the authority of Howard v. Ludwig; no opinion."

It might be that as to third parties this messenger boy would be the servant of both or either, but that could have no relation to the question whether, as between the general employer who furnished the servant and the person who engaged the messenger for a particular work,

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the general employer was responsible for the misfeasance or malfeasance of the messenger. Nor was the case submitted to the jury upon any such theory. The question that was submitted to them was whether or not there was a special agreement by the defendant corporation to deliver this particular package to the bank at Rutherford, and the jury were especially instructed that, in the absence of such an agreement, they must find for the defendant. That instruction is the law of this case, and, as the evidence did not sustain a finding that there was such a special agreement, the verdict was not sustained by the evidence.

It follows that the determination of the Appellate Term and the judgment and order of the City Court must be reversed, and a new trial ordered, with costs to the appellant to abide the event. All concur.

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## LACKNER v. AMERICAN CLOTHING CO.

**(Supreme Court, Appellate Division, Second Department. April 20, 1906.)**

1. TENDER—PAYMENT INTO COURT—EFFECT.

**Where, in an action for rent, defendant paid a certain sum into court as a tender, defendant could not in any event have the money back or any part of it, but it immediately became the property of the plaintiff, which he was entitled to take at any time.**

**[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Tender, § 89.]**

2. COSTS—EFFECT OF TENDER.

**After a tender and payment of money into court, the only question to be litigated is whether plaintiff has established a cause of action for more than the amount of the tender, which, if he fails to do, judgment should be rendered in favor of defendant for costs.**

**[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Costs, §§ 137-164.]**

3. COURTS—MUNICIPAL COURT—PRACTICE—JUDGMENT—AMENDMENT.

**Municipal Court Act, Laws 1902, p. 1563, c. 580, § 254, limits the right of the Municipal Court to amend a judgment to the exceptions taken on the trial, or because the verdict is for excessive or insufficient damages, or otherwise contrary to the evidence or law, and must be exercised within five days after rendition of the judgment; and Code Civ. Proc. § 724, made applicable to the Municipal Court by Municipal Court Act, Laws 1902, p. 1496, c. 580, § 20, only authorizes the amendment of the judgment in cases arising from mistake, inadvertence, surprise, or excusable neglect of the party seeking the relief. *Held* that, where judgment was erroneously entered for plaintiff, notwithstanding his failure to prove a cause of action in excess of a tender, the Municipal Court, after the expiration of five days, had no power to correct the error by amending the judgment, so as to make it a judgment in favor of defendant for costs.**

Appeal from Municipal Court of New York.

Action by John Lackner against American Clothing Company. From a Municipal Court order denying defendant's motion to amend a judgment, so that it should read "Judgment for defendant, with costs," defendant appeals. Affirmed.

Argued before WOODWARD, JENKS, GAYNOR, and RICH, JJ.

Harry A. Gordon, for appellant.

Solon J. Liebeskind, for respondent.

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RICH, J. The plaintiff brought this action to recover the sum of $166.64 for rent of real property, alleged to be due and owing him by the defendant. Before the commencement of the action the defendant had made a tender of $68.12. On the return day it filed an answer, admitting the allegations of the complaint, alleging a counterclaim of $100, pleading the tender, and concurrently therewith paid the $68.12 into court, where it remained and yet is, in the possession of the clerk. Upon the trial the justice before whom the case was tried without a jury, without knowledge of the fact that such tender had been made, rendered judgment for the plaintiff for $63.66 damages, to which the clerk of the court added a trial fee of $2, making a total judgment of $65.66, and taxed costs for the defendant for $15. The justice states in his opinion that he is informed by the clerk that he deducted the $15 costs from the amount of the plaintiff's judgment and paid the balance, $50.66, to the plaintiff's attorney, who on the following day returned it and took a receipt therefor. The plaintiff then obtained a transcript of the judgment, which was filed in the county of New York, and caused an execution to be issued, which was levied upon the defendant's property in that county. As soon as the levy was made the defendant called the attention of the clerk of the Municipal Court to the fact that the judgment was less than the money paid into court, and the clerk thereupon satisfied the judgment, and a transcript of such satisfaction was filed and entered in New York county. The defendant then moved at a Special Term of the Supreme Court for an order vacating and setting aside the execution and levy of the sheriff, and plaintiff concurrently moved for an order reinstating the judgment on the records of the clerks of Queens and New York counties. The Special Term denied the defendant's motion, and granted that of the plaintiff, basing its decision upon the ground that the clerk was without power or authority to satisfy the judgment or transcript such satisfaction, and that the court would not determine the question of fact presented of whether the trial court intended to render a judgment in favor of the plaintiff for $63.66, in addition to the $68.36 paid into court, or a judgment for $63.66 only, upon conflicting affidavits. The defendant then moved in the Municipal Court for an order amending the judgment rendered, so that it would read "Judgment for the defendant, with costs," upon the ground that the form of the judgment was improper, which motion was denied, the court holding that it was not within his power to grant the relief sought. The defendant asks this court to reverse such ruling and grant the motion.

The opinion of the Municipal Court Justice denying said motion clearly establishes that the judgment he intended to render was for $63.66 only, and that at the time of its rendition he did not know that the defendant had paid a larger sum into court. Upon the facts the judgment should have been for the defendant, for costs. The money paid into court immediately became the property of the plaintiff, and he was entitled to take it at any time. The defendant could not in any event have the money back, or any part of it. After such tender and payment the only question to be litigated was whether the plaintiff established a cause of action for more than the amount of the tender. If he failed to prove that he was entitled to more than the amount paid into court,

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judgment should have been rendered for the defendant. It was at the plaintiff's risk of paying defendant's costs if the recovery fell short of the amount tendered, and the defendant's risk of losing the amount deposited in the event of his success upon the trial. Such payment was more than sufficient to satisfy the amount determined by the trial court to be owing the plaintiff, notwithstanding which he seeks to enforce his judgment, thus taking from the defendant money to which he has no claim or right.

We should not hesitate to reverse the order appealed from and grant the relief asked, were it within our power to do so, but are reluctantly forced to the conclusion that the appellant has mistaken his remedy and that this court is without power to aid him. The Municipal Court has no jurisdiction or powers, except such as are conferred upon it by statute. The only power to amend a judgment of that court is found in section 254 of the Municipal Court Act (Laws 1902, p. 1563, c. 580), and is limited to the exceptions taken upon the trial, or because the verdict is for excessive or insufficient damages, or otherwise contrary to the evidence or contrary to law, and must be exercised within five days after the rendition of the judgment. The relief sought, and to which the defendant was entitled, had he moved within the time limited, arose from the fact that the judgment was "contrary to law," within the meaning of those words as used in the section referred to, and at the time the defendant's motion was made the Municipal Court was without power to grant such relief. Granting the contention that section 724 of the Code of Civil Procedure is by the provisions of section 20 of the Municipal Court Act, Laws 1902, p. 1496, c. 580, made applicable to municipal courts, it does not aid the appellant, as the exercise of the power therein given the court is limited to cases arising from the mistake, inadvertence, surprise, or excusable neglect of the party seeking relief. An error of the trial court in the form of the judgment rendered is not one of the grounds upon which the court may act in granting the relief authorized by its provisions. The defendant, however, is not without a remedy. A court of equity can give the appropriate relief and restrain the enforcement of the execution and judgment during the pendency of an action.

The order appealed from is affirmed, with costs. All concur.

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## A. BUCHANAN'S SONS v. CRANFORD CO.

**(Supreme Court, Appellate Division, Second Department. April 20, 1906.)**

1. HIGHWAYS—USE—CHARACTER OF VEHICLES—FRIGHTENING ANIMALS.

**Under Highway Law, Laws 1890, p. 1205, c. 568, § 155, as amended, prohibiting the passage of any vehicle propelled by steam on a highway without some one being sent ahead to warn persons of its approach, where a steam roller was operated in a highway without such warning being given, and as plaintiff's horse was driven in view of the roller suddenly and unexpectedly, and a steam whistle was sounded by the engineer in charge, the horse bolted and ran away, the operator of the steam roller was guilty of negligence.**

**[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Highways, §§ 457, 459, 469.]**

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2. DAMAGES—INJURY TO HORSE—EVIDENCE.

In an action for injuries caused by the frightening of a horse by the operation of a steam roller on a highway, evidence of the usable value of the horse during the period its owner was deprived of its use by reason of the injuries sustained was admissible.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, § 280.]

Appeal from Municipal Court of the City of New York.

Action by A. Buchanan's Sons against the Cranford Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Argued before HIRSCHBERG, P. J., and WOODWARD, JENKS, RICH, and GAYNOR, JJ.

George A. Logan, for appellant.

Henry A. Powell, for respondent.

HIRSCHBERG, P. J. The plaintiff has recovered a judgment for damages which are chargeable to the negligence of the defendant. While a horse and wagon of the plaintiff was being driven on one of the public streets in the borough of Brooklyn, the horse became frightened by a steam roller then operated by the defendant in violation of the requirements of section 155 of the Highway Law (chapter 568, p. 1205, Laws 1890, as amended). There was evidence tending to show that there was no one in front of the roller to warn persons of its approach, as required by the statute. The plaintiff's horse was driven in view of the roller suddenly and unexpectedly, and as a steam whistle was sounded by the engineer in charge of the roller the plaintiff's horse bolted and ran away. The evidence in the case was sufficient to warrant the justice in concluding that the plaintiff's driver was free from blame, and the circumstances established negligence on the part of the defendant.

In Mullen v. Village of Glens Falls, 11 App. Div. 275, 42 N. Y. Supp. 113, a horse driven by the plaintiff approached a cross street and was frightened by a steam roller belonging to the defendant and approaching on a cross street. No warning was given of the presence of the steam roller as required by statute, and it was held that the facts were sufficient to justify a verdict in favor of the plaintiff. In Halstead v. Village of Warsaw, 43 App. Div. 39, 59 N. Y. Supp. 518, a steam roller was allowed upon the street after work was suspended for the day. A horse passing the roller shied and ran away, and in an action to recover the resultant damages it was held that a nonsuit was error. The case of Rector v. Syracuse Rapid Transit R. Co., 66 App. Div. 395, 72 N. Y. Supp. 745, relied on by the counsel for the appellant, is not in point, as there the provisions of the statute requiring some one to be sent ahead of the steam roller at a distance of at least one-eighth of a mile were complied with.

The court was not in error in admitting testimony as to the usuable value of the horse during the period the owner was deprived of its use by reason of the injuries sustained. See Allen v. Fox, 51 N. Y. 562, 10 Am. Rep. 641; and Moore v. Metropolitan St. R. Co., 84 App. Div. 613, 617, 82 N. Y. Supp. 778.

The judgment should be affirmed.

**Judgment of the Municipal Court affirmed, with costs. All concur.**

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## ROWE v. GERRY et al.

(Supreme Court, Appellate Division, Second Department. April 20, 1906.)

CONTRACTS—BUILDING CONTRACTS—SUBSTANTIAL PERFORMANCE—ACTIONS—ISSUES AND PROOF.

Where, in an action on a building contract, plaintiff alleged performance, it was not essential to sustain such complaint that plaintiff prove more than a substantial performance.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, §§ 1353, 1750.]

Appeal from Special Term, Westchester County.

Action by Edward Rowe against Isabel H. Gerry and others. From a judgment for plaintiff, defendant Gerry appeals. Affirmed.

Argued before HIRSCHBERG, P. J., and WOODWARD, JENKS, HOOKER, and GAYNOR, JJ.

Henry G. K. Heath, for appellant.

J. Mortimer Bell, for respondent.

PER CURIAM. This case has been here twice on appeal from judgments for the plaintiff. 86 App. Div. 349, 83 N. Y. Supp. 740; 109 App. Div. 153, 95 N. Y. Supp. 857. The complaint was to recover the final balance due on a building contract; i. e., it was for performance of the contract. The first judgment was reversed, for the reason that performance was not shown by the plaintiff, but nonperformance, and excuse therefor, whereas a recovery could be had under the complaint only for performance. The second judgment was affirmed, because substantial performance, which is performance, was shown and found by the trial court. A reargument was ordered. The learned counsel for the appellant understands that the second judgment should have been reversed, because it was for substantial performance, which he understands from our two former opinions to be not performance, but nonperformance. We do not wish to leave any such impression as that. There is a wide difference. Substantial performance is performance, and entitles the plaintiff to recover under a complaint for performance; and especially is that so under building contracts, where some of the infinite details may be easily overlooked. Glacius v. Black, 50 N. Y. 145, 10 Am. Rep. 449; Spence v. Ham, 163 N. Y. 220, 57 N. E. 412, 51 L. R. A. 238. It may well even happen that the plaintiff may not know of existing omissions when he draws his complaint for performance. When such omissions are proved by the defendant, the plaintiff may recover on his complaint for performance, if they be unsubstantial, and not willful, but the cost of supplying them has to be deducted.

The judgment is affirmed.

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## PEOPLE v. WOLF.

(Supreme Court, Appellate Division, Second Department. April 20, 1906.)

1. FISH—FISH AND GAME LAW—VIOLATION—ACTION TO RECOVER PENALTY—PLEADINGS—QUESTIONS INVOLVED.

Where, in an action to recover the penalty provided by forest, fish, and game law, for possessing certain fish contrary to the provisions of section 47 of the law, as amended by Laws 1905, p. 585, c. 314, and providing that pickerel and wall-eyed and yellow pike shall not be taken or possessed from March 1st to April 30th, both inclusive, "provided that during the close season any person may buy, possess or sell pickerel or pike taken without the state if such person shall have a license from the commission so to do," issued after a bond has been approved and conditioned as in such section provided, and further provided "that any person purchasing during the close season of a dealer giving such bond may possess the same," the cause of action was limited by the complaint to the possession of certain fish during the close season by defendant, he not having a license and not having given a bond required, and the answer denied the alleged unlawful possession and averred that all the fish possessed by defendant during the time covered by the allegations of the complaint were taken without the state of New York and were purchased by him of a dealer who had duly given the bond and obtained the license, etc., the question of the resale by defendant of the fish was not involved.

2. SAME—DEFENSES—PROOF—STATUTORY CONSTRUCTION.

Under such section, defendant was not bound to prove that the fish in his possession were taken without the state.

Appeal from Trial Term, Suffolk County.

Proceeding by the people against Simon Wolf. From a judgment dismissing the complaint, the people appeal. Affirmed.

Argued before HIRSCHBERG, P. J., and HOOKER, GAYNOR, RICH, and MILLER, JJ.

Selah B. Strong, for the People.

C. F. Goddard, for respondent.

RICH, J. The action was brought to recover the penalty provided by the forest, fist, and game law for possessing wall-eyed pike and pickerel, contrary to the provisions of section 47, as amended by chapter 314, p. 585, of the Laws of 1905. This section provides that pickerel and wall-eyed and yellow pike shall not be taken or possessed from March 1st to April 30th, both inclusive, "provided that during the close season any person may buy, possess or sell pickerel or pike taken without the state if such person shall have a license from the commission so to do," issued after a bond has been given approved and conditioned as in such section provided, and further provided "that any person purchasing during the close season of a dealer giving such bond, may possess the same." The cause of action is limited, by the allegations of the complaint, to the "possession" of 32 wall-eyed pike and 10 pickerel during the close season by the defendant; he not having a license and not having given the bond required by the section referred to. The answer denied the alleged unlawful possession and averred that all wall-eyed pike and pickerel possessed by defendant during the time covered by the allegations of the complaint were taken without the state of New York and were purchased by him of a dealer who had duly given the bond and obtained the license provided for by said section 47.

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It was stipulated upon the trial that Mizel & Brownell, wholesale fish dealers in the borough of Manhattan, had given a bond and procured a license authorizing them to sell pike and pickerel under the provisions of section 47, and the defendant testified, without contradiction, that he purchased the fish at the Fulton Market of Mizel & Brownell, at their regular sidewalk public auction. It was shown upon the trial that the defendant sold several of the fish. The learned trial justice found, however, that the question of the resale of the fish purchased by defendant from a licensed dealer was not involved in the action. In this he was clearly right. Upon the pleadings as they stood, no question based upon the selling of fish was before the court, and evidence of such sales having been made did not establish the plaintiff's right to a recovery. Judgment against the defendant was authorized only upon evidence of an unlawful "possession." The complaint was dismissed upon the merits. We think the findings are supported by the evidence, and the exceptions thereto are without merit.

The contention that the defendant was bound to prove that the fish in his possession were taken without the state is not well founded. It overlooks the provision of the statute which makes the possession of such fish lawful when purchased of a licensed dealer during the close season. It was not necessary for the defendant to prove more than that the fish were purchased from such a dealer. The rule contended for would make it incumbent upon every person purchasing fish from licensed dealers for family consumption to provide himself with proof that the specific fish purchased was taken without the state of New York, a construction of the statute not warranted, an intolerable hardship, and not within the intention of the lawmakers.

The judgment must be affirmed, with costs.

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## GANSEVOORT BANK v. EMPIRE STATE SURETY CO.

(Supreme Court, Appellate Division, First Department. April 20, 1906.)

1. PLEADING—DEMURRER—EFFECT OF DEMURRER AS OPENING RECORD.

On a demurrer to an answer the sufficiency of the complaint is to be examined, as a demurrer searches the record for the first fault in the pleading.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, §§ 540–548.]

2. BONDS—ACTION ON BOND—COMPLAINT—SUFFICIENCY.

Code Civ. Proc. § 481, requires a complaint to contain a plain statement of the facts constituting the cause of action. Code Civ. Proc. § 1915, provides that the condition in a bond given in a penal sum has the same effect as if it contained a covenant to pay the sum or perform the act specified in the condition thereof. A complaint in an action against a surety company alleged that a third person delivered his note to plaintiff, who declined to receive it without additional security, that the maker deposited with plaintiff as security for the amount a bond of himself and defendant, and that the note was not paid; and it was then alleged that concurrently with the delivery of the note defendant delivered to plaintiff a bond by which it acknowledged it was bound to plaintiff in the sum of $10,000, that the bond was conditioned for the payment of $5,000, and that by reason of the failure of the maker of the note to pay the amount due on the foot of the

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**note there was a breach of the condition, and that all the conditions were fulfilled and all things happened and all times elapsed necessary to entitle plaintiff to maintain the action for recovery on foot of the bond for the amount of the note. *Held*, that the complaint was insufficient, as it did not state that the bond was conditioned by the payment of the maker of the note, and the statements that all conditions were fulfilled, etc., were mere conclusions.**

**3. APPEAL—DECISIONS REVIEWABLE—INTERLOCUTORY DECISIONS.**

**An appeal from the "decree" sustaining a demurrer, upon which an interlocutory judgment sustaining the demurrer was entered, is dismissible, as no appeal is allowed by the code from a decision.**

**[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 411.]**

Appeal from Special Term, New York County.

Action by the Gansevoort Bank against the Empire State Surety Company. From a judgment sustaining a demurrer to a partial defense set up in the answer, and from the "decree" sustaining the demurrer, defendant appeals. Judgment sustaining the demurrer to the partial defense reversed, and dismissed on the appeal from the "decree."

Argued before O'BRIEN, P. J., and INGRAHAM, McLAUGHLIN, CLARKE, and HOUGHTON, JJ.

Benjamin Reass (Hirsh & Rasquin, of counsel), for appellant.

J. Campbell Thompson, for respondent.

CLARKE, J. This action was brought to recover the sum of $3,700 on a surety bond or undertaking. Defendant interposed as a partial defense usury, and to this defense plaintiff demurred. The demurrer was sustained. The matters pleaded as a partial defense are conceded to have been bad; but it is urged that, inasmuch as the complaint does not state facts sufficient to constitute a cause of action, any defense was good. "A bad answer is good enough for a bad complaint." "A demurrer searches the record for the first fault in pleading, and reaches back to condemn the first pleading that is defective in substance; because he who does not so plead as to invite an issue cannot compel his adversary to so plead as to accept it." Baxter v. McDonnell, 154 N. Y. 432, 48 N. E. 816. It is necessary, therefore, to examine the complaint.

It alleges that one Newman delivered to the plaintiff, for value received, his note, by which he promised to pay $5,000 four months after date, but that, prior to the delivery and negotiation of the note, plaintiff declined to receive it without additional security, and that, when the note was delivered, Newman, as an inducement to the plaintiff to take the note, deposited with it as security for the amount a bond of himself and the defendant, and also a certified check for $1,500, and thereupon the plaintiff took the note, and that the note was subsequently dishonored and protested for nonpayment, no part of which has been paid, except the certified check. The complaint then alleges that concurrently with the delivery of the note the defendant executed and delivered to the plaintiff a bond, by which it acknowledged it was held and bound to the plaintiff in the sum of $10,000, payment of which it bound itself to make; that the bond was conditioned for the payment of $5,000, and that by reason of the failure of New-

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man "to pay the amount due on foot of said note there has been a breach of the condition of said bond"; "that all conditions were fulfilled, and all things happened, and all times elapsed necessary to entitle the plaintiff to maintain this action for recovery on foot of said bond of the amount of said note less by the said $1,500."

The complaint evidently attempts to state a cause of action for a breach of the conditions of the bond. Under section 1915 of the Code of Civil Procedure the condition in a bond given in a penal sum such as the one at bar "has the same effect * * * as if it contained a covenant to pay the sum, or to perform the act specified in the condition thereof." The condition of the bond—that is, the covenant of the defendant—is not set forth in full or alleged in its legal effect, except in that it is alleged "that said bond was conditioned for the payment of $5,000." But it goes on to say "that solely by reason of the failure as herein stated of the said Randolph M. Newman to pay the amount due on foot of said bond there has been a breach of the conditions of said bond." It therefore appears that the conditions in the bond are not simply for the payment of $5,000, and that the breach of them is predicated solely upon an act or failure to perform an act by Newman. If that act of Newman, whatever it may be, be the condition of the bond for the breach of which the action was brought, it is nowhere stated in the complaint. For all that appears this bond may have been for any purpose beside security for the payment of a note, as, for instance, as collateral security for the payment of a mortgage on real estate, or security for the faithful service of an employé. Indeed, the complaint leaves it in doubt whether the bond alluded to in the fourth paragraph of the complaint is the same bond attempted to be described in the seventh paragraph thereof.

Not having set forth the terms and conditions of the bond, other than the final sum thereof and the amount of the condition thereof, the attempted allegations of the breach thereof are solely of conclusions. "That all conditions were fulfilled," there being no statement of what the conditions were, "and all things happened," no things being set forth, "and all times elapsed necessary to entitle the plaintiff to maintain this action," with no dates or periods or times set forth, are pure conclusions, and hence bad. The complaint must contain "a plain and concise statement of the facts constituting each cause of action without unnecessary repetition." Section 481, Code Civ. Proc. There are no facts set up to enable the court to determine whether the alleged conclusions are properly drawn. It nowhere having been stated in the complaint that the bond was conditioned by the payment by Newman of the amount due on foot of said note, the allegation in the eighth paragraph is a clear legal conclusion. It does not give the defendant an opportunity to deny and raise an issue. That this complaint is bad is too obvious to justify citation.

It follows, therefore, that the judgment sustaining the demurrer to the partial defense should be reversed, with costs, upon the ground of the insufficiency of the complaint, and the demurrer overruled, with costs, with leave to the plaintiff to withdraw the demurrer on payment of such costs, or to apply to the Special Term for leave to amend.

The defendant, in its notice of appeal, also appeals from the "de-

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cree" sustaining the demurrer, upon which the interlocutory judgment was entered. There is nothing that this could apply to except the decision upon which the interlocutory judgment was entered; and, as no appeal is allowed by the Code of Civil Procedure from a decision, such appeal is dismissed, with costs. Spies v. Monroe, 35 App. Div. 527, 54 N. Y. Supp. 916. All concur.

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## FARWELL v. BOODY et al.

**(Supreme Court, Appellate Division, First Department. April 20, 1906.)**

PLEADING—BILL OF PARTICULARS.

**Where the complaint alleged that plaintiff was the owner and entitled to the immediate possession of 1,100 shares of certain stock, and that between certain dates defendants being then in possession thereof converted the stock to their own use, but does not allege that plaintiff ever had possession of the stock, or that it was taken from her possession or control, and the answer was a general denial, plaintiff should not be required to furnish a bill of particulars stating the date when plaintiff delivered or parted with the possession of the certificates of stock and each of them, or the date when they were taken from her possession; she making affidavit in opposition thereto that it was impossible for her to furnish such particulars, because she did not voluntarily part with such possession, but such certificates were taken from her possession without her consent.**

Appeal from Special Term, New York County.

Action by Martha C. Farwell against David A. Boody and others. From so much of an order as required plaintiff to give a bill of particulars as to the date when she delivered or parted with certain certificates of stock, and the name of the person or persons to whom she delivered them, plaintiff appeals. Modified.

Argued before O'BRIEN, P. J., and PATTERSON, INGRAHAM, LAUGHLIN, and CLARKE, JJ.

John J. Crawford, for appellant.

George M. Mackellar, for respondents.

INGRAHAM, J. The complaint alleges that the plaintiff was the owner and entitled to the immediate possession of 1,100 shares of the capital stock of the Peoria & Eastern Railway Company, of the value of $110,000, and that between the 1st day of July, 1903, and the 1st of November, 1903, the defendants, at the city of New York, being then in possession of said stock and the certificates thereof, unlawfully converted and disposed of the same to their own use, and to the plaintiff's damage in the sum of $50,000. The answer was in form a general denial, and the defendants made an application to require the plaintiff to serve a bill of particulars. This motion was granted, and the plaintiff appealed from the fourth and fifth clauses of the order, which required her to state the date when the plaintiff delivered or parted with the possession of said certificates of stock and each of them, or the date when such certificates of stock and each of them were taken from the possession of the plaintiff without her consent, specifying whether such certificates of stock were delivered by the plaintiff, or



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were taken from her possession without her consent. The plaintiff, in opposition to this motion, submitted an affidavit which stated that it was impossible for her to furnish these particulars, for the reason that she did not voluntarily part with such possession, but such certificates were taken from her possession without her consent.

I do not think that the plaintiff should be required to furnish these particulars. The complaint is based upon a conversion of the stock by the defendants, but there is no allegation that the plaintiff ever had possession of the stock, or that the stock was taken from her possession or control. She is entitled to maintain the action on proving that she was entitled to the possession of the stock and that the defendants converted it to their own use.

The order should be modified by striking out the fourth and fifth clauses, and, as modified, affirmed, with $10 costs and disbursements to the plaintiff. All concur.

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## HAYS et al. v. FAATZ REYNOLDS FELTING CO.

(Supreme Court, Appellate Division, First Department. April 20, 1906.)

1. VENUE—PLACE OF TRIAL.
   The place where the transaction which is the subject of the action took place will have a controlling effect in determining the place of trial, as provided by general practice rule 48.
   [Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Venue, § 21.]

2. SAME—CONVENIENCE OF WITNESS—EMPLOYÉS.
   On an application for a change of the place of trial to subserve the convenience of witnesses, the convenience of witnesses in the employ of a party to the action is not generally given the same consideration as is given to witnesses whose attendance a party must procure to sustain his cause of action or defense.
   [Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Venue, §§ 76, 77.]

3. SAME—NUMBER OF WITNESSES.
   Where, on an application for a change of venue to subserve the convenience of witnesses in an action for breach of warranty of goods sold, plaintiff showed a greater number of witnesses required than defendant, six of whom were not plaintiff's employés, while all of defendant's witnesses were employés, and the testimony of plaintiff's witnesses was as material as that expected to be given by defendant's witnesses, the burden of proof being on plaintiff, it was error to grant the change requested by defendant.
   [Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Venue, §§ 76, 77.]

Appeal from Special Term, New York County.

Action by Isaac M. Hays and others composing the firm of Hays, Levi & Co., against the Faatz Reynolds Felting Company. From an order changing the place of trial from New York to Broome county, plaintiffs appeal. Reversed.

Argued before O'BRIEN, P. J., and PATTERSON, INGRAHAM, LAUGHLIN, and CLARKE, JJ.

Manfred W. Ehrich, for appellants.
Gerard Roberts, for respondent.

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INGRAHAM, J. The plaintiffs reside in the city of New York and are engaged in business here. The defendant is a corporation with an office for the transaction of business in the city of New York. A contract was made in the city of New York between the plaintiffs and the defendant, by which the defendant agreed to sell and the plaintiffs to buy certain goods, which were subsequently delivered by the defendant to the plaintiffs in the city of New York. The plaintiffs claim that there was a breach of warranty, by which they sustained damage. After issue was joined the defendant moved to change the place of trial to Broome county upon an affidavit which stated that it had 13 witnesses to prove its defense in the action. All these witnesses appeared to be employés of the defendant corporation and resided in Broome county. In opposition to the motion the plaintiffs submitted an affidavit which alleged that they had 16 witnesses, 6 of whom were not employés of the plaintiffs. The plaintiffs thus show a greater number of witnesses than the defendant, and it would appear, from the statement of what these witnesses are expected to testify to, that the plaintiff's witnesses are as material as the defendant's. The contract was made in the city of New York. The transaction took place in the city of New York, and this fact is to be considered, and will have a controlling influence in determining the place of trial. Rule 48, General Rules of Practice; Church v. Swigert, 99 App. Div. 273, 90 N. Y. Supp. 939; Jacobs v. Davis, 65 App. Div. 144, 72 N. Y. Supp. 558.

In determining a question of this kind, when a motion to change the place of trial is based upon the convenience of witnesses, the convenience of those witnesses in the employ of a party to the action is not generally given the same consideration as is given to witnesses who are not in his employ and whose attendance a party must procure to sustain his cause of action or defense. We must also consider the fact that the burden of proof is upon the plaintiff. The plaintiff is bound to prove that the goods delivered were not according to the contract; and if the plaintiff fails in this respect, testimony of the defendant's witnesses will not be necessary. In every aspect of this case, it would seem that the defendant failed to present to the court facts which sustained the finding that the convenience of the witnesses who will be necessary on the trial required that the place of trial be changed; and under these circumstances I think the learned court below was not justified in changing the place of trial.

The order appealed from is therefore reversed, with $10 costs and disbursements, and the motion denied, with $10 costs. All concur.

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## DONNELLY v. THIRD AVE. R. CO.

**(Supreme Court, Appellate Division, First Department. April 20, 1906.)**

**COSTS—SECURITY—APPLICATION—LACHES.**

**On a motion by defendant to require plaintiff to give security for costs, on the ground that plaintiff had been adjudged a bankrupt after issue joined, defendant was not obliged to show affirmatively diligence in discovering the bankruptcy.**

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Appeal from Special Term, New York County.

Action by Michael Donnelly against the Third Avenue Railroad Company. From an order vacating an order requiring plaintiff to give security for costs, defendant appeals. Reversed.

Argued before O'BRIEN, P. J., and PATTERSON, INGRAHAM, LAUGHLIN, and CLARKE, JJ.

Bayard H. Ames, for appellant.

D. O. L. Cohalan, for respondent.

LAUGHLIN, J. The order requiring security for costs was granted upon the ground that since the commencement of the action, and after issues joined therein, and after the cause was placed upon the calendar, the plaintiff was duly adjudged a bankrupt. The order vacating the order requiring security for costs appears to have been granted upon the ground of laches. We fail to find in the record any evidence of laches. It does not appear when the plaintiff became a bankrupt, or when the defendant became aware of such bankruptcy. Surely, where the bankruptcy occurs after issue joined, there can be no duty of active vigilance on the part of the defendant to discover it; and the defendant is not obliged to show affirmatively on a motion of this kind diligence in discovering the bankruptcy occurring after joinder of issue, which is the basis of the motion.

It follows, therefore, that the order should be reversed, with $10 costs and disbursements, and the motion denied, with $10 costs. All concur.

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## REMSEN v. WINGERT.

(Supreme Court, Appellate Division, First Department. April 6, 1906.)

SPECIFIC PERFORMANCE—CONTRACT TO BUY LAND.

A vendor of land, agreeing to convey it with general warranty free from all incumbrances, is not entitled to a specific performance of his contract where a deed under which he holds title reserves to an adjoining owner the privilege of keeping the windows forever open that were in the house on the adjoining lot, though in the meantime a building had been erected on the adjoining lot without any windows facing the lot in question.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Specific Performance, §§ 257-263.]

Appeal from Special Term, New York County.

Action for specific performance of a contract for the purchase of real estate by Jane Remsen against Charles A. Wingert. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Argued before O'BRIEN, P. J., and McLAUGHLIN, INGRAHAM, CLARKE, and HOUGHTON, JJ.

Theodore T. Baylor, for appellant.

John Ewen (William R. Wilder and Wilder & Allen, on the brief), for respondent.

CLARKE, J. The plaintiff and the defendant entered into a written contract under seal wherein the plaintiff agreed to sell and the de-

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fendant agreed to buy a certain described piece of land, with the buildings thereon, situated in the city of New York, and known as No. 2 Watts street. In and by said contract the plaintiff agreed to deliver on the closing day "a proper deed, containing a general warranty and the usual full covenants for the conveying and assuring to them the fee simple of the said premises free from all incumbrances." The defendant rejected the title and refused to perform, upon the ground that the title was not marketable.

It will be necessary to consider but one of the defects insisted upon. The learned trial court made this finding of fact:

"That the building erected on the premises in question, which is known as No. 2 Watts street, has been in existence in its present state for one hundred years. That for some time prior to May 2, 1835, the said premises and the adjoining premises, known as No. 4 Watts street, were owned in common by Abraham Remsen and James Ackerman. That on that day the said Ackerman deeded to the said Remsen his interest in the premises No. 2 Watts street, and the said Remsen deeded to the said Ackerman his interest in the premises No. 4 Watts street. That in the deed from the said Ackerman to Remsen there is reserved 'the privilege of keeping the windows forever open that are in the easterly side of said house No. 4 Watts street,' and in the deed from Remsen to Ackerman there is granted 'also the privilege of keeping the windows open forever that now are in the easterly side of said house No. 4 Watts street.' That the said provisions are the covenants alleged to create an easement in favor of the premises No. 4 Watts street, over the premises in question, and are the basis of one of the objections made by defendant to said title."

The court further found:

"That some time in the year 1895 the building on the premises No. 4 Watts street, which was a brick front, frame, two-story building, was torn down, and a six-story brick factory and business building was erected in its place. That the building destroyed had no windows on the side facing No. 2 Watts street. That the building erected in its place has on the side facing upon No. 2 Watts street, at least twelve windows."

In his opinion the learned court said:

"The fact that Ackerman reserved the 'privilege of keeping the windows forever open that are on the easterly side of said house No. 4 Watts street,' etc., does not give the owner of No. 4 Watts street an easement over the property which the plaintiff contracted to sell to the defendant, because the evidence shows that the building that was on the property at the time the Ackerman deed was made is not now on said property, and an easement does not survive the destruction of said building that was on the property at the time the easement was created. Heartt v. Kruger, 121 N. Y. 386, 24 N. E. 841, 9 L. R. A. 135, 18 Am. St. Rep. 829."

The question in Heartt v. Kruger was whether or not the tenements of adjacent owners were subject to a perpetual party wall easement, dominant as to the defendant's, and servient as to the plaintiff's, property. The original owner of the two lots had erected two buildings thereon, with a party wall dividing them. He conveyed both premises to one Falk, and took back from his grantee a mortgage on the lot owned by the defendant, which described the westerly line of the lot as "running through the center of a party wall." The buildings were subsequently burned down. The defendant then obtained title to one lot, and erected upon the old foundation wall a party wall of the same thickness as the former one. Judge Gray said:

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"This erection of the new wall partly upon the adjoining lot was without any other right in the defendant than was to be found in the condition of his title. * * * Where will we find the legal foundation for such a claim? There had certainly been no agreement, and there was no express grant of any easement in the land by the common owner, and I do not see how any grant arose by implication from his mortgaging the lot now owned by the defendant. The only language in the mortgage capable of such an implication was in the description of the westerly boundary, which I have quoted above. That, however, was merely language of description, and, while sufficient to create a servitude in the adjoining lot for the purpose of the existing party wall, was insufficient to predicate any grant of a perpetual easement upon. * * * The implied agreement that the party wall existing at the time of the conveyance of the two lots by their common owner should continue in its use and occupancy as such cannot be extended so as to relate to a changed condition of things caused by the casual destruction of the wall and building."

The decision that an implied agreement growing out of a description which carries to the center of a party wall does not create a perpetual easement, which survives the destruction of the buildings, seems not to apply to an easement created by reservation "forever" in mutual deeds. Deeves v. Constable, 87 App. Div. 352, 84 N. Y. Supp. 592, is cited by respondent. But it can have no force in this controversy, for it is said in the opinion:

"The covenant in the deed contains no reservation of any easement of light and air. * * * Such removal [of the old building] carried with it no right to put windows in the side walls [none such having been in the old building], and thereby acquired an easement of light and air over the restricted space for the benefit of its side. The restrictive covenant does not provide for it, and no conditions are shown to exist which require that it should be applied to it. Easements of light and air are protected only when they are reserved and remain beneficial to the property in whose favor they exist."

There is no doubt that an easement of light and air, at least to the extent of the windows then existing, was reserved in the mutual conveyances, and that, if existing, said easement would be still beneficial to the property. When one acquires a title by deed, it will not be affected by nonuser unless there is a loss of title in some of the ways recognized by law. Mere nonuser, however long continued, does not create an abandonment. Conabeer v. N. Y. C. & H. R. R. Co., 156 N. Y., at page 484, 51 N. E. 402, and cases cited. In Welsh v. Taylor, 134 N. Y., at page 460, 31 N. E., at page 899, 18 L. R. A. 535, it was said:

"A person who acquires title by deed to an easement appurtenant to land has the same right of property therein as he has in the land, and it is no more necessary that he should make use of it to maintain his title than it is that he should actually occupy or cultivate the land. Hence his title is not affected by nonuser, and unless there is shown against him some adverse possession, or a loss of title in some of the ways recognized by law, he may rely on the existence of his property, with full assurance, when the occasion arises for its use and enjoyment, he will find his rights therein absolute and unimpaired."

Said Mr. Justice Laughlin in McCullough v. Broad Exchange Co., 101 App. Div. 566, 92 N. Y. Supp. 533:

"* * * This right of way and easement were acquired by deed, and the rule is that such an easement is not extinguished by a nonuser, but only by grant or adverse possession. * * * It was formerly held in England that the easement of 'ancient lights' might be lost or suspended until the premises

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were restored to their original condition, by enlarging or changing the position of the windows, but it is doubtful whether that rule still prevails, * * * and, moreover, it was never given place in our jurisprudence."

An easement is an interest in land created by grant or agreement, express or implied, which confers a right upon the owner thereof to some profit, benefit, or dominion or lawful use out of or over the estate of another. "That the covenant against incumbrances is broken by an outstanding easement of any kind is perfectly well established by the authorities in this state." Huyck v. Andrews, 113 N. Y. 81, 20 N. E. 581, 3 L. R. A. 789, 10 Am. St. Rep. 432.

This is an action for specific performance. The owner of No. 4 Watts street, to which the easement is claimed to be appurtenant by reservation in the deed, is not a party, and no determination here had would bind or control her. The facts are doubtful or in dispute as to these matters; what windows existed at the time of the deed in 1835 on the easterly side of No. 4 Watts street; whether the house pulled down in 1897 was the same house which was standing in 1835; what windows, if any, were on the east side of that house so pulled down. Further, it distinctly appears in evidence that the building now No. 4 Watts street has a large number of windows upon the east side, and that the present owner thereof still claims the easement for light and air, and has notified the defendant in person that if he attempted to build on the line he would have a lawsuit on his hands. It therefore seems to me that this case comes within the rule as stated by Mr. Justice O'Brien in Salisbury v. Ryon, 105 App. Div. 445, 94 N. Y. Supp. 352, citing the many cases in the books upon this subject; that the court will not force a party to take title where doubtful questions of law and fact exist concerning it, and all the parties who have a right to be heard upon that question are not before the court.

The judgment should therefore be reversed, with costs to the appellant, and judgment should be directed to be entered in favor of the defendant, dismissing the plaintiff's complaint, and judgment directed in favor of the defendant against the plaintiff on the defendant's counterclaim for the sum of $500, paid on account of the purchase price, and $185 for expenses for examining the title, together with interest thereon and costs. All concur.

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## EUGENE C. LEWIS CO. v. METROPOLITAN REALTY CO.

(Supreme Court, Appellate Division, Second Department. April 20, 1906.)

1. LANDLORD AND TENANT—LEASES—INJURIES TO TENANT'S GOODS—NEGLIGENCE—EXEMPTIONS.

A provision in a lease that the lessor shall not be liable for any damage or injury which may be caused by a leakage of gas, steam, or water pipes, or leakage or overflow of any kind whatsoever, did not relieve the landlord from liability for an overflow of a water tank, resulting from the affirmative negligence of the landlord's servants in defectively adjusting a manhole cover to the tank.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Landlord and Tenant, §§ 647–655.]

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2. SAME—NEGLIGENCE—RES IPSA LOQUITUR.

Where the goods of certain tenants of a building were injured by the overflow of a water tank, the fact that the tank had been water-tight, and that it leaked around the edges of a manhole immediately after the taking off of the manhole cover to clean the tank and the replacing thereof by defendant's servants, was in itself evidence that the cover had been negligently replaced.

Appeal from Trial Term, Suffolk County.

Action by Eugene C. Lewis Company against the Metropolitan Realty Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Action for damages to chattels by negligence. The plaintiff was tenant of one floor of a building of the defendant. The defendant supplied water to the whole building by means of water tanks, one of which was on the floor above the plaintiff. The defendant had it cleaned out on Sunday. The cleaners had to enter it through a manhole on top of it. This hole was closed by a cover with a flange, which fitted a flange in the rim of the manhole, and the interstice was made tight by a rubber washer or gasket which had to be put in. On Monday morning when the pump below was started to force water into this tank until it was full, and thence from this tank through a connecting pipe up to a tank above, the water leaked through the seams of these flanges, and overflowed down into the plaintiff's floor and injured its chattels, and the chattels of several other persons, consisting of printed matter, sent by them to the plaintiff to be bound, it being a bookbinder. They assigned their claims for damages to the plaintiff, and this action is for the damage to the plaintiffs and also upon the said other claims.

The lease of the defendant to the plaintiff contained the following: "The lessor shall not be liable for any damage or injury which may be caused by a leakage of gas, steam, or water pipes, or leakage or overflow of any kind whatsoever."

The trial judge ruled that this prevented the plaintiff recovering for its own damage, and allowed a recovery on the assigned claims only.

Argued before HIRSCHBERG, P. J., and WOODWARD, JENKS, GAYNOR, and RICH, JJ.

Charles J. Hardy, for appellant.

Willard N. Baylis, for respondent.

GAYNOR, J. It is claimed that the exemption clause in the lease for damage by leakage prevents a recovery for the damage to the plaintiff's assignors as well as for the damage to the plaintiff. It is enough to say that such exemption clause did not in terms exempt the defendant for liability to the plaintiff for acts of negligence by it, and no such exemption can be implied. The recovery here is for the affirmative act of negligence in putting on the manhole cover defectively. Levin v. Habicht, 45 Misc. Rep. 381, 90 N. Y. Supp. 349; Rathbone v. N. Y. C. R. Co., 140 N. Y. 48, 35 N. E. 418.

The fact that the tank had been water-tight, and that the leak around the edges of the manhole immediately showed itself after the taking of it off to clean the tank and the replacing of it by the defendant, was in itself evidence that the cover had been negligently replaced, under the maxim that the thing speaks for itself; and in addition there was evidence that the rubber gasket or washer had not been properly put in.

The reading of this case is rendered burdensome by much colloquy between counsel and the court, and discussion of counsel, which it

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should not contain at all. A case on appeal should be stripped of all such matter, unless it be excepted to, or contain an admission, or the like.

The judgment and order should be affirmed.

**Judgment and order affirmed, with costs. All concur; HIRSCHBERG, P. J., in result.**

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## FINK v. HARTOG & BEINHAUER CANDY CO.

**(Supreme Court, Appellate Division, Second Department. April 20, 1906.)**

**MASTER AND SERVANT—SERVANT'S INJURIES—CONTRIBUTORY NEGLIGENCE.**

**Where a servant in a factory stopped a freight elevator at one of the floors, but the elevator, owing to some defect, went up, and the servant, on returning to the shaft, intending to go down on the elevator, walked into the open shaft, there being daylight at the place and the shaft being plainly visible, he could not recover for his injuries because of contributory negligence.**

**[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 706–709.]**

Appeal from Trial Term, Kings County.

Action by Charles Fink against the Hartog & Beinhauer Candy Company. From a judgment in favor of plaintiff, and from an order denying a motion for a new trial, defendant appeals. Reversed.

Argued before WOODWARD, JENKS, HOOKER, RICH, and GAYNOR, JJ.

L. Sidney Carrere, for appellant.

Edward J. McCrossin, for respondent.

GAYNOR, J. The plaintiff testified that he went up alone from the ground floor to the third floor by the elevator with a hand truck to get some boxes of candy; that he stopped the elevator and wheeled his truck off some considerable distance to the middle of the floor and loaded it; that he then pulled it over to within four or five feet from the elevator, noticed that the elevator platform was about an inch above the room floor, and went upon it and let it down level with the floor; that it stopped there, and he immediately stepped off and took hold of his truck and pulled it to the elevator to go upon it, but instead went down the open shaft, the elevator having meanwhile gone up; that he did not go backwards in pulling the truck, but forwards to the elevator. The accident happened in daylight, and the elevator could be seen without difficulty. The plaintiff's brother, a fellow workman, corroborated him.

For the plaintiff to walk into the open shaft in this way was plain negligence. The case of Dieboldt v. United States Baking Co., 72 Hun, 403, 25 N. Y. Supp. 205, seems to be applicable.

The plaintiff's brother and another fellow workman testified that the elevator would sometimes when standing start and go up to the top or down to the bottom of its own accord, because of a defect. Even so, the plaintiff walked right into the open shaft, according to his own story.

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But the evidence for the plaintiff's side is not only inherently improbable, but most seriously contradicted. A girl working on the same floor testified that when the plaintiff had loaded his truck he went backwards pulling it all the way over to the elevator shaft and into it without stopping, meanwhile looking at her and singing a song to her. A member of the defendant testified that he came up in the elevator with the plaintiff, let him off at the third floor, and then continued on to a floor above, where he left the elevator to have some freight put on it. He came down by the stairs to the third floor and saw the accident. He corroborated the girl as to how it happened.

The judgment should be reversed on the law and the facts.

**Judgment reversed, and new trial granted; costs to abide the event. All concur.**

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## RAMSAY v. HAYES, Fire Com'r.

**(Supreme Court, Appellate Division, Second Department. April 20, 1906.)**

MUNICIPAL CORPORATIONS—FIRE DEPARTMENT—PENSIONS.

Under New York City Charter, Laws 1901, p. 331, c. 466, § 790, providing that after ten years continuous service in the fire department the amount of annual pension to be allowed shall be one-half the salary of the member at the time of his retirement, or such less sum as the condition of the fund will warrant, the burden is upon the fire commissioner, when he fixes a pension at less than one-half the salary of a retired fireman, to show that the condition of the fund is such as to prevent the allowance of the full amount.

Hooker and Gaynor, JJ., dissenting.

Appeal from Special Term, Kings County.

Action by John Ramsay against Nicholas J. Hayes, as fire commissioner of the city of New York. From a judgment for plaintiff, defendant appeals. Affirmed.

Argued before JENKS, HOOKER, RICH, MILLER, and GAYNOR, JJ.

James D. Bell, for appellant.

Charles J. Ryan, for respondent.

RICH, J. This is an appeal from a judgment in favor of the plaintiff, and the facts are as follows: The plaintiff, who had been in the employ of the fire department of the city of Brooklyn and Greater New York for more than 10 years, was retired in March, 1903. The order retiring the plaintiff allowed him $533.33 per annum, whereas plaintiff claims that he was entitled to one-half his salary as pension, or $800 per annum. The plaintiff alleged that the difference between $533.33 and $800 was due him, and the fire commissioner claims it was not. The act set up by the fire commissioner is as follows:

"After ten years active and continuous service in the fire department, the amount of annual pension to be allowed shall be one-half the annual compensation allowed such officers or member as salary at the date of his retirement from the service, or such less sum in proportion to the number of officers and members so retired as the condition of the fund will warrant." Section 790 of the Charter (Laws 1901, p. 331, c. 466).

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The fire commissioner claims he had a perfect right to reduce the amount payable to the plaintiff. He also claims that the burden was on the plaintiff to prove that the commissioner was not warranted in paying him the less amount. The real question here then is, on whom is the burden of proof? The defendant claims that the presumption is in his favor; that his acts as an official were correctly and legally done. I believe that the qualifying clause in this statute is in the nature of a proviso and that the principles discussed in Harris v. White, 81 N. Y. 532 and Rowell v. Janvrin, 151 N. Y. 67, 45 N. E. 398, do apply, and that the burden is not upon plaintiff to negative the proviso clause of the statute; that he properly pleaded that portion of the clause under which he claims to maintain his contention; and that, if the commissioner is acting under the proviso, the burden is upon him to allege and prove that the funds were insufficient to meet the demands upon them. Again, the facts were "peculiarly within the knowledge of defendant," and the burden was therefore upon him. Greenleaf on Evidence (15th Ed.), vol. 1, § 79.

The judgment must be affirmed, with costs.

JENKS and MILLER, JJ., concur.

HOOKER, J. (dissenting). This case was tried without a jury, judgment was entered in favor of the plaintiff, and the defendant appeals. The findings of fact are as follows:

"That, on March 14, 1903, plaintiff having served over 10 years in active and continuous service as a member of the uniformed force of the fire department, and being at that time an engineer of steamers in the said fire department, the annual salary attached to which said position was, at said date, at the rate of $1,600 per annum, was retired from all other or further service in said fire department on the certificate of the medical officers thereof that he was totally and permanently disabled for the performance of duties, and that such liability was not caused in or induced by the actual performance of the duties of his position, on a pension, as fixed by the commissioner of the department of fire as trustee of the New York fire department relief fund, of one-third of his pay or salary at the time of his said retirement, to wit, at the sum of $533.33 per annum. That plaintiff's disability occurred after 10 years' active and continuous service in the fire department, and having then been retired, he was entitled to the pension fixed by the charter (section 790), viz., one-half of his compensation at the time of such retirement. That from March 14, 1903, to June 1, 1904, being for a period of 1 year 2½ months, there was lawfully due to plaintiff from defendant, as trustee of the said relief fund, at the rate of $800 per annum pension, the sum of $966.65, as stated in the complaint herein; but that the said defendant has paid to the plaintiff the sum of $644.45 only, leaving a balance due to plaintiff from said defendant as trustee up to June 1, 1904, amounting to the sum of $322.20, as stated in the complaint."

Section 790 of the charter of the city of New York (Laws 1901, p. 331, c. 466), provides that:

"In case of total permanent disability, at any time, caused in or induced by the actual performance of the duties of his position, or which may occur after ten years' active and continuous service in the said fire department, the amount of annual pension to be allowed shall be one-half of the annual compensation allowed such officer or member as salary at the date of his retirement from the service, or such less sum in proportion to the number of officers and members so retired as the condition of the fund will warrant."

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No evidence was offered on the part of either party as to the condition of the pension fund, and it will be seen from the facts and from this section 790 that the sole question in this case is upon whom does the burden of proof rest to show the condition of the fund. If this burden is with the plaintiff, then the judgment is wrong; for it nowhere appears that the condition of the fund is such as to warrant the payment of the full one-half of the annual compensation he had been allowed. On the other hand, if it lies with the defendant to show this, the judgment is right; for the defendant has not shown that the plaintiff has been awarded by him a sum of less than half the annual compensation because of consideration of the proportion of the number of officers and members retired and the condition of the fund. The plaintiff seeks to have us hold that the words in the statute, "or such less sum in proportion to the number of officers and members so retired as the condition of the fund will warrant," form a proviso in and not an exception to the other provisions of the section. Then he would have us invoke the rule that:

"Where an exception is incorporated in the body of the clause of the statute, he who pleads the clause ought to plead the exception. But when there is a clause for the benefit of the pleader, and afterwards follows a proviso which is against him, he may plead the clause, and leave it to his adversary to show the proviso." Harris v. White, 81 N. Y. 532, 546.

It is doubtless true, as he urges, that:

"An exception exempts something absolutely from the operations of the statute by express words in the enacting clause. A proviso defeats its operation conditionally. An exception takes something out of the statute that otherwise would be part of the subject-matter of it. A proviso avoids them by way of proviso or excuse."

There is nothing, however, in the language of the statute, which points to a legislative intent to treat this clause either as an exception or proviso, and we do not believe it to be necessary to decide that it is either, and, if either, which one. The clause is part of a more or less elaborate scheme in relation to many phases of the fireman's pension fund which have been enacted out of charitable consideration for the benefit of those who may be injured by reason of their engagement in a necessary and sometimes heroic occupation, and those who have become incapacitated after serving in that occupation for a long time, together with their dependents. The administration of the fund and management of the affairs connected therewith are vested in the fire commissioner, who also occupies the position of the actual and virtual head of the fire department of the city. The act of the defendant fire commissioner as trustee of the pension fund must be, we think, at least until the contrary is shown, presumed to have been done with honesty and discretion, when he allowed the plaintiff but one-third, instead of one-half, of his former salary as a pension, and that this act on his part was done out of consideration of the condition of the pension fund and the number of officers and members retired. It is said in Wood v. Terry, 4 Lans. 80, 84:

"The law presumes the due performance of official duty; and this presumption must be overcome before the court can declare the proceedings void. When an officer or party is in the attitude of asserting rights founded on official acts, and when due performance is essential to the right, due perform-

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ance must be proved, and cannot be presumed. * * * But when a party asserts a right based on the illegality or irregularity of the proceedings of a court or public officer, the onus is on him to prove the defects; otherwise, the presumption prevails."

Broom, in commenting upon the maxim, "Omnia præsumuntur rite et solemniter esse acta," says:

"Again, where acts are of an official nature, or require the concurrence of official persons, a presumption arises in favor of their due execution; * * * that a man, acting in a public capacity, was properly appointed and is duly authorized so to do; that, in the absence of proof to the contrary, credit should be given to public officers who have acted prima facie, within the limits of their authority, for having done so with honesty and discretion." Broom's Legal Maxims, 944.

In Bank of the United States v. Dandridge, 12 Wheat. (U. S.) 64, 69, 6 L. Ed. 552, it was stated that the law "presumes that every man, in his private and official character, does his duty, until the contrary is proved. It will presume that all things are rightly done, unless the circumstances of the case overturn this presumption, according to the maxim, 'omnia præsumuntur rite,'" etc.

Considerations of expediency should not entirely be disregarded. The force of firemen and officers in the city of New York is composed of many scores of men, who are being from time to time retired and placed upon the pension list. It is doubtless true that sometimes it may be necessary to award retiring members of the force less than the limit the law would allow them if the pension fund were in its most flourishing condition. To adopt a rule other than that we have announced should govern would permit suits to be brought by these retired members against the fire commissioner which would result in judgments against him for the full amount possible to be allowed by statute, unless in all of such cases he met the burden sought to be imposed upon him by the plaintiff in this case: First, of showing, among other things, the condition of the fund, the number of firemen, the amounts which had been and were likely to be derived from the various sources which supplied the fund, the number of men who had served for a considerable length of time, together with the exact service many of them rendered, and the number of probable retirements as near as he could estimate it within a reasonable time after the showing; and, secondly, of satisfying the court that upon all these considerations he had exercised a wise discretion and that the conditions of the fund did not warrant an award of the full amount which might be allowed by statute. To impose this burden upon the trustee of this fund is more than we can believe the Legislature intended. In a case of this sort, if the plaintiff is not content with the allowance made to him, but claims the maximum which might be allowed under the statute, the burden should be upon him to show that the condition of the fund would warrant his claim.

The judgment, therefore, should be reversed, and a new trial granted.

GAYNOR, J. (dissenting). Section 789 of the charter of the city of New York (Laws 1901, p. 326, c. 466) provides for a pension fund for the fire department, and prescribes the revenues from various sources which shall feed it. It makes the fire commissioner the trus-

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tee of it, and directs him to invest and husband it. Its capacity is limited to the said revenues, and the pensions have necessarily to be scaled down to keep within it. Section 790 prescribes who are to get pensions, and how the amounts thereof are to be fixed. It requires the fire commissioner to fix the amount in every case. To take the plaintiff's case (and they are all governed in the same way), it provides that in the case of members of the department retired after ten years active and continuous service "the amount of annual pension to be allowed shall be one half of the annual compensation allowed such officer or member as salary at the date of his retirement from the service, or such less sum in proportion to the number of officers and members so retired as the condition of the fund will warrant." It also gives the commissioner power to retire any officer or member, and requires him on doing so to determine the amount of the pension.

It seems plain from this that the retired officer or member is not entitled to draw his pension until the commissioner has computed it and fixed it according to the condition of the fund. If the fund warranted it in the plaintiff's case, the commissioner's duty was to fix his pension at one-half of the salary he had been receiving from the city, viz., at the sum of $800, but if the fund could not pay that sum, then he had to fix it at the best sum the fund could pay. It follows that if he refused to fix it, the plaintiff would have to compel him to perform that duty before he could maintain an action to collect it; and if he fixed it unlawfully the plaintiff could compel him to do it lawfully; but the plaintiff could not maintain an action to recover a sum over and above that fixed by the commissioner, as he is trying to do here.

This case was tried on the pleadings. They did not show the condition of the fund; but the complaint does allege that the commissioner fixed the pension at $533.33 a year, and prays judgment for the difference between that and $800 a year. It is claimed that the burden was on the defendant commissioner to show that he had done his official duty properly and lawfully in fixing the amount of the pension. I do not see how that can be so. If the plaintiff could maintain the action at all, it would be for him to show that the sum which the complaint alleges was fixed by the commissioner was less than the sum which should have been fixed. The presumption is that the commissioner did his duty.

There is a very rare exception to the rule that the plaintiff must prove the allegations of the complaint, that a negative has not always to be proved by a plaintiff, as in an action to recover a penalty for selling liquors without a license, where the burden is on the defendant to show a license; but that is because all sales are presumptively illegal, for the reason that they are prohibited without a license, and it it therefore for the defendant to justify the sale; but the exception has no application here. The defendant was under no legal prohibition; on the contrary, he had to fix the amount of the pension. Nor do such cases as Harris v. White, 81 N. Y. 532, apply. The principle there discussed is not involved here at all. The exception of the affirmative being on the defendant where the evidence is "peculiarly" within his knowledge is only part and parcel of the exception already mentioned,

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and limited to the class of cases already referred to. Gr. on Ev. § 79. Moreover, the statistics with regard to the said fund are open to every one.

The judgment should be reversed.

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## PEOPLE ex rel. HUMMEL v. REARDON.

(Supreme Court, Appellate Division, Second Department. April 20, 1906.)

1. CRIMINAL LAW—APPEAL—RIGHT TO APPEAL.

An appeal in a criminal case is not a matter of inherent right, guarantied by the Constitution, but exists only by express authorization of the Legislature.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 2563, 2615.]

2. BAIL—APPEAL—CERTIFICATE OF REASONABLE DOUBT—STAY OF PROCEEDINGS—STATUTES.

Code Cr. Proc. § 555, authorizes admission to bail, after conviction of a crime not punishable with death, of a defendant who has appealed "when there is a stay of proceedings, but not otherwise." Section 556 provides that, if the appeal is from a judgment imposing a fine only, the undertaking shall be for payment of the fine, and, if the judgment imposes imprisonment, that appellant will surrender himself, if the judgment be affirmed or modified or the appeal be dismissed, or, in either case, "if the certificate of reasonable doubt be vacated" as provided in section 529. Section 527 declares that an appeal to the Appellate Division "stays the execution of the judgment or other determination" on the filing of a certificate of reasonable doubt with the notice of appeal, "but not otherwise"; and section 529 authorizes a stay of execution until the determination of an application for a certificate of reasonable doubt. *Held*, that a defendant who has appealed from a conviction of a crime not punishable with death, and has obtained an order from a justice of the Supreme Court staying the execution of the judgment pending an application for a certificate of reasonable doubt, may be admitted to bail pending the granting or refusal of such certificate.

Appeal from Special Term.

Habeas corpus by the people, on relation of Abraham H. Hummel, against Edward J. Reardon, a peace officer of the city of New York, to obtain relator's discharge from arrest pending an application for a certificate of reasonable doubt. From an order discharging relator, the people appeal. Affirmed.

Argued before HIRSCHBERG, P. J., and JENKS, HOOKER, GAYNOR, and RICH, JJ.

Robert S. Johnstone, for the People.

Nathaniel Cohen, for respondent.

GAYNOR, J. On December 20, 1905, the relator was convicted of the misdemeanor of conspiracy at a trial term of the Supreme Court held in the county of New York, and was sentenced to one year's imprisonment in the Penitentiary and to pay a fine of $500. On the same day one of the justices of the Supreme Court, upon the application of counsel for the relator, made an order returnable ten days later requiring the district attorney of the county of New York to show cause why the certificate of reasonable doubt provided for by section 527 of

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the Code of Criminal Procedure should not issue. This order further directed that the execution of the judgment be stayed pending the determination of the application (Id. § 529) and that the relator be meanwhile admitted to bail in the sum of $10,000. Bail in this sum was furnished and the relator was released from custody. The district attorney, upon the theory that the relator's admission to bail was "in excess of the authority" vested in the justice, subsequently issued a warrant for the relator's arrest, upon which he was taken into custody in Kings county by a peace officer of the county of New York. He immediately sued out the writ of habeas corpus in Kings county, upon the return of which, the foregoing facts appearing, an order was entered sustaining the writ and directing his discharge. It is this order from which this appeal has been taken, and the sole question presented is whether or not, after a conviction of a crime not punishable with death, a defendant who has appealed and obtained an order from a justice of the Supreme Court staying the execution of the judgment pending the determination of an application for a certificate of reasonable doubt, may be admitted to bail before the granting of the application.

The right of appeal is not guarantied by the constitution. It only exists when the legislature has expressly authorized it. People v. Trezza, 125 N. Y. 740, 26 N. E. 933; Matter of Jones, 181 N. Y. 389, 74 N. E. 226; People v. Patrick, 182 N. Y. 131, 74 N. E. 843; People v. Rutherford, 47 App. Div. 209, 62 N. Y. Supp. 224; People v. Dunn, 31 App. Div. 139, 52 N. Y. Supp. 968, affirmed 157 N. Y. 528, 52 N. E. 572, 43 L. R. A. 247. "An appeal is not a matter of inherent right; it is one extended to a defendant by the favor of the state." Gray, J., in People v. Patrick, supra. As an incident to this purely statutory right, which in many cases might otherwise avail him little, the legislature has from time to time enacted measures for a convicted defendant's liberation on bail pending the decision of the higher court.

Prior to the Revised Statutes, when there was no statutory right of appeal, the trial court might postpone sentence and certify to the Supreme Court any question as to which it was in doubt, but whether or not the proceedings should be reviewed was a matter wholly within its discretion. The exercise of this discretion, however, did not, of course, in any way impair its power to continue the defendant's bail until final judgment. The Revised Statutes provided two methods of review, viz., certiorari before judgment, or writ of error after judgment. On certiorari provision was made for a stay of execution and the defendant's admission to bail. A writ of error operated as a stay, provided the justice who issued it so directed, and in allowing the writ the justice might issue a habeas corpus and admit the defendant to bail. Either writ could be allowed, stays granted and the defendant enlarged on bail upon ex parte applications and without notice to the district attorney.

It is contended by the appellant that the provisions of the Code of Criminal Procedure which abolished writs of error and certiorari and declared that "the only mode of reviewing a judgment or order in a criminal action is by appeal" were intended not only to correct the two principal evils of the former system, namely, the "inconvenience of this

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double right of appeal" and its tendency to "great delay" (Graham's Draft Code 1850, § 581, note. See, also, People v. Bork, 1 N. Y. Cr. R. 393) but also to prevent the discharge on bail of a convicted defendant pending appeal until after the hearing and decision of an application for a certificate of reasonable doubt made on due notice to the district attorney. Such an interpretation of the statute would work great hardship in many cases, and is not to be adopted unless the language employed by the legislature fairly requires it. To determine this question reference must be had to the various Code provisions dealing with the subject.

Section 555 provides for the admission to bail after conviction for a crime not punishable with death, of a defendant who has appealed "when there is a stay of proceedings, but not otherwise." Section 556 provides that if the appeal be from a judgment imposing a fine only the undertaking shall be for the payment of the fine, etc., and if from a judgment of imprisonment that the appellant will surrender himself if the judgment be affirmed or modified, or the appeal be dismissed, "or" (in either case) "if the certificate of reasonable doubt be vacated" as provided in section 529. Section 585 prescribes the qualifications of bail and a general form of undertaking. Section 527 which is entitled "Stay of Proceedings on Appeal," etc., provides that an appeal to the Appellate Division "stays the execution of the judgment or other determination" upon filing a certificate of reasonable doubt with the notice of appeal, "but not otherwise." Section 529 applies to stays upon appeals to the Court of Appeals, and is not material to the present inquiry. Section 529 after declaring that the certificate of reasonable doubt cannot be granted until such notice of the application as the judge may prescribe has been given to the district attorney, accompanied by a specification of the grounds upon which the application is based, provides that the judge may "stay the execution of the judgment until the determination of such application." The remaining portion of this section provides that but one application may be made, and that the certificate may be vacated for delay in bringing the appeal to argument. It thus appears that there is express legislative authority for the release on bail pending appeal of a convicted defendant "when there is a stay of proceedings, but not otherwise," and for the granting of a stay of execution (a) pending the determination of the appeal, and (b) pending the determination of an application for a certificate of reasonable doubt.

While conceding that the stay of execution pending appeal provided for by section 527 is a "stay of proceedings" within the meaning of section 555, the learned district attorney argues that the temporary stay of execution provided or by section 529 is not such a "stay of proceedings," notwithstanding precisely the same form of language is used in both sections; and he bases his argument largely upon the circumstances that section 556 refers to a certificate of reasonable doubt which, as he contends, renders it meaningless unless bail is only permissible when such certificate has been first issued. The answer is that section 556 as originally enacted contained no such reference. The Code provisions for the vacatur of a certificate of reasonable doubt were the result of certain statutory amendments of sections 529, 556,



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585 and other sections, which went into effect May 14, 1897 (Laws 1897, p. 569, c. 427), and are therefore not to be taken into consideration in determining the purpose and intent of the original framers of those sections. Eliminating the language thus interpolated and construing the sections as they previously stood it is clear that the stay of proceedings the existence of which authorizes the defendant's admission to bail (section 555) includes as well the temporary stay provided for by section 529 as that resulting from the filing of a certificate of reasonable doubt under section 527.

The district attorney urges in his brief, however, that these very amendments were passed with a view to controlling the abuses following the issuance of indiscriminate stays in criminal cases "by refusing bail pending appeal, unless the defendant, after notice to the district attorney, can convince a judge that there is a reasonable doubt of his guilt." We do not agree with this view. The amendments in question had no relation to the subject of bail. Their sole purpose was to provide a means, then lacking, whereby tardy appellants at large on recognizances could be summarily dealt with. People v. Lyons, 29 App. Div. 174, 51 N. Y. Supp. 811. In the case just cited, in speaking of the frequency with which certificates of reasonable doubt were then granted, the court said:

> "The result has been in many cases to create unreasonable delay and to impede the course of justice. Defendants who have obtained stays in such cases have often been tardy in their appeals and the people have found many obstacles thrown in their way in bringing the cases before the appellate courts. To remedy this difficulty the legislature made an amendment to section 529," etc.

In this connection it should be noted, as showing that the legislation in question had no bearing on the question of bail, that the act of 1897 also makes provision for the dismissal of criminal appeals if the same "be not brought on for argument as promptly after the return has been as the circumstances of the case will reasonably admit." Code Cr. Proc. § 534, as amended by Laws 1897, p. 569, c. 427. With these provisions of law available to the District Attorney it is difficult to see how the mere fact that an appellant has been released on bail can delay the disposition of the appeal.

The requirement of notice to the District Attorney and service upon him of a specification of the grounds of the application, before a certificate of reasonable doubt which operates as a stay pending the appeal, can be granted, is not, in the absence of language indicting a contrary intention on the part of the legislature, to be taken as an implied deprivation of the power of the justice to whom the application is addressed to let the defendant to bail pending the application, when, in the exercise of the power expressly given him by the same section he has stayed the execution of the judgment for the purposes of the application. These requirements serve a useful purpose in preventing the issuance of ex parte stays operative until final judgment, but they do not require the arbitrary imprisonment of a defendant who in good faith intends to prosecute an appeal upon grounds which prima facie satisfy the judge to whom the application is made that there is reasonable doubt whether the conviction should stand. The supposition that

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the legislature intended that a convicted defendant, though abundantly entitled to a stay pending appeal, must undergo actual incarceration in order to afford the district attorney an opportunity to contest his application is utterly at variance with the motive and spirit of the legislation under consideration which was intended to postpone the infliction of the penalty following a conviction of doubtful validity. This purpose would not be furthered by the detention in jail of a defendant prima facie entitled to a stay and bail whose surrender in execution of the judgment could be assured by a sufficient undertaking. A temporary stay, so far from being of any benefit to a defendant, would operate to his distinct disadvantage unless bail were allowed, for the only effect would be to add to the term of the sentence a period of preliminary imprisonment. We cannot believe the legislature contemplated any such incongruity.

The district attorney lays some stress upon the fact that the Code while prescribing the form of undertaking to be given where there is a stay pending appeal makes no provision for an undertaking for the defendant's surrender if his application for such a stay is denied. We regard this as a mere casus omissus. The power to let bail in either case being expressly conferred, the absence of an appropriate statutory form of bond will not prevent the exercise of that power.

The order should be affirmed.

**Order discharging the relator affirmed, with costs. All concur.**

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## DAVENPORT v. CORBETT.

**(Supreme Court, Appellate Division, Second Department. April 20, 1906.)**

**BROKERS—SALE OF REAL ESTATE—EMPLOYMENT BY DEFENDANT—EVIDENCE.**

**Where a broker sent the owner of real estate a form of a purchase option, which the owner executed, and a sale took place under the option, the broker was not entitled to recover commissions from the owner, as the transaction did not amount to an employment.**

Appeal from Municipal Court of New York.

Action by Julius B. Davenport against Marshall J. Corbett. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Argued before WOODWARD, JENKS, HOOKER, GAYNOR, and RICH, JJ.

Alonzo G. McLaughlin, for appellant.

R. M. Cahoone, for respondent.

GAYNOR, J. This is an action by a real estate broker to recover a brokerage for the sale of the defendant's house and lot. He was never employed by the defendant to sell the property. The Site Committee of the Academy of Music of Brooklyn desired to get a suitable site. The plaintiff, as well as other brokers, was trying to get it for them. For that purpose he got purchase options for them of the several owners of a large number of lots, including the defendant's, which taken together would make a plot large enough for such site.

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The defendant's house was in the possession of a tenant. The plaintiff sent to the tenant a printed form of such options, and asked him to get the defendant who was not in the city to sign it. He told him finally after some negotiation and delay that he might have the defendant sign the option for $11,000 as the purchase price if he could not get it for less, and the defendant signed the option for that sum. The sums of $9,000 and $10,000 had been offered by the plaintiff. The terms of the option are that the defendant "hereby gives the Site Committee of the new Academy of Music, through J. Davenport, Son & Co." (the name under which the plaintiff was in business) "as brokers, for the sum of $1, a sixty day option to purchase" the defendant's house and lot for $11,000.

The plaintiff did not see the defendant, and this was all that occurred between them, before the signing of the option. Title was passed under the option. There is not enough to support a finding of fact that the plaintiff was employed by the defendant. It is true that the option disclosed that the plaintiff was acting as a real estate broker, but he never asked employment of the defendant or informed him that he was to charge him a commission, and the law did not call upon the defendant to assume that he was acting for him. Real estate brokers are often commissioned by purchasers to buy. They cannot act for both sides without their consent. The plaintiff's success in getting the Site Committee to take the plot, instead of some of the other plots that were offered, depended on his getting the option price low enough. There was no indication whatever that he was working for the plaintiff, but the contrary. A real estate broker cannot recover a commission of the seller unless he was employed by him to sell, either expressly or impliedly. If the facts be just as consistent with non-employment as with employment, they do not suffice to prove a contract, and that is the best that could be claimed for the plaintiff on the facts here.

The judgment should be reversed.

**Judgment of the Municipal Court reversed, and new trial ordered; costs to abide event. All concur.**

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## CLEWS et al. v. PEPER.

**(Supreme Court, Appellate Division, First Department. April 20, 1906.)**

JUDGMENT—DEFAULT—INQUEST—VACATION—EVIDENCE.

**Defendant having failed to appear for trial, an inquest was taken and a judgment entered, after which defendant applied to vacate the same on the affidavit of his attorney that defendant had a good and substantial defense to the merits, as shown by the answer. The answer was but a general denial, and the attorney did not aver that defendant had fully and fairly stated the facts constituting the defense to him, nor did the attorney give it as his professional opinion that on such statement he believed the facts established a valid defense. There was also no affidavit from defendant himself, nor explanation why such affidavit was not presented. *Held*, that the papers were insufficient to justify a vacation of the judgment.**

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Appeal from Special Term, New York County.

Action by Henry Clews and others against George Peper. From a Special Term order opening a default and vacating a judgment entered on an inquest, plaintiffs appeal. Reversed.

Argued before O'BRIEN, P. J., and PATTERSON, INGRAHAM, LAUGHLIN, and CLARKE, JJ.

Nathan D. Stern and Felix Jellenik, for appellants.

John C. L. Daly, for respondent.

CLARKE, J. This is an action brought to recover a balance claimed to be due to plaintiffs as brokers upon the sale of certain shares of stock purchased by them for the account of the defendant and upon his request. The answer is a general denial. Issue was joined in 1901. The case has been on the calendar since October, 1901. Having appeared upon the Friday call calendar, it was moved for trial by the plaintiffs, and thereafter duly appeared upon the day calendar of Trial Term, Part 10, and upon the first day that it so appeared, the defendant not appearing, it was marked for inquest for a subsequent day. It again appeared upon the day calendar upon the adjourned day, and, the defendant not appearing, an inquest was taken on said day, January 23, 1906, and judgment thereon entered on February 7, 1906. Thereafter the defendant obtained an order to show cause, returnable on the 16th of February, why said inquest should not be set aside and the judgment vacated.

The defendant moved upon the answer and an affidavit of defendant's attorney. The moving papers are insufficient. The taking of an inquest and the entering of judgment thereon are not mere idle ceremonies, to be brushed aside for the mere asking. Parties seeking to be relieved from their defaults must show a reasonable excuse for their neglect, and must establish a meritorious case, before they are entitled to the favor of the court. The affidavit of the attorney sets forth "that the defendant has a good and substantial defense to the merits of this cause of action, as shown by the answer of defendant, a copy of which is hereto annexed." That answer is a general denial. The attorney does not aver that his client has stated to him fully and fairly the facts constituting his defense, nor give it as his professional opinion that upon such statement he believes that such facts constitute a good and substantial defense to the merits; nor is there any affidavit from the defendant himself, nor explanation why such affidavit is not presented.

The relief prayed for should not have been granted upon these papers, and the order appealed from should be reversed, with $10 costs and disbursements, with leave, however, upon payment thereof, to renew the motion at Special Term upon further papers within 10 days. All concur.

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## LYNCH v. SHANLEY CO.

(Supreme Court, Appellate Division, Second Department. April 2, 1906.)

1. MASTER AND SERVANT—INJURIES TO SERVANT—WARNING.
Where, in an action for injuries to a laundry mangle operator, she testified that she knew very well, if she did not watch out, her hand might get caught, and that it would hurt if it did get caught, she was fully apprised of all that defendant could have informed her, and hence defendant was not guilty of negligence in failing to give her proper instructions.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 308, 309.]

2. SAME—NEGLIGENCE OF FOREMAN—DETAILS OF WORK.
Where a master owed a servant no duty of instruction, the negligent direction of the foreman respecting the manner of doing the work concerned a mere detail thereof, and not a duty devolving on the master, for the omission of which the master was liable.

Appeal from Trial Term, Westchester County.

Action by Annie Lynch against the Shanley Company. From a judgment in favor of plaintiff, and from an order denying defendant's motion for a new trial, it appeals. Reversed.

Argued before HIRSCHBERG, P. J., and HOOKER, GAYNOR, RICH, and MILLER, JJ.

George Gordon Battle, for appellant.
Marston Niles, for respondent.

MILLER, J. The plaintiff was working in defendant's laundry upon a machine called a "mangle," which contained a revolving roller, over which the linen was fed into the machine for the purpose of being dried and ironed. She was waxing the roller on the feeding side of the machine while it was in motion, and in some manner her hand was drawn into the machine, inflicting serious injury, for which she seeks to recover in this action.

Three grounds of negligence were assigned: First, the omission to provide proper machinery; second, allowing the plaintiff, alleged to have been a minor, to clean the machine while in motion, in violation of the statute; and, third, the omission to discharge the duty of properly instructing the plaintiff. No proof was offered in support of the first two assignments of negligence, and, although it is stated in respondent's brief that the answer admits that the plaintiff was a minor, this allegation was denied on information and belief, and no proof was offered in support of it. The only question respecting the defendant's negligence, submitted to the jury by the learned trial justice, was whether it omitted to discharge the duty of giving proper instructions, and the judgment must be sustained upon this ground, if at all.

The plaintiff had been at work in the laundry for some time before the accident, and had had opportunity to observe fully the operation of this machine. She testified:

"I didn't want to get my hand in, in that place. I knew very well, if I did not watch out, it might get caught. * * * I knew my hand might get caught, if I didn't look out. I did not know how badly it would be hurt,

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**but I knew it would hurt it if it got caught in there; and that is what I was careful about all the time. * * * Now, the linen, whenever it would be put here, would be caught by the revolving mangle, drawn down through the roller underneath, and deliver it on the receiving side; and I had seen that going on for several months, so that I knew that that machine would have the effect of drawing things in there, unless I looked out for it."**

It appears that the plaintiff was told by the foreman to observe the manner in which the other girls operated the machine, and that she cleaned it precisely as she had seen the others do; and her complaint is that she was in fact instructed to clean the machine on the involving side, which subjected her to danger, instead of on the revolving side where she would have been safe. So far as the duty of instruction which the master owed her is concerned, it appears by her own evidence that she was fully apprised of all that the master could have informed her; and, this being so, the master owed her no duty in this regard. Hickey v. Taaffe, 105 N. Y. 26, 12 N. E. 286; Stevens v. Gair, 109 App. Div. 621, 96 N. Y. Supp. 303.

The defendant was not responsible for the negligence of the foreman, except such negligence occurred in the attempted discharge of, or the omission to discharge, some duty which the master owed, because this case is not brought under the employers' liability act; and, as the master owed no duty of instruction, the negligent direction of the foreman respecting the manner of doing the work, in case there was such negligence, concerned a detail of the work, and not a duty devolved upon the master. It is therefore unnecessary to consider whether section 3 of the employers' liability act (chapter 600, p. 1750, of the Laws of 1902) is applicable to all actions for negligence between master and servant, and what effect, if any, it has upon the doctrine of assumption of risk.

The judgment and order should be reversed, and a new trial granted; costs to abide the event. All concur.

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## DANCY v. WALZ.

**(Supreme Court, Appellate Division, Second Department. April 20, 1906.)**

**LANDLORD AND TENANT—FAILURE TO SUPPLY HEAT AS AGREED—ACTIONS FOR DEATH.**

**A tenant cannot maintain an action for the death of his infant child, occasioned by the landlord's failure to supply heat to the premises as required by his agreement.**

Appeal from Trial Term, Richmond County.

Action by Charles E. Dancy against Michael Walz. From a judgment for defendant, entered on dismissing the complaint on the opening of the case by plaintiff, he appeals. Affirmed.

Argued before HIRSCHBERG, P. J., and JENKS, HOOKER, RICH, and MILLER, JJ.

Leslie C. Ferguson, for appellant.

Wm. J. Lippmann, for respondent.

HIRSCHBERG, P. J. The complaint was properly dismissed, as it fails to state a cause of action. It alleges in substance that the defendant is the owner of certain premises in the borough of Manhattan,

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in which the plaintiff leased an apartment for himself and family at an agreed monthly rental, and in which he continued as a tenant from month to month until May, 1904. It further alleges that the apartment was heated by steam supplied by the defendant, that in consideration of the rental the defendant agreed to supply steam to heat the apartment comfortably, and that in the middle of the month of April, 1904, the defendant discontinued the supply of steam heat, and thereafter neglected and refused to furnish any heat, whereby the plaintiff's infant child, being sick with measles, contracted pneumonia and died. The plaintiff seeks to recover $5,000 damages for the death of the child, and $175 expended for physician's fees and the services of an undertaker.

The action is not maintainable. It was unknown at the common law, and as created by statute is given only to the representatives of the deceased, who are permitted to sue for the benefit of the next of kin. The relation between the parties herein was wholly contractual, and it has been often held that no action will lie for personal injuries sustained in consequence of the breach of an agreement to keep leased premises in repair. Frank v. Mandel, 76 App. Div. 413, 78 N. Y. Supp. 855; Stelz v. Van Dusen, 93 App. Div. 358, 87 N. Y. Supp. 716; Sherlock v. Rushmore, 99 App. Div. 598, 91 N. Y. Supp. 152; Boden v. Scholtz, 101 App. Div. 1, 91 N. Y. Supp. 437; Hagin v. Cayuga Lake Cement Co., 105 App. Div. 269, 93 N. Y. Supp. 428. There is no distinction in principle between a covenant to repair and one to keep the premises heated in respect of the right of recovery of damages such as are asserted in this action. In Eschbach v. Hughes, 7 Misc. Rep. 172, 27 N. Y. Supp. 320, it was held by the General Term of the Common Pleas in the City of New York that where the landlord violated a covenant in a lease requiring him to keep the roof in repair, and the tenant contracted pneumonia in consequence of the failure, there could be no recovery for the damages caused by such sickness; that they were too remote, were not within the reasonable contemplation of the parties, nor the immediate or natural result of the breach. This decision was followed by the Appellate Term in O'Gorman v. Teets, 20 Misc. Rep. 359, 45 N. Y. Supp. 929.

The judgment should be affirmed.

**Judgment affirmed, with costs. All concur.**

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## KOEBEL v. BEETSON.

(Supreme Court, Appellate Division, First Department. April 20, 1906.)

1. WORK AND LABOR—EXCESSIVE ALLOWANCE.

   Evidence in a suit to establish a claim against the estate of a decedent for services performed by claimant as a professional nurse for decedent examined, and *held*, that an allowance of $25 per week for two years' services was excessive.

2. SAME—SERVICES BETWEEN PERSONS IN FAMILY RELATION.

   Where a daughter-in-law, after the death of her husband and while she was maintaining a household of her own, rendered services for her father-in-law, there was no presumption that the services rendered were gratuitous.

   [Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Work and Labor, §§ 11½, 49.]

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3. SAME—QUESTION FOR JURY.

A daughter-in-law, after the death of her husband and while she maintained a household of her own, rendered services for her father-in-law as a professional nurse during his illness. He repeatedly stated that she would be paid for her services. *Held*, that the question whether he expected to pay and she expected to be paid, so as to entitle her to recover for the value of her services, was for the jury.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Work and Labor, § 61.]

4. ADMINISTRATORS—CLAIMS—ALLOWANCE—ESTOPPEL.

In a suit to establish a claim against the estate of a decedent for services performed as a professional nurse for decedent, it appeared that she had presented a claim against the estate for cash advanced, that the claim was allowed, and that she signed a receipt reciting that it was in full of all claims against the estate. Her affidavit in support of the claim for cash advanced stated that the account presented embraced all items of expense due her. Claimant claimed that the administrator desired to reimburse her for the moneys which she had advanced, and that she made a bill for that purpose, and did not observe that the receipt covered anything further. *Held* to authorize a finding that she did not intend to present a claim for anything except the money that she had paid out, and she was not thereby foreclosed from thereafter presenting a bill for her personal services.

O'Brien, P. J., and Houghton and Patterson, JJ., dissenting in part.

Appeal from Trial Term, New York County.

Action by Rosa Koebel against Frederick W. Beetson, as administrator of Andrew Moll, deceased. From a judgment for plaintiff, and from an order denying a motion for a new trial, defendant appeals. Reversed.

Argued before O'BRIEN, P. J., and PATTERSON, McLAUGHLIN, LAUGHLIN, and HOUGHTON, JJ.

George H. Taylor, Jr., for appellant.

Henry Wetherhorn, for respondent.

LAUGHLIN, J. This is an action against the estate of Andrew Moll, deceased, to recover for services alleged to have been performed by the plaintiff as a professional nurse for the testator for the entire period of 105 weeks from the 1st day of February, 1900, until the 4th day of February, 1902, when the testator died. The plaintiff married the son of the testator, and her husband died in the month of November, 1884, leaving two children, Catherine and Marie E., issue of the marriage. Immediately after the death of his son, the testator took one of his granddaughters to live with him, and a little later on the other. They thereafter made their home with him, and he fully provided for them.

Within seven or eight months after the death of her first husband the plaintiff married again. She and her father-in-law, the testator, were not on friendly terms from the death of her first husband until a few years prior to 1900, when it appears they became reconciled, but were not very intimate even after that. The plaintiff had two children by her second husband, and she lived with them and him at No. 258 West Twenty-Second street. Her second husband became ill, and she studied to be a nurse with her brother, who was a physician, but did not take a course at a training school or obtain a diploma as a trained nurse. She,

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however, followed the vocation of a nurse from 1888, obtaining employment in that capacity when she could, and received a diploma as a midwife in 1898. The testator became quite ill with rheumatic pains in his limbs about the 1st of February, and the plaintiff was called in by one of her daughters at his direction. From that time on until his death she continued to attend him whenever summoned, and after being summoned continued to call, as long as her services were needed, morning, noon, and evening, to wait upon him and administer to him, remaining during the evening and all night when necessary. She slept at home, however, and went back and forth, supervising her own household, during the entire period. Her services were required or rendered continuously as are ordinarily those of a trained nurse. At times the testator was quite well and needed but little attention, other than the services rendered by his granddaughters. It was not until the last few months of his life that he became helpless and required some one in attendance constantly.

The evidence shows that he quickly recovered from his first illness, and was about and did not require the services of the plaintiff to any great extent until the latter part of April or fore part of May of the same year, when he was taken ill again. The second illness was severe for about two weeks, but he did not recover until the latter part of June; and during part of this period the testator required rather constant care and attention, and some attention during all of it, and he received it from the plaintiff and from his granddaughters. From June until September the attendance required of the plaintiff was not exacting, and then he had another severe illness, from which, however, he recovered slowly, and was up and about again with assistance in January, 1901. It appears that he was rapidly growing feeble, owing principally to age, for he was nearly 81 when he died, and that he needed more or less assistance in dressing and undressing himself, and in going up and downstairs and about the streets, and that he would occasionally be taken violently ill and require constant attendance. The varying condition of his health is fairly indicated by the visits of the physicians. His regular physician testified that he attended the testator first during the period from May 3, to May 19, 1900, for a chronic rheumatic condition of both lower extremities; that he did not see him again from May 19, 1900, until May, 1901, and then attended him off and on, making nine visits in May, six in June, seven in September, three in October, four in November, one in December, all in the year 1901, and one in January and four in February, 1902. In addition to this it appears that Dr. Varcoe was called in emergencies, because he lived nearby, to attend the testator for convulsions in September, 1900, and made three visits within 24 hours, and was also called once in January, May, October, and December, 1901. Dr. Morris was called seven times after January 2, 1902.

The evidence on the question of the testator's physical condition is not without conflict; but the preponderance of the evidence shows that he did not require the constant attention of a nurse until within a few months of his death, when he became helpless, had bed sores that required dressing, suffered partial paralysis, and was unable to move about in bed or walk alone, and had the assistance of the plaintiff and

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others in supporting him in taking necessary exercise. The evidence shows that the plaintiff was devoted in her attendance upon the testator, and that she rendered many services of the nature of those for which a professional nurse is generally required, and which it might not have been pleasant or agreeable for her young lady daughters to perform. But from August, 1901, other assistance was at hand: First, a niece of the testator, who was visiting one of his granddaughters for four weeks, and then his brother, who came specially to wait upon him for six weeks, and after that two men hired by the testator for separate periods, at the rate of $2 and $2.50 per week and board, and Mrs. Beetson's husband also assisted from time to time.

It appears that the plaintiff's second husband was taken ill and obliged to go to a hospital in the spring of 1901, and that he returned to their home on the 7th of June thereafter, and died on the 6th of December, 1901, of cancer of the stomach. After returning from the hospital, her husband was ailing and needed more or less attendance, which he received from the plaintiff and others about the household; and she conceded that she devoted two entire weeks of her time to waiting upon him immediately prior to his death. The plaintiff canceled two engagements at the time she was first called to see the testator, and the evidence indicates that she directed their cancellation, on the ground of his illness requiring her services, in his presence; and it appears from that time until after his death she did not do any professional nursing outside of her own house, other than looking after him. She had been accustomed to let a room in her own house for confinement cases; and after February, 1900, she gave some little time and attention to two confinement cases there. According to her own testimony her husband was janitor of Nos. 256 and 258 West Twenty-Second street, and according to all the other evidence in the case she was janitress of those premises during this entire period, receiving $45 per month therefor. The evidence, however, shows that the only personal services she rendered were in supervising and directing the work, exhibiting the apartments for rent, and collecting the rent. According to her own testimony the regular charge for the services of a midwife, for which profession alone she had a diploma, was $15 per week; and the regular charge for a trained nurse was $25 a week, and she had theretofore been paid from $15, as the minimum, to $25, as the maximum, per week, for services as a nurse or midwife. Other undisputed evidence in the case is to the effect that the services of an ordinary nurse, not graduated as a trained nurse, are worth only $10 or $12 a week.

The plaintiff's claim, as has been seen, was at the rate of $25 per week; and it has been allowed by the jury for every day of the period without deduction. It is manifest that in any view of the case the verdict is grossly excessive. It is also against the weight of the evidence and wholly unsupported by the evidence, in so far as it finds that the plaintiff was entitled to recover at any rate per week for continuous services throughout the services. There is no evidence of an express contract to pay for these services, other than the testimony of the testator's granddaughter Marie, now Mrs. Stoops, which is in substance that on different occasions after the plaintiff had administered to the testator and relieved his pain and suffering he would say to her

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when he got well he would see "that she would be provided for. He would compensate her. He did not use that language. He spoke German as a rule. He told us she would not have to work any more. He would see that she would have a much easier time. She had worked very hard in her lifetime, and he would provide for her, and she would have it a great deal easier than she had before, when he got better. He said he would pay her at times. He spoke about paying her also. He said he would make it all right with her. I suppose the exact language would be that he would make it all right. We, of course, interpreted that he meant he would pay her."

The existence of an express contract to pay for these services, or of any intention on the part of the testator to pay therefor, or knowledge or belief that a claim therefor would be presented, is thoroughly impeached by the other evidence in the case. The testator was a thrifty German. His means were limited. His only income was the rents from two buildings, aggregating $245 per month, from which, evidently, he was obliged to pay for repairs, taxes and interest on some outstanding mortgages. This claim is made for nearly half of that gross income during the entire period. Every witness in the case who testified on the subject, including Mrs. Stoops, who was called by her mother, the plaintiff, and is very friendly to her, testified that the testator would not allow bills to run and could not rest until he paid his obligations. She says he had "an abhorrence of an indebted condition." No claim was ever made by the plaintiff during the lifetime of the testator for compensation for her services. They had financial transactions concerning which her daughter testifies that the testator paid the plaintiff regularly during this period from $3 to $5 per week for furnishing meals to him and her daughters, and for some washing. It further appears by the testimony of the other granddaughter, who flatly contradicts her sister concerning the conversation with respect to compensation, and says that she never heard a suggestion that her mother was to make any claim for services until the presentation of the bill, that the testator expressed the view that her mother would not accept anything for her services, and for that reason he made her presents from time to time, at one time giving her $5 and at another time $20.

Doubtless the testator appreciated the plaintiff's devotion and services to him, and, if he did not reward her fully therefor by presents, would have rewarded her, had he lived. But it is very evident that he believed she was rendering these services gratuitously and to relieve her granddaughters, who for their bringing up were severally obligated to care for the testator in his illness, and out of consideration, also, for the fact that the testator had relieved her of the burden of bringing up her daughters; that he would not have employed plaintiff, either as a trained nurse at $25 per week, or as an ordinary nurse at $10 or $12 per week. Unless, therefore, she could make the contract, not only for herself, but for him also, she was not employed. Moreover, it quite satisfactorily appears that the plaintiff never intended to charge for her services until long after the death of the testator. During his last illness she had expended $60 for him, and early in April, when she was negotiating a lease from the administrator, she mentioned

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to him in the presence of his attorney that she had a small claim against the estate aggregating $60, for moneys advanced; and she was advised to present it in the form of a bill, and that whatever was right would be paid. According to the testimony of the administrator and of the attorney, she did not refer to any claim for services at this time, or until after the bill for $60 was paid; and their testimony in this regard is not disputed by her. She made out and presented an itemized bill, and subsequently received a check therefor, and signed a receipt reciting that it was in full of all claims against the estate, and made an affidavit in support of the claim in which it was stated in substance that the account presented "embraces all items of expense or otherwise now justly due her by the said estate."

She questions, but does not deny, the genuineness of her signatures to these papers; and she claims that they were not read over to her, and that she did not understand them. The other evidence shows clearly the genuineness of her signatures, and quite satisfactorily that she knew the contents of the papers and that no deception was practiced upon her. The separate presentation of the claim for $60 for moneys advanced is not accounted for on the theory that it would not be disputed and would be paid promptly, because it appears that she had $2,000 cash on hand, received from her husband, and did not need the $60 at that time. Her change of front is quite clearly accounted for by an item of evidence which her counsel introduced over the objection and exception of the appellant. It appears that, after she presented her claim for $60 against the estate, a partition action was brought by her daughter Catherine, then Mrs. Beetson, against her daughter Marie E., then Mrs. Stoops, for the partition or sale of premises No. 267 West Twenty-Second street, which the testator by his will attempted to devise to Mrs. Stoops, but the title to which was not in him, but in his wife, who died intestate in 1884, leaving these two grandchildren her only heirs. The testator owned certain premises on Seventh avenue, and evidently intended to devise his property equally to the two grandchildren. He devised the Seventh avenue premises to Mrs. Beetson and the Twenty-Second street premises to Mrs. Stoops. If Mrs. Beetson succeeded in the partition action, she would receive about three-quarters of the testator's property, the whole of which was valued at $48,000, instead of one-half, as he intended. The commencement of this partition action caused friction, and the plaintiff evidently took sides with Mrs. Stoops. The claim in suit was not presented until June 26, 1902, after the first claim had been paid and the action in partition had been commenced. The fair inference from the evidence in the record before us is that the commencement of the partition action to accomplish the inequitable result that would attend success was the father of this claim; and that explains the verdict of the jury. The jurors doubtless thought that if Mrs. Beetson was to receive three-quarters of the property, when the testator only intended she should have half, the mother was justified in presenting a claim, three-quarters of which would come out of the interest of the plaintiff in the partition suit, who was taking advantage of a misapprehension on the part of the grandfather concerning the ownership of the title.

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But whether this item of evidence was seized upon by the jury and led them to render the verdict sustaining this claim in full is not very material, for in any view of the case the verdict is clearly against the weight of the evidence and should not be permitted to stand. The plaintiff doubtless thought, and had reason to believe, that her father-in-law would leave all his property, as he did, to her daughters, and that any claim that she made would come out of them. Compensation out of the estate cannot be allowed where there was no contract of employment, and no intention on the part of the testator to pay, and no intention on the part of the plaintiff at the time she rendered the services to make a charge, merely because it is possible that the property may not be enjoyed in equal shares by the granddaughters of the testator and daughters of the plaintiff, as he intended.

It follows that the judgment and order should be reversed, and a new trial granted, with costs to the appellant to abide the event.

McLAUGHLIN, J., concurs.

HOUGHTON, J. I concur in the reversal of this judgment, because upon the proof the verdict is too large; but I do not think this court should say, in effect, that the plaintiff has no cause of action, as is the purport of the opinion of Mr. Justice LAUGHLIN. Whether or not the deceased expected to pay, and the plaintiff expected to be paid, for her services in caring for the deceased in his helpless condition, is a question for the jury to determine. While the plaintiff occupied in a measure an intimate relation to the deceased, she was not a member of his household, nor any blood relation, and the presumption which would apply if she had lived with him, or was a near relative, that the services which she rendered were gratuitous and sprung from love and affection, does not apply to her. She left her own household to perform the services. They were in the line of work that she was accustomed to do. Under these circumstances, a presumption rather arises that there was an intention to pay and to be paid. Added to this presumption are the repeated statements of the deceased that she would be reimbursed for her trouble, or taken care of, or well paid. It seems to me that the plaintiff can and has made a case entitling her to some compensation.

The receipt which she signed is capable of explanation. It is true that there was no claim for services in the bill which she presented. Her explanation that the administrator with the will annexed desired to reimburse her for the moneys which she had paid out, and that she made a bill for that purpose, and did not observe that the receipt covered anything further, authorized the jury to say that there was no intention on her part to present a claim for anything except the money which she had actually paid out for the deceased, and that she was not foreclosed from thereafter presenting a bill for her individual services.

If a new trial should be granted, I do not think the plaintiff should be embarrassed by the broad statements of the main opinion.

O'BRIEN, P. J., and PATTERSON, J., concur.

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## In re McGARREN'S ESTATE.

(Supreme Court, Appellate Division, First Department. April 20, 1906.)

1. JUDGMENT—COLLATERAL ATTACK—WANT OF JURISDICTION—EXTRINSIC EVIDENCE.

On a collateral attack on a judgment annulling a marriage, on the ground that summons was not served on defendant, it appeared, from the affidavit of the process server in such action, that he served defendant at a certain time and place by delivering a copy of the summons to her, and that he testified in such action in corroboration of his affidavit. A witness testified that defendant in the action to annul the marriage told him that she had been served with a summons and complaint; that the officer had handed her a summons and she had thrown it on the sidewalk. Defendant herself testified that the officer, at the time and place he claimed to have served the summons, attempted to hand her an envelope, but that she struck him, and that it fell to the ground and she left it there; nothing having been said as to the contents. *Held*, that in view of such evidence, and in view of the fact that many important statements in her affidavit were disproved by the affidavits of others, the attack on the judgment was insufficient.

2. SAME.

On a petition for revocation of letters of administration and for the appointment of petitioner as administratrix, on the ground that she was the widow of deceased, it appearing that a judgment had been rendered annulling the marriage, the surrogate had jurisdiction to consider whether, in entering the judgment annulling the marriage, the Supreme Court had acquired jurisdiction of the person of the petitioner for revocation by sufficient service of process, notwithstanding that in the action to annul the marriage witnesses were called for plaintiff and examined on the question of service; it appearing that the trial in the action to annul the marriage was a trial on default, so that the fact as to service of process was not "litigated."

Appeal from Surrogate's Court, New York County.

Judicial proceedings on the settlement of the estate of Alexander McGarren, otherwise known as Alexander McGoughran, deceased. From an order of the Surrogate's Court, denying a motion by Hester McGarren for the revocation of letters of administration granted to Henry McGoughran, she appeals. Affirmed.

Argued before O'BRIEN, P. J., and PATTERSON, INGRAHAM, LAUGHLIN, and CLARKE, JJ.

Edward W. S. Johnston and Daniel W. Blumenthal (Maurice Blumenthal, on the brief), for appellant.

Daniel D. Sherman, for respondent.

CLARKE, J. This is an appeal from an order of the Surrogate's Court of the county of New York denying the petition of Hester McGarren, asking for the revocation of letters of administration theretofore granted to Henry McGoughran on the estate of Alexander McGarren, or McGoughran, and the appointment of said petitioner as administratrix of said estate. The petitioner alleges in the petition that said Alexander McGarren departed this life on June 25, 1905, being at the time of his death a resident of the city and county of New York, and that she is the widow of the said Alexander McGarren; that he left, him surviving, only his widow and eight cousins; that he left a large estate of personal property and two pieces of real property; that

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a petition, verified by the respondent Henry McGoughran, had been filed on June 29, 1905, praying that letters of administration be issued to him, and a decree of the Surrogate's Court had been entered appointing the said respondent such administrator; that said petition did not refer to this petitioner at all; that such respondent was incompetent and disqualified to act as such administrator, and that petitioner had a prior right to be appointed administratrix of the estate; that neither she nor anybody representing her had made any objection to the appointment of the said Henry McGoughran as such administrator, for the reason that she had no notice whatever of the pendency of said application until after the issuance of such letters of administration, and no citation had been issued to her. Answering said petition, the administrator alleged that the petitioner was not the widow of the decedent; that she had been married to the decedent on October 1, 1898, but respondent submitted a certified copy of the judgment roll in the suit of Alexander McGarren v. Hester McGarren in the Supreme Court in the county of New York, which judgment annulled the marriage of the petitioner with the deceased on April 1, 1902, and presented the affidavits of nine persons tending to show that the petitioner, appellant, had full knowledge of the proceedings in the annulment suit from and after the service of the summons therein upon her; that she knew of the judgment in 1902, nearly three years prior to the death of the deceased; that she took no steps to set said judgment aside prior to the death of the decedent; and that she had full knowledge of the respondent's application for letters of administration, approved of his application, and conceded his right until some time after the entry of the decree granting administration to the respondent.

The question really involved here is the validity of the judgment annulling the marriage. If that is a good judgment, concededly the appellant has no right of administration. The validity of said judgment is attacked upon the ground that the court in which it was rendered did not acquire jurisdiction of the defendant, in that the summons therein was not served upon her. Incidentally the question is raised whether the surrogate has power to pass upon the question of jurisdiction, because, while in his order no such determination is made, in his opinion on the motion the learned surrogate said:

> "Upon these facts the inquiry that her counsel asks me to make is, not as to whether any service of summons was made, but as to whether, upon the facts, what was done in the attempt to serve her amounted to a regular and sufficient compliance with the requirements of the law as to the service of a summons in the Supreme Court. This I decline to do, upon the ground that I am without jurisdiction."

Section 1754 of the Code of Civil Procedure provides that:

> "A final judgment, annulling a marriage, rendered during the lifetime of both the parties, is conclusive evidence of the invalidity of the marriage in every court, of record, or not of record, in any action or special proceeding, civil or criminal."

The judgment entered April, 1902, was rendered during the lifetime of the parties. The marriage upon which the petitioner relies to establish her claim is identified and conceded to be the marriage annulled by said judgment. The entire record of that judgment is before us,

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and was before the surrogate, and shows that the Supreme Court itself inquired into the facts necessary to give it jurisdiction, and determined for itself that it had acquired jurisdiction to render its judgment; that is, that its process was regular in form and was duly served on the defendant. In the decision filed in said suit it is stated:

"And due proof having been made of personal service of the summons upon the defendant in this action."

In the judgment and decree it is stated:

"Now, therefore, on reading and filing the summons and complaint in this action, and proof of personal service of the summons herein on the defendant herein within the state of New York."

The affidavit of service of Joseph N. Starin, verified October 10, 1901, a part of the judgment roll, after stating the facts showing his knowledge and acquaintance with the defendant, proceeds:

"On the 5th day of June, 1901, at the northwest corner of Twenty-First street and Ninth avenue, in the city of New York, at 3:30 p. m. on that day, he served the annexed summons on the said Hester McGarren by delivering a copy of the same to her and leaving the same with her. Deponent further says that, when he served the said summons upon the said Hester McGarren as aforesaid, he asked her if she was Mrs. McGarren, and she said, 'Yes;' that deponent thereupon said to her, 'I have a paper to summon you,' and handed a copy of annexed summons to her; that she thereupon said, 'I won't take a summons; I don't want your summons paper,' and refused to take it, and thrust it away, and allowed it to fall to the sidewalk; and that deponent thereupon left the said summons by her and departed. Deponent further says that the said copy of the annexed summons so delivered to said Hester McGarren by him as aforesaid had the words 'Action to Annul a Marriage' legibly written upon the face thereof."

Starin was examined in open court before the learned judge who granted the decree, on February 26, 1902, and testified that he served the summons in the action on the defendant June 5, 1901, at the northwest corner of Twenty-First street and Ninth avenue, in this city, at about 3:30 o'clock in the afternoon; that he offered a copy of the summons to her; that he told her it was a summons; that he left the copy with her; and that it had the words "Action to Annul a Marriage" written plainly upon the paper.

Thomas Dusenberry testified that he was special officer of the Equitable Building Safe Deposit Vaults; that he had known the defendant for 12 years; and that at the Equitable Building, outside of the vaults, he had an interview with her on or about June 25, 1901. The testimony proceeds:

"Q. Was anything said at that interview concerning this suit brought by Alexander McGarren to annul his marriage with Hester McGarren? A. Yes, she told me— Q. What was said—what did she say to you about this suit? A. She said that she had been served with a summons and complaint. Q. Was anything else said? A. She said that the officer had handed a summons and complaint to her, and she threw it down on the sidewalk. He picked it up again and placed it on her arm."

The evidence, therefore, is amply sufficient to sustain the statement of the decision and the decree as to the fact of personal service of the summons.

In Ferguson v. Crawford, on the second appeal (86 N. Y. 609), Judge Rapallo said:



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"The judgment in the McFarquhar Case was regular on its face, and every intendment should be in favor of its validity; and although we have held that the defendant therein was at liberty to show, if he could, that the court never acquired jurisdiction of his person, yet the burden of establishing that fact was upon him, and it should be established in the most satisfactory manner to deprive the judgment of its effect."

What does the petitioner offer in this collateral attack upon a judgment most seriously affecting her status, and of which concededly she had knowledge for three years prior to decedent's death without any step whatever being taken by her to test its validity? Her own affidavit alone, in which she says:

"I remember the interview with the man who it was claimed was Starin, at which he claimed to have served me with a summons in the said annulment action. The interview occurred on June 5, 1901, on the public highway in this city in the neighborhood of Twenty-First street and Ninth avenue, in the afternoon of that day [the very time and place testified to by Starin]. "He * * * asked me whether my name was McGarren, and said, in effect, that I should take from him a paper. In his hand was an envelope. * * * I struck Starin, and I think the envelope fell to the ground. Then Starin went away. The envelope was not taken by me, and was never in my actual possession for a moment. Nothing was said by Starin as to the contents of the envelope. He did not at any time say that he had a summons for me."

—And she denied the conversation with Dusenberry. There is here no suggestion of fraud, as was the case in Bulkley v. Bulkley, 6 Abb. Prac. 307, cited by appellant. Assuming the facts stated by petitioner to be true, it was simply a defective service, and not an entire want of service. But, as appellant's affidavit corroborates the process server in important details, as his original affidavit fully sets forth the occurrence, as where she denies his statements she is uncorroborated, and as many important statements in her affidavit as to other facts are completely disproved by the affidavits of others, we find that she has not sustained the burden thrown upon her, and think that her collateral attack upon the judgment has failed, and that the surrogate was warranted in making the order appealed from.

We might well stop here; but, inasmuch as the learned surrogate has expressed a conviction as to his want of jurisdiction in the premises, we are of the opinion that he had power to consider whether, in entering the judgment annulling the marriage, the Supreme Court had acquired jurisdiction of the person of the defendant. In Kerr v. Kerr, 41 N. Y. 272, there was a proceeding before the surrogate to revoke letters of administration. An Indiana judgment of divorce was submitted, and extrinsic evidence of want of jurisdiction received. Judge Grover said:

"The counsel for the appellant insists that, it having appeared from the evidence that, to determine which of the parties was the wife and widow of the intestate, it was necessary to inquire into and pass upon the validity of a judgment divorcing the intestate from the respondent, rendered by a circuit court of the state of Indiana, it was not competent for the surrogate to decide that question, and that he should have dismissed the proceeding. In this position I do not concur. The statute expressly empowers the surrogate to determine the truth or falsity of the allegation upon which the letters were issued. This includes the power to decide every incidental question necessary for that purpose, whether such question be one of fact or law."

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And the surrogate was sustained in revoking her letters upon the ground of the invalidity of the Indiana divorce established by extrinsic evidence.

In the Matter of Kimball, 155 N. Y. 62, 49 N. E. 331, there was an appeal from an order of the Appellate Division affirming a decree of the surrogate denying a petition for the removal of administrators and for the appointment of petitioner. The proceeding turned upon the validity of a North Dakota divorce. The surrogate determined the judgment invalid, and was affirmed; Judge Haight saying:

"It is equally well settled that the judgment of a court of a sister state has no binding effect in this state, unless the court had jurisdiction of the subject-matter and the person of the parties, and that want of jurisdiction may always be interposed against a judgment, where it is sought to be enforced, or where any benefit is claimed for or under it. * * * Such a judgment is void and of no force or effect in this state" citing, among other authorities, Kerr v. Kerr.

It is thus directly settled by the Court of Appeals that upon such a proceeding as in the case at bar the surrogate has the power to take extrinsic evidence as to the jurisdiction of the court of a sister state, and, finding said court had not acquired jurisdiction, to treat the judgment so obtained as a nullity.

But the judgment here is a domestic judgment. In the leading case of Ferguson v. Crawford, 70 N. Y. 253, 26 Am. Rep. 589, Judge Rapallo examined with characteristic care and ability the whole question of the force and effect of judgments. After stating the then well-established rule in regard to judgments of sister states, that the question of jurisdiction may be inquired into, and a want of jurisdiction over the person shown by evidence, he says:

"When we consider the effect of these authorities, it is difficult to find any solid grounds upon which to rest a distinction between domestic judgments and judgments of sister states in regard to this question. * * * In holding, therefore, that a defense that the party was not served and did not appear, although the record stated that he did, was good, our courts must have held that such is the law of this state and the common law, and consequently that, in the absence of proof of any special law to the contrary in the state where the judgment was rendered, it must be presumed to be also the law of that state. The judgments of our courts can stand on no other logical basis."

In O'Donoghue v. Boies, 159 N. Y. 87, 53 N. E. 537, Judge O'Brien said:

"In case of judgments recovered in the courts of other states, which are to be given full faith and credit here under the federal Constitution, the record may be impeached for want of jurisdiction, even by extrinsic evidence; and the same is true with respect to domestic judgments. * * * These propositions have been settled in this court once for all in the case of Ferguson v. Crawford, 70 N. Y. 253, 26 Am. Rep. 589. In the opinion by Judge Rapallo, which covers the whole field of discussion, the positions stated are sustained by weight of argument and a wealth of illustration which leaves nothing further to be said on the subject."

Numerous cases are cited, following and approving Ferguson v. Crawford. Therefore it seems clear that the surrogate has the same power to pass upon the question of whether the court had jurisdiction in regard to domestic judgments that the Court of Appeals has directly decided that he has in regard to the judgments of sister states.

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There remains one further consideration. As stated in O'Donoghue v. Boies:

"There is but one solitary exception to this rule, and that is in a case where jurisdiction depends on a fact that is litigated in a suit, and is adjudged in favor of the party who avers jurisdiction. There the question of jurisdiction is judicially decided, and the judgment record is conclusive on that question until set aside or reversed by a direct proceeding. Ferguson v. Crawford, 70 N. Y. 265, 26 Am. Rep. 589."

The record in the annulment suit shows that witnesses were called for the plaintiff and examined upon the question of the service of the summons. I do not think that fact brings the case within the exception. It was a trial on default. There was no appearance, no answer, no witnesses for the defense, and no cross-examination. I do not think the fact was "litigated" within the meaning of the rule. If so, it would have been a "litigated fact" upon the affidavit of service alone, and hence the question could never arise in a collateral proceeding.

It follows that the order appealed from should be affirmed, with costs. All concur.

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## BROWN et al. v. FAILE et al.

(Supreme Court, Appellate Division, Second Department. April 20, 1906.)

MORTGAGES—DEFICIENCY JUDGMENT—DOCKETING OF JUDGMENT—TIME.

Though a deficiency judgment in mortgage foreclosure was not docketed for 10 years after the filing of the judgment roll, the lapse of time was no ground for a cancellation of the docket.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Mortgages, § 1006.]

Appeal from Special Term, Westchester County.

Action by Annie Wilmerding Brown and another against George E. Faile and others. From an order denying a motion for an order to cancel the docket of a deficiency judgment, defendant George E. Faile appeals. Affirmed.

Argued before HIRSCHBERG, P. J., and WOODWARD, JENKS, and RICH, JJ.

John J. Crawford, for appellant.

Stephen O. Lockwood, for respondents.

HIRSCHBERG, P. J. This action was brought in the year 1892 to foreclose a mortgage upon real estate in the county of Westchester. It resulted in a judgment of foreclosure and sale duly entered on the 7th day of January, 1893, which provided in the usual form, among other things, that the appellant should pay any deficiency which might result from the sale, and that the plaintiffs should have execution therefor. The sale occurred on the 27th day of May, 1893, and resulted in a deficiency of $4,770.82. The referee's report of sale, showing the deficiency, was made on the 26th day of June, 1893, but the report was not filed until the 8th day of July, 1905, on which day the judgment was docketed. It appears that the delay was caused by the fact that immediately or shortly after the judgment of foreclosure and sale was obtained the plaintiffs were engaged in litigation with their attorney,

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which resulted in his removal, and the substitution of other attorneys in his place, and that the former attorney had not paid the referee's fees or taken up his report, and the substituted attorneys were unable to get the report from the referee until the month of March, 1897, when it was delivered to them, and by them through inadvertence placed with the papers in the case in their office, where it remained until it was finally filed.

In Moore v. Shaw, 15 Hun, 428, it was held that, where a judgment in an action to foreclose a mortgage provides for the payment of a deficiency by the defendant, it is unnecessary to confirm the referee's report before issuing an execution, or to enter any further judgment upon the filing of the report. In that case a motion to set the deficiency judgment aside as irregular was denied. An appeal to the Court of Appeals was dismissed (Moore et al. v. Shaw, 77 N. Y. 512), the court declining to consider the question whether the practice was regular, but stating (page 513) that:

"It is sufficient that the alleged error, at most, is a mere irregularity, based upon a rule of practice, and not upon any positive statute, and that the defendant has not been in any way prejudiced."

In Evans v. Cleveland, 72 N. Y. 486, the court, intimating that the same rule applies in legal and equitable cases, held that in a legal action commenced before it was barred by any statute of limitations no lapse of time will defeat an application for its continuance in the name of a representative of a deceased party, and no statute of limitation will bar a recovery.

The appellant claims that the object of docketing the judgment is twofold: First, that an execution may issue; and, second, that the judgment may become a lien. He admits that the plaintiffs were not entitled to issue an execution as of right, but claims that the judgment now docketed could not become a lien, for more than 10 years have elapsed since the filing of the judgment roll. Assuming that he is right in his contention, I cannot see that he has any grievance under the circumstances, as the only result of the delay would be to deprive the plaintiffs of a lien for the deficiency which they might have acquired by a timely docketing. There is concededly no statutory limitation for the docketing of a deficiency judgment. There is no authority for the judicial creation of such limitation. The appellant has not been prejudiced in any manner by the delay of the plaintiffs in the enforcement of their claim against him.

The order should be affirmed.

Order affirmed, with $10 costs and disbursements. All concur.

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## BRINK v. STRATTON et al.

(Supreme Court, Appellate Division, Second Department. April 20, 1906.)

BILLS AND NOTES—PAYMENT—SUBSTITUTION OF NOTES.

Where the payee of a note signed by three persons agreed to accept in payment a note signed by only one of the signers of the original note, this agreement was based upon a sufficient consideration.

[Ed. Note.—For cases in point, see vol. 7, Cent. Dig. Bills and Notes, § 1252.]

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Appeal from Orange County Court.

Action by Leander Brink against William D. Stratton and others. From a judgment for defendants, and from an order denying a motion for a new trial, plaintiff appeals. Affirmed.

Argued before HIRSCHBERG, P. J., and JENKS, HOOKER, RICH, and MILLER, JJ.

John F. Bradner, for appellant.

Thomas Watts (Abram F. Servin, on the brief), for respondents.

JENKS, J. This action is upon the following note:

"$850.00 Middletown, N. Y., July 1st, 1893.

"On demand, we or either of us promise to pay to the order of Leander Brink eight hundred and fifty dollars at his office, value received, with interest from date.

"W. D. Stratton,
"E. A. Brown,
"Corey & Co."

Of the three makers sued, Stratton and Brown answered. The learned county judge restricted them to their defense of payment. This was based upon the contention that the plaintiff expressly agreed to accept in payment of the note in suit the following note, made by Corey & Co., who were of the makers of the first note:

"$850.00 Middletown, N. Y., Aug. 4th, 1893.

"Three (3) months after date we promise to pay to the order of John E. Corwin eight hundred and fifty dollars, payable at the banking house of John E. Corwin, Middletown, N. Y., for value received, with interest.

"Corey & Co.

"[Indorsed] Leander Brink."

The plaintiff indorsed and discounted the second note, but it was not paid by Corey & Co. The question of the express agreement between the plaintiff and Corey & Co. was submitted to the jury under instructions that, if they found it was made, and the note given and accepted thereunder, there was no liability of the defendants Stratton and Brown upon the note in suit. The jury gave its verdict for the defendants.

We think that the evidence is sufficient to sustain the verdict. The learned counsel for the appellant now first raises the question that, even if this agreement were made, the verdict cannot stand in law. Notwithstanding that the question is first raised here, I shall consider it. The argument of the learned counsel for the appellant is that the agreement was nudum pactum, inasmuch as one of several debtors simply gave his note for the note which he executed with others. This contention is accompanied with the citation of cases. Many of them are enumerated and discussed in the note to the text of Parsons on Bills and Notes (vol. 2) p. 159. The plaintiff before or on the day of the giving of the second note could have enforced the first note. Acceptance by express agreement of the second note in payment of the first note suspended the plaintiff's power to enforce the debt for three months from the date of the second note. I think that this is sufficient to support the express agreement. See Plearis v. Van Heirop, 3 Burr. 1663, 1672, 1673, approved in Seaman v. Seaman, 12 Wend. 381, which is cited in turn in 2 Kent's Com. (14th Ed.) 465; Whelan v. Swain, 132

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Cal. 390, 64 Pac. 560. The plaintiff in payment of the first note, which was then due as a demand note, took the second note, whereby he forebore to enforce the debt for three months from its date. This was a different instrument from that which he held. See Thompson v. Percival, 5 B. & A. 933. Moreover, in Sheehy v. Mandeville, 6 Cranch (U. S.) 264, 3 L. Ed. 215, Marshall, C. J., says:

"That a note without a special contract would not, of itself, discharge the original cause of action, is not denied. But it is insisted that if, by express agreement, the note is received as payment, it satisfies the original contract, and the party receiving it must take his remedy on it. This principle appears to be well settled. The note of one of the parties or of a third person may, by agreement, be received in payment. The doctrine of nudum pactum does not apply to such a case, for a man may, if such be his will, discharge his debtor without any consideration."

See, too, in comment, Arnold v. Camp, 12 Johns. 410, 7 Am. Dec. 328, and Waydell v. Luer, 3 Denio, 419. We cannot inquire into the quantum of the consideration. Oakley v. Boorman, 21 Wend. 588; Ludington v. Bell, 77 N. Y. 141, 33 Am. Rep. 601. In Bates v. Rosekrans, 37 N. Y. 410, the court say:

"That the giving of a new note by one of two joint and several makers, intended as a provision for the payment of a former note, not agreed to be taken in payment, and not in fact paid, constitutes no defense to an action upon the original note, is well settled. The principle is quite familiar, and of frequent occurrence. Highland Bank v. Dubois, 5 Denio, 558; Cole v. Sackett, 1 Hill, 516; Smith v. Rogers, 17 Johns. 340."

This is recognition of the principle invoked by the defendants.

I advise affirmance of the judgment and order, with costs. All concur.

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## PHILLIPS v. LINDLEY.

(Supreme Court, Appellate Division, Second Department. April 20, 1906.)

1. GUARANTY—DISCHARGE OF GUARANTOR—DILIGENCE OF CREDITOR.

Where plaintiff purchased a note from defendant, who executed a writing to the effect that, in consideration of the purchase, he agreed to collect the note without expense to plaintiff, the guaranty was one of collection, not payment, and it was incumbent on plaintiff to show due diligence against the principal before he could hold defendant.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Guaranty, §§ 37, 78.]

2. SAME—INSOLVENCY OF PRINCIPAL.

The insolvency of the principal was no excuse for plaintiff's failure to endeavor to recover from him.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Guaranty, § 80.]

3. SAME—BREACH OF CONDITIONS.

Defendant, a dealer in commercial paper, agreed to collect a note without expense to plaintiff, who purchased it, and in an action on the agreement defendant contended that plaintiff had failed to show a breach of the contract, in that he had not sent the note to defendant, demanded defendant's services, and been refused. It appeared that plaintiff had several interviews with defendant after the note became due, and that defendant told plaintiff that the note would be looked after, and that during legal proceedings by plaintiff to recover on the note from the maker defendant said that plaintiff should resort to the maker first, and that defendant "would take care of him." *Held*, that there was a waiver by defendant of any formal demand.

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4. SAME—EXTENSION OF TIME FOR PAYMENT.

Where defendant, a dealer in commercial paper, in consideration of the purchase of a note by plaintiff, agreed to collect the same, and thereafter he wrote plaintiff that the maker could use the money for a longer time, and that the maker would pay interest, and asking to be advised as to plaintiff's inclination, defendant was liable on his guaranty notwithstanding an extension of time granted by plaintiff.

5. EVIDENCE—JUDICIAL NOTICE.

On appeal the court will take judicial notice that a certain place is a city and the county seat of a certain county in another state.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 31-33.]

6. GUARANTY—DISCHARGE OF GUARANTOR—DILIGENCE.

Plaintiff purchased a cognovit note executed by a corporation and its directors, payable at the office of the corporation in a certain county, and defendant guarantied the collection. When the note fell due, plaintiff entered judgment in the county where the note was payable, and caused executions to be issued there and in other counties against all the defendants, which executions were returned unsatisfied. Defendant claimed that the corporation received a sum of money from fire insurance, and that plaintiff should have realized from it, but it did not appear that defendant ever informed plaintiff as to how plaintiff could realize, and it appeared that at the time the judgment was recovered the corporation and all the directors were insolvent. *Held*, that defendant was not relieved from liability on the ground of lack of diligence on the part of plaintiff.

7. SAME—PAYMENT—EVIDENCE.

Defendant guarantied the collection of a cognovit note executed by a corporation and its directors, which was purchased by plaintiff. Plaintiff caused judgment to be entered on the note, and thereafter, in an action by plaintiff on the guaranty, it appeared that the owner of another judgment sued in a federal court to set aside certain deeds, executed by one of the directors, making plaintiff in the action on the guaranty a defendant, and that he filed a cross-bill, uniting in the prayer of the complaint, that in the action in the federal court the same attorney appeared for plaintiff in that action and for plaintiff in the action on the guaranty, and that the whole amount recovered was directed to be paid to the attorneys for the various parties as their attorneys' fees and costs, as a result of which plaintiff in the action on the guaranty received no part of his note. The attorney in question was paid $1,500 out of a total recovery of $6,000. Plaintiff in the action on the guaranty in the federal court sued on a judgment of $2,500, but the judgments of the various creditors represented amounted to nearly $50,000, and they were all anterior to plaintiff. *Held*, that a contention on the part of the guarantor that he should have been credited with $1,500 as against his liability was without merit.

8. EVIDENCE—JUDICIAL ADMISSIONS—DEPOSITIONS.

Where on an issue as to limitations the question was as to the residence of defendant at certain times, his statements in depositions taken in judicial proceedings were admissible as admissions.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 730-736.]

9. LIMITATION OF ACTIONS—BURDEN OF PROOF.

Code Civ. Proc. § 401, relative to limitations, provides that when a cause of action accrues against a person without the state the action may be commenced within the time limited therefor after his return into the state. *Held* that, where there is evidence that when the cause of action accrued defendant was without the state, the burden of showing the time of his residence in the state is on him.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Limitation of Actions, §§ 713, 714.]

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Appeal from Trial Term.

Action by Oswell C. Phillips against Charles N. Lindley. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

A corporation and nine persons made a joint and several cognovit promissory note for $5,000, at six months, payable to plaintiff at the office of defendant's firm in Chillicothe, Ohio. Plaintiff purchased the note through the defendant, a dealer in commercial paper. When it fell due, March 23, 1894, $2,500 was paid upon it, and on that date defendant executed and delivered to plaintiff this paper:

"$2,500.00 Boston, Mch. 23rd, 1894.

"This agreement witnesseth: That whereas, O. C. Phillips, of Boston, Mass., has purchased a note of $2,500.00 of the Nat'l Cotton Seed Oil and Huller Co. of even date herewith, due in six months time, in consideration of said purchase, C. N. Lindley, of Chillicothe, Ohio, hereby agrees to collect said note without cost of expense to said Phillips. C. N. Lindley."

This action upon that undertaking was begun on August 7, 1903. A jury was waived, and the court found the following additional facts: The makers of the note other than the corporation were directors and stockholders of the corporation. On or about September 15, 1894, and before the maturity of the $2,500 note, at the request of the defendant the plaintiff extended the time of payment for 90 days, receiving $50 as interest therefor. On or about November 9, 1894, the property of the said corporation was destroyed by fire, and thereupon and thereafter the corporation became and has remained insolvent and without property from which the plaintiff could have collected the note. Plaintiff thereafter presented his note for payment, which was refused. Thereupon plaintiff recovered judgment against all the makers in the Ross county common pleas court in Ohio in November, 1894, and issued execution to the sheriffs of the counties of Ross, Pike, and Scioto in said state, in which counties, as he has been advised by defendant, the makers had property and also resided. The executions were returned unsatisfied, and it was subsequently discovered that real estate of the makers had been conveyed by deeds made prior to the date of judgment. In June, 1895, an action was brought in the United States Circuit Court for the Eastern Division of the Southern District of Ohio by the Thompson National Bank of Connecticut, the holder of a judgment upon another note of the said corporation, and the other makers against Corwine, one of the makers, and others, joining this plaintiff as a party defendant, to set aside certain deeds of the real estate of said Corwine. The plaintiff appeared, and filed a cross-bill, uniting in the prayer of the complaint. That action went to a final decree in June, 1902, in and by which the total amount recovered was directed to be paid to the attorneys for the various parties as their attorneys' fees and costs. See Corwine v. Thompson Nat. Bank of Putnam, 105 Fed. 196, 44 C. C. A. 442. As a result, this plaintiff received no part of his note, and the note is unpaid. At the time of the recovery of the judgment in the plaintiff's own action in the Ross county common pleas, and thereafter, all the makers of the note were insolvent. The plaintiff acted with due diligence in attempting to enforce payment of the said note and of the said judgment. After maturity of the note, the plaintiff demanded that defendant collect the same, and defendant refused to do so, and no part has been paid. The defendant resided at Chillicothe, Ohio, at Cincinnati, Ohio, and in Campbell county, Ky., and was without this state from 1892 until 1897, and thereafter. The court concluded that the defendant was liable, and that the statute of limitations interposed was not a defense. It gave judgment in the amount of the note, with interest from the date of its maturity.

Argued before JENKS, HOOKER, GAYNOR, RICH, and MILLER, JJ.

William H. Harris, for appellant.

John Ewen, for respondent.

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JENKS, J. In Cumpston v. McNair, 1 Wend. 457, the words were, "I guaranty the collection of this note to George Leitch," and the court held that the very terms implied "that measures to collect it from the principals were first to be used, and the defendant's contract or guaranty was that those measures should be successful; if not, that he would pay the note and costs." See, too, Craig v. Parkis, 40 N. Y. 181, 100 Am. Dec. 469; Jackson v. Decker, 14 App. Div. 415, 43 N. Y. Supp. 957. I think that, as the guaranty was one of collection, not payment, it was incumbent on the plaintiff to show due diligence against the principal debtors before he could hold the defendant, and that the insolvency of the principal debtors was no excuse for failure to pursue them. S. S. N. Bank v. Sloan, 135 N. Y. 371, 32 N. E. 231, and authorities cited.

The appellant contends that plaintiff has failed to show a breach of the contract, in that if plaintiff desired his services he should have sent the note to him, and demanded such services, and that only a refusal thereupon could establish the breach. The plaintiff testifies that he had several interviews with the defendant after the note became due; that after the first of 1894 he asked defendant about the payment of the note, and that the defendant told him "to rest easy; there was enough insurance to take care of it and several others; that they would all be looked after, and that he was going to Europe"; and thereupon the defendant went to Europe for several months. The plaintiff then proceeded to put his cognovit note in judgment. The plaintiff testifies that, during the course of the United States Court litigation, in several conversations with the defendant the plaintiff referred to the guaranty, saying that he was tired of waiting for his money, and that he did not wish to go through with the suit, because "he had guarantied me the payment of that note," and defendant told him to resort to the makers of the note first, and afterwards, if he did not get it, defendant "would take care of him." If up to that time the plaintiff had omitted the formal demand for action by the defendant, I think that this testimony is sufficient to establish a waiver by the defendant. See Sigourney v. Wetherell, 6 Metc. (Mass.) 553; Mead v. Parker, 111 N. Y. 259, 18 N. E. 727; Ege v. Barnitz, 8 Pa. 304. In Sigourney v. Wetherell, supra, the court say (page 563 of 6 Metc. [Mass.]):

> "A new promise or unequivocal act of recognition of his continued liability, made with full knowledge of the laches of the holder of the note guarantied, will continue the liability of the guarantor."

It is also urged that the defendant had extended the note so that it could not be enforced until December, 1894, and that if so, it was the duty of the plaintiff to make the demand upon defendant when it became due, whereas plaintiff had proceeded to collect it himself before it became due under the extension. But the conversation last narrated, wherein defendant told plaintiff to resort to the makers first, and, if he failed, the defendant "would take care of it," took place long after the note fell due, even by the extension. The evidence is sufficient to hold the defendant to his guaranty despite the extension, for he wrote the following letter to the plaintiff, which, if we may not assume to have been the moving cause of such extension, at least, in the absence of evidence contra, indicates acquiescence and consent:

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"Dear Sir: The note $2,500. National Cotton Seed Oil and Huller Company, which you hold, matures on the 23rd instant. The company are now in the midst of their crushing season, and could use the funds for 90 days longer. Will of course get you 8% inst. payable in advance. Advise me."

Even if after his first conversation after the fire with the defendant as to the payment of the note, the plaintiff took steps to protect himself by entry of judgment on the cognovit note while the defendant was absent in Europe, it is hard to see how the defendant was prejudiced as to his guaranty. Despite the extension, plaintiff obtained judgment, which apparently stands in full force and effect. Even if no formal demand was made at the time the extension expired, and the plaintiff had taken the matter in his own hands, he was but pursuing the course required of him before he could proceed against the defendant, and the defendant fails to suggest in what way he was thereby prejudiced in any steps that defendant could have taken to collect the note. In any event, the doctrine of waiver would apply, for the reasons heretofore stated.

The appellant also contends that there was failure of proof of due diligence. The note was primarily a corporate note, payable at Chillicothe, Ohio, and the individual makers were evidently upon the paper for the reason that they were directors and stockholders of that corporation. When the note fell due (I exclude the extension in this discussion), the plaintiff entered judgment thereon in the Ross County Common Pleas Court. We will take judicial notice that Chillicothe, Ohio, is a city, and the county seat of Ross county, Ohio. Rice on Evidence, vol. 1, p. 26. It appears that executions issued in that county and two other counties against all the defendants were returned unsatisfied. This proceeding was "at least prima facie a compliance with the contract." Backus v. Shipherd, 11 Wend. 629. And in Camden v. Doremus, 3 How. (U. S.) 515, at page 533, 11 L. Ed. 705, the court say: "The diligent and honest prosecution of a suit to judgment, with a return of nulla bona, has always been regarded as one of the extreme tests of due diligence." "If beyond this there is negligence, or more than what was done might reasonably have been done to collect the debt, and a loss ensues, it lies on the defendant to show the loss, and that it was occasioned by such negligence or omission." Backus v. Shipherd, 11 Wend., at page 636. The appellant points out that the corporation received a large sum for insurance, and complains that the plaintiff did not realize from that; but the evidence shows that the defendant alone testifies to the fact that "he saw a good deal of insurance money paid"—about $100,000—which was paid "to them or their creditors." It does not appear that he ever informed the plaintiff in response to his inquiries how plaintiff would realize, and he does not suggest now any legal way then known to the plaintiff by which he could have laid hand upon any part of this money, or that any part was available to discharge the note. The court has found upon sufficient evidence that after the fire of November 9, 1894, the corporation became and has remained insolvent, and that at the time of the recovery of the judgment on November 28, 1894, and thereafter, all of the makers were insolvent. I think that, so far as the liability of the defendant is concerned, the defendant is entitled to the finding that he pursued due diligence.

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In White v. Case, 13 Wend. 543, the court (per Nelson, J.) say:

"So in the common case, where by the guaranty the party is obligated to pay after due course of law, the contract reasonably and fairly implies an undertaking on the part of the guarantor that the principal will be in a situation to be sued, or, in other words, within the jurisdiction of the state, so that he may be sued when the demand becomes due."

So far as the suit in the United States Court is concerned, the plaintiff did not institute it; he was made a party defendant. It does not appear that his delay in appearance therein in any way prejudiced the defendant.

The further point is made that, as it appears that the attorney for the plaintiff in that suit was paid $1,500 out of the total recovery therein of $6,000, therefore the defendant in any event should have been credited with that sum as against his liability in this action as a recovery on the note. The defendant concludes that as $1,500 was paid to the attorney who appeared for the plaintiff when a defendant in the United States Court suit, therefore the client received $1,500 as his part of the recovery of $6,000. He is not entitled to that conclusion, because it appears that the said attorney was also one of the attorneys for the Thompson Bank, the plaintiff in that action. Hence, this sum presumably was paid to him also as attorney for the plaintiff. How can we determine, when the record is silent, what was his quotient as an attorney for the plaintiff and as attorney for the defendant uniting with the plaintiff? Generally, as an attorney for the plaintiff he would naturally tender more services, and so be entitled to greater consideration. As between his two clients, his client the plaintiff in the action was a creditor in double the sum owed to his client this plaintiff. There is a further consideration. The scheme of the order was to divide the $6,000 equally between four attorneys, one representing both the plaintiff in that action and this plaintiff as a defendant. This plaintiff, as such defendant, sued on a judgment of $2,500. The judgments of the various creditors represented in that suit amounted to nearly $50,000. They were all anterior to that of this plaintiff. What, then, justifies the conclusion that this plaintiff, with a claim of one-twentieth, received an allowance of one-fourth? Of the other attorneys representing defendants, and receiving $1,500 each, Douglas represented defendants with judgments of $15,000, and Jewett $10,000. All that we can logically conclude is that, whatever dividend the plaintiff received in that suit was, under the order of the court, entered on consent, paid to the plaintiff's attorney for his services therein. The terms of the guaranty expressly absolved the plaintiff from all costs of collection. There is evidence that the defendant knew of these legal proceedings, and approved of them. Moreover, the plaintiff was entitled to charge up his costs in pursuing the principal debtor. Mosher v. Hotchkiss, 41 N. Y. 589; Brandt on Suretyship and Guaranty, vol. 1, § 111. Finally, it does not appear that this point was raised by pleading or at the trial.

The defendant pleads that he resides in the city, county, and state of New York, and that any cause of action by reason of the facts alleged in the complaint did not accrue within six years before this action was begun. The cause of action arose outside of this state. Under section 390a of the Code of Civil Procedure, the statute of limitations of

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the state where the cause of action arose would apply, unless the cause of action originally accrued in favor of a resident of this state. The plaintiff testifies that he resided in this state at the time this action was begun. We can only consider this plea of our statute of limitations on the theory that the cause of action originally accrued to a resident of this state.

The defendant contends that, as the note fell due in 1894, and this action was begun August 7, 1903, the New York statute is a bar. The court found that defendant resided at Chillicothe, Ohio, and Cincinnati, Ohio, and in Campbell county, Ky., and was without the state from 1892 to October 8, 1897, and thereafter. The defendant, in the guaranty executed in March, 1894, described himself as of Chillicothe, Ohio. He testifies that in September or November, 1894, he was in his office at Chillicothe, Ohio, and that he was a law student, engaged in the business of selling commercial paper; that he maintained an office there for several years after that, and also one in Cincinnati. In a deposition read in evidence, taken January 12, 1897, in answer to a question of his residence, he testifies: "I live in Campbell County, Ky." He also testifies that he resided, he thought, at Chillicothe in the years 1892, 1893, and 1894. In a deposition taken February 17, 1899, read in evidence, he testifies that he resided in Campbell county, Ky. The plaintiff testifies that the defendant resided at Cincinnati, Ohio, on February 10, 1897. These answers of the defendant in such proceedings were competent as admissions. Stephens' Digest on Evidence (2d Ed.) p. 58, note, and authorities cited, 74, note, and authorities cited; Greenleaf on Evidence, § 193. No testimony was offered by the defendant as to his residence in this state. Thus there was evidence to establish that when the cause of action accrued the defendant was without the state; the burden of showing the time of his residence in the state was upon him. See Code Civ. Proc. § 401; Mayer v. Friedman, 7 Hun, 218, affirmed 69 N. Y. 608; Palmer v. Bennett, 83 Hun, 220, 31 N. Y. Supp. 567, affirmed 152 N. Y. 621, 46 N. E. 1150.

The appellant contends that the court regarded the writing sued on as a guaranty of payment; that it was not, and therefore the judgment in any event should not stand. Although the court did make a remark at the close of the trial which may indicate that such was its view, the complaint, the proof, and the findings are sufficient to sustain the judgment upon the agreement pleaded, even though we construe it as a guaranty of collection.

The judgment is affirmed, with costs. All concur.

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## WEISS v. RUBINSON et al.

(Supreme Court, Appellate Division, Second Department. April 20, 1906.)

BROKERS—RIGHT TO COMMISSION—PRODUCING PURCHASER.

A real estate agent does not produce purchasers willing to execute a contract on the terms prescribed, so as to be entitled to commissions, where they insist on more onerous terms than those verbally agreed on, and on denial thereof refuse to buy.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Brokers, §§ 72, 75, 76.]

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Appeal from Kings County Court.

Action by Max Weiss against Max Rubinson and another. From a judgment for plaintiff, and from an order denying a motion for new trial, defendants appeal. Reversed.

Argued before WOODWARD, JENKS, HOOKER, and RICH, JJ.

W. H. Burby, for appellants.

M. Hallheimer, for respondent.

PER CURIAM. The defendants, who owned two houses, hired the plaintiff as a broker to procure purchasers. The plaintiff brought Greenberg and Schiller as purchasers to the defendants. One of the defendants testifies that plaintiff then told him that they had seen the houses, and were ready to purchase them; that thereupon defendant asked him if they had seen mechanics and plumbers working on it, and a scaffold, and that Greenberg answered that he had examined it, and everything was all right. Greenberg then asked if he had any violations, and the witness answered "Yes," and showed a contract with a mechanic that was satisfactory to the department. Greenberg suggested that it be put in the contract, but the owner refused, saying that they would put in the contract with the mechanics for removing the violations. Thereupon the purchasers said that they "would do everything; we will take your word for it." The plaintiff then asked if they would take a deposit. The defendants refused, but finally accepted a deposit from each purchaser. Thereupon a receipt was given by the defendants, which provided that a contract should be made two days later (June 16th) at a certain place, title to be delivered on August 1st thereafter. When the parties met at the appointed time and place, an attorney for the purchaser insisted that the removal of the violations should be embodied in the contract. The defendants refused, saying that they had not agreed. At the same time they again exhibited the contract with the mechanics, and stated that they would see to it that the violations were removed before the deed was delivered. Thereupon the purchasers said that they did not want the premsies, but demanded their deposits, which were finally paid to them. Nothing further was done. Although the proposed purchasers were called to the stand after the defendants had given their testimony, neither of them contradicted the defendants. The broker now sues for his commissions.

If the testimony of the defendants is to be credited, then the purchasers insisted upon more onerous terms in the contract than those which were verbally agreed upon between them, and the defendants were not bound to execute such contract. Under such circumstances, the plaintiff did not produce a purchaser willing to execute a contract upon the terms prescribed. Platt v. Kohler, 65 Hun, 559, 20 N. Y. Supp. 547; Pullich v. Casey, 43 App. Div. 112, 59 N. Y. Supp. 298.

The judgment is reversed, and a new trial ordered; costs to abide the event.

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## SORONEN v. VON PUSTAU.

(Supreme Court, Appellate Division, Second Department. April 20, 1906.)

1. ANIMALS—INJURIES TO PERSONS—LIABILITY OF OWNER.

The owner of a dog is charged with the knowledge of his brother, to whose custody the dog was committed, of its vicious character prior to personal injuries caused by it, though the knowledge was not communicated to the owner.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Animals, § 235.]

2. EVIDENCE—ADMISSIONS—ADMISSIBILITY.

In an action for injuries from being bitten by a dog, evidence of statements by the defendant's brother, to whose custody the dog was intrusted, tending to show his knowledge of the vicious character of the dog, was competent.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Animals, § 266; vol. 20, Cent. Dig. Evidence, § 887.]

Appeal from Municipal Court, Borough of Brooklyn, Second District.

Action by Eina Soronen against William Von Pustau. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Argued before WOODWARD, JENKS, HOOKER, and RICH, JJ.

Edo E. Mercelis, for appellant.

Charles Oakes, for respondent.

RICH, J. This is an appeal from a judgment dismissing the complaint at the close of the plaintiff's case. The action was brought to recover damages alleged to have been sustained by plaintiff as the result of her having been bitten by a vicious and dangerous dog, owned by the defendant, while she was in the employ of defendant's mother as a servant. Upon the trial the plaintiff endeavored to prove that information was given defendant's brother, to whom the care and custody of the dog was intrusted, of its dangerous and vicious character, and of statements made by him to third parties tending to establish that he had such knowledge. The trial court sustained objections made to the questions asked for this purpose, and excluded the evidence. To these rulings the plaintiff duly excepted.

The defendant's liability rested upon his knowledge of the vicious character of his dog. If the brother had knowledge of the vicious character of the dog prior to the injury, the defendant was charged with that knowledge, although it may not have been communicated to him. Brice v. Bauer, 108 N. Y. 428, 15 N. E. 695, 2 Am. St. Rep. 454; Niland v. Geer, 46 App. Div. 194, 61 N. Y. Supp. 696. Evidence of such knowledge was therefore competent, and its exclusion error, for which the judgment must be reversed.

Judgment reversed, and new trial ordered; costs to abide the event. All concur.

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## SCHELLENBERG et al. v. MULLANEY.

(Supreme Court, Appellate Division, Second Department. April 20, 1906.)

BANKRUPTCY—LIABILITIES—EXCEPTIONS—GOODS USED BY FAMILY OF BANKRUPT.

Under National Bankruptcy Act, § 17, as amended by Act Feb. 5, 1903, c. 487, § 5, 32 Stat. 798 [U. S. Comp. St. Supp. 1905, p. 684], excepting, among others, "liabilities * * * for alimony due or to become due, or for maintenance or support of wife and child," from discharge does not refer to liabilities for goods purchased by the husband or parent, and used by wife or child, and a discharge in bankruptcy discharges a debt incurred for such goods.

Appeal from Trial Term.

Action by Nathan Schellenberg and another against Michael Mullaney. From a judgment for plaintiffs, defendant appeals. Reversed.

The complaint is for goods sold and delivered to the defendant, and alleges that the goods were clothing which were used by the defendant's children, and that they were necessaries for the said children, and this was all admitted at the trial.

Argued before HIRSCHBERG, P. J., and HOOKER, GAYNOR, RICH, and MILLER, JJ.

William J. Courtney, for appellant.

Edward Lazansky, for respondents.

GAYNOR, J. The defendant's subsequent discharge in bankruptcy was held by the justice not to discharge him from this debt. This was error. Section 17 of the national bankruptcy act as amended in 1903 (Act Feb. 5, 1903, c. 487, § 5, 32 Stat. 798 [U. S. Comp. St. Supp. 1905, p. 684]) excepts among others, "liabilities * * * for alimony due or to become due, or for maintenance or support of wife and child," from discharge. This last clause refers only to the involuntary liability under the common law for support of wife and children, and to any one who relieves their want; and under bonds, or the like, given for such support by requirement of courts and magistrates. It does not refer to liabilities for goods purchased by a husband or parent, as in this case, and used by wife or child. This latter fact does not change the character of the debt. The purchaser was free to do what he liked with the goods. They were a matter of free bargain and sale (Collier on Bankruptcy, p. 199).

The judgment should be reversed.

**Judgment of the Municipal Court reversed, and new trial ordered; costs to abide the event. All concur.**

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## MATHERS v. INTERURBAN ST. RY. CO.

(Supreme Court, Appellate Division, Second Department. April 20, 1906.)

STREET RAILROADS—INJURY TO PEDESTRIAN—QUESTIONS FOR JURY—CONTRIBUTORY NEGLIGENCE.

**In an action against a street railway company for injuries to a pedestrian who was struck by a car as he was crossing the street, evidence *held* to authorize a submission to the jury of the question of plaintiff's contributory negligence.**

Appeal from Trial Term, Westchester County.

Action by Joseph W. Mathers against the Interurban Street Railway Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Argued before HIRSCHBERG, P. J., and HOOKER, GAYNOR, RICH, and MILLER, JJ.

Thomas J. O'Neill, for appellant.

Anthony J. Ernest (Bayard H. Ames, on the brief), for respondent.

GAYNOR, J. The jury could have found from the evidence that the plaintiff was crossing 3d avenue, Manhattan, at the lower crossing of 30th street from east to west at an ordinary walk; that as he left the curb he looked up and down 3d avenue, and saw a car up near 31st street coming down and another down at 29th street coming up (i. e., on the east track); that another car going uptown was at the time passing the crossing he was on; that no other cars were between 29th and 31st streets; that he walked across in the rear of the said uptown car that was passing at the time, and as he came out from behind it was hit by the downtown car.

The plaintiff was nonsuited for not looking uptown again before going on the downtown track. This was error. When he looked on leaving the curb the downtown car was that far away that it was at least a question of fact whether it was contributory negligence not to look again. I do not see it would be of any use to cite decisions.

The judgment is reversed.

**Judgment reversed, and new trial granted; costs to abide the event. All concur.**

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## In re KEOGH.

## In re JONES' WILL.

(Supreme Court, Appellate Division, Second Department. April 20, 1906.)

1. WILLS—CONSTRUCTION—VESTING OF REMAINDER.

**Testator devised one-fifth of his estate in trust during the life of his brother to pay the net income to his brother semiannually for life, and on his death to transfer the corpus and income then remaining to the brother's children in equal proportions and to the child or children of any dead, and if the brother should die leaving neither children nor grandchildren, the trust res should be given to the children of his sisters; the child or children of each to take an equal portion thereof. *Held*, that the remainder to the children of testator's sisters did not vest in them until the time for distribution.**



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2. SAME—DEVISE TO CLASSES.

Where testator gave one-fifth of his estate in trust for his brother, with a provision that on the brother's death the property should be divided among the brother's children or grandchildren, but, if he left neither, then to the children of testator's sisters, the child or children of each to take an equal portion thereof, the gift in remainder was to the children of each sister as a class by representation.

3. SAME—INCOME—ACCUMULATION.

Where a will created a trust, and provided for semiannual payments of income to the life tenant without any provision that it should not be paid oftener, the income vested in the life tenant as it was paid in, so that the income which had accrued at the time of the life tenant's death passed to his personal representative.

Appeal from Surrogate's Court, Westchester County.

Judicial accounting of Martin J. Keogh, as sole surviving trustee of the last will of David Jones, deceased. From a surrogate's decree (95 N. Y. Supp. 191) construing the will, certain legatees appeal. Modified and affirmed.

Argued before HIRSCHBERG, P. J., and JENKS, HOOKER, RICH, and MILLER, JJ.

Charles M. Cannon, for appellant Julia D. Haviland.

Walter R. Beach, for appellants Griffith.

David McClure, for appellant Walter D. Starr.

John M. Digney, for appellant Chandler D. Starr.

Shilund, Shoemaker & Hedges, for appellant William T. Dannat.

Wilfrid N. O'Niel, for appellants Cannon and another, as administrators of David J. Dannat.

Henry A. Monfort, for respondents Thayer.

John P. Elder, in pro. per., as executor of John J. Jones.

Townsend Scudder, for respondent Mary Thayer Scudder.

MILLER, J. The testator the construction of whose will is involved in this appeal died January 17, 1881, leaving as his only surviving next of kin John J. Jones, a brother, and Mary J. Griffith, Susan J. Dannat, Jane J. Thayer, and Margaret A. Jones, sisters. The particular paragraph of the will to be construed is as follows:

"Sixth: I give, devise and bequeath to the said Wilson G. Hunt, Hamilton Blydenburg, Alexander Thayer and John J. Jones, Executors and Trustees as aforesaid, the remaining one equal fifth part of all my estate, real and personal (after payment of debts and funeral expenses as aforesaid). To have and to hold the same to them and the survivors and survivor of them for and during the life of my brother John J. Jones, in trust, nevertheless, to take possession of the real estate, keep the same in suitable and proper repair, keep the buildings thereon well insured and to let or lease the same from time to time and for such terms of time within the lifetime of my said brother as to them may seem best and for the best rent that can be obtained therefor, to keep the personal estate safely and securely invested and to collect the rents and profits of the real estate and the interest, dividends and income of the personal estate and after paying all taxes, assessments, expenses of repairs, insurance and all other legal and necessary charges and expenses pay over the residue or net proceeds of said remaining fifth part of my estate so given to them in trust as last aforesaid to my said brother John J. Jones semi-annually during his life, and immediately upon his death the said trustees, the survivors and survivor of them shall grant, convey, transfer and deliver over the said remaining one-fifth part of my estate so given to them in trust as last aforesaid and any income thereof remaining in their hands to the

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**lawful children of my said brother in equal portions share and share alike, and to the child or children of any who may be dead, the grand child or children in such case to take the same share or portion that the parent would have taken if living. In case my said brother John J. Jones shall die leaving no child, children, grand child or grand children him surviving, I direct the said trustees then to grant, convey, transfer and deliver over the said remaining one-fifth part of my estate so given to them in trust as last aforesaid, together with any income thereof remaining in their hands to the children of my sisters hereinbefore mentioned, the child or children of each to take an equal portion thereof."**

In like language he created four other trusts of the remaining four equal fifth parts of his residuary estate for the benefit of each of his four sisters, respectively, using the same language in the disposition of the remainders in each case. The brother, John J. Jones, died November 14, 1904, leaving no descendants. The sister Margaret never married. The sister Jane J. Thayer has seven children. The sister Mary J. Griffith had four children, one of whom predeceased the said brother, John J. Jones, leaving no descendants, and the sister Susan J. Dannat had four children, one of whom predeceased the said brother, John J. Jones, leaving two descendants.

Three questions are argued on this appeal, viz.: First. Did the remainder of the trust estate for the brother, John J. Jones, vest upon the death of the testator? Second. In the division of said remainder, did the testator intend equality among his nephews and nieces, or equality among his sisters' children by classes, each class including the child or children of a sister? Third. To whom did the accrued income not distributed at the time of the death of said John J. Jones pass?

We think the learned surrogate correctly held that there was no vesting of the remainders until the time for distribution arrived, and his opinion is so satisfactory upon this point that we desire to add nothing to it.

We do not agree, however, with the construction adopted respecting the division of the remainder. It may be granted that, in the absence of anything in the will evincing a contrary intent, the remaindermen would take equally, and it may also be assumed that they would take equally but for the phrase "the child or children of each to take an equal portion thereof"; but we think that this phrase, when construed in the light of the manifest testamentary scheme, evinces an intention to treat the child or children of each sister as one class, and to divide the remainder equally among the different classes. The expression "per stirpes" may not be strictly applicable to this case, as, technically, said children do not take by representation; and yet we think in the mind of the testator the children of each sister were regarded simply as the representatives of such sister. As the learned surrogate aptly says, the will clearly shows that the testator stood in the attitude of parent to his brother and sisters, and it is clear that he intended to divide his estate equally among them, preserving it so far as he could by the creation of trust estates, terminating upon the death of each, respectively. There is nothing in the will to suggest that the testator had nephews and nieces in mind other than as representatives of their parents, or that he desired upon any contingency a distribution of his estate other than in accordance with his paramount intention of preserving equality among the

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brothers and sisters and their descendants as representatives. With this in mind, we are prepared to determine what he meant by the phrase "the child or children of each to take an equal portion thereof," because it cannot be supposed that these were idle words. Had said phrase been omitted, there might have been force in the argument that, respecting the share of each brother or sister dying without descendants, he intended to depart from the general scheme of preserving equality among brothers and sisters, and the expression must have been used either to make such intention clear or to evince a contrary intent. If it was used to make clear the intention claimed by the respondents, it was certainly very inapt. The word "each" refers to sisters, and the expression should be read, "the child or children of each sister to take an equal portion thereof." Does the equality sought to be maintained refer to the sisters or the children? If he had in mind simply the children, it would have been very easy to have provided for a distribution among his "nephews and nieces equally." He does not say that "each child shall take an equal portion," nor that "the children of each shall take equal portions." The words "child" and "children of each" are used in the alternative, and plainly refer to a class. It will not be profitable to discuss the rules which have governed the descent or distribution of intestates' estates, or the authorities bearing on such questions, because all agree that in case of a will the intention of the testator is controlling. For cases analogous to the case at bar, see Ferrer v. Pyne, 81 N. Y. 281, and Vincent v. Newhouse, 83 N. Y. 505. It is true that, respecting the share of each brother or sister dying leaving descendants, he provided by apt language for representation among such descendants, so that they should take "per stirpes"; but the fact that he omitted to provide for representation so that the child or children of a child dying should take the share of the parent in the contingency which has happened, and which he may well have regarded as remote, does not militate against the position that he intended to treat the child or children of each sister as a separate class. This will was executed in 1866, and, in the absence of anything to indicate the contrary, it must be supposed that he considered his prospective nephews and nieces as representatives of parents, among whom he desired equality. As the language employed, construed according to its grammatical construction, evinces such intention, and as this construction is in harmony with the whole testamentary scheme, it should be adopted.

As to the third question, we think that the conclusion of the learned surrogate that the unpaid income accrued prior to the death of said John J. Jones passed to his personal representative is correct. Although the will provided for semiannual payments of income, in the absence of anything to the contrary, it must be assumed that the testator intended the immediate vesting in the life beneficiary of all income upon its being paid in. Smith v. Parsons, 146 N. Y. 116, 40 N. E. 736. The postponement of such vesting for however short a time would offend the statute against unlawful accumulations. Section 4, Personal Property Law, Laws 1897, c. 417, p. 508; section 51, Real Property Law, Laws 1895, c. 547, p. 568; Cray v. Hegeman, 92 N. Y. 508. There is nothing in the will showing an intention to postpone the immediate vesting of income, unless it be found in the words, "together with

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any income thereof remaining in their hands," found in the provisions directing the distribution of the remainder upon the death of said John J. Jones. As the learned surrogate remarked, those words may well refer to the time of distribution, for obviously the testator must have known that some time must elapse between the death of said John J. Jones and said distribution; but in any event an expression which might refer to either the death of the life beneficiary or the distribution of the remainder, found in the clause providing for such distribution, should not be given an effect which would invalidate the plain disposition of the income during the term of the trust provided in another part of the will.

The decree should be modified to the extent of providing that the corpus of the trust estate created by the sixth paragraph of the will, together with all income thereon which has accrued subsequent to the death of the life beneficiary, be distributed among the nephews and nieces of the testator living at the time of the death of said life beneficiary, or to the personal representative of any since dying, in the following proportions: One equal third part thereof to the children of Mary J. Griffith; one equal third part thereof to the children of Susan J. Dannat; one equal third part thereof to the children of Jane J. Thayer; and, as modied, affirmed, with costs to all parties payable out of the estate. All concur.

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## In re McAVOY'S ESTATE.

(Supreme Court, Appellate Division, Second Department. April 20, 1906.)

TAXATION—LEGACIES—BEQUESTS FOR MASSES.

Testatrix, after directing that all her just debts and funeral and testamentary expenses be paid, bequeathed $800 to a priest, or, in the event of his death, to his successors as pastor of a certain church, to be used in saying 800 low masses for the repose of the soul of herself and three others. *Held*, that such bequest was not exempt from transfer taxes as funeral expenses.

Appeal from Surrogate's Court, Kings County.

Proceeding for the assessment of a transfer tax on a legacy bequeathed to Rev. Father Guhl by the will of Mary J. McAvoy, deceased. From an order of the Surrogate's Court exempting the bequest, the Comptroller appeals. Reversed.

Argued before WOODWARD, JENKS, GAYNOR, and RICH, JJ.

Leonard B. Smith, for appellant.

JENKS, J. By paragraph 2 of her will the testator provided:

"I give and bequeath unto Rev. Father Guhl, of St. Alphonsus Church on Kent Street, Brooklyn Borough, N. Y. City, or in the event of his death, to his successors as pastor of said Church, the sum of eight hundred (800) Dollars, to be used in saying eight hundred (800) low masses, as follows: two hundred thereof for Henry J. Riley; two hundred thereof for Mary J. McAvoy; two hundred thereof for James A. McAvoy, and two hundred thereof for Jane Riley."

The sole question presented is whether this sum of $800 is subject to a transfer tax. The tax law does not specially exempt such a be-

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quest, and the legacy in question seems to me a transfer by will, and as such taxable. See Matter of Gould's Estate, 156 N. Y. 423, 51 N. E. 287. I do not see how it can be held that such a provision is for funeral expenses. Certainly the bequest for masses to be said for others than the testator cannot be for the funeral expenses of the testator. So far as the masses to be said for the testator are concerned, it is quite clear that she did not contemplate that the bequest was for her funeral expenses, inasmuch as she provided by the first paragraph of her will as follows: "I direct that all my just debts, funeral and testamentary expenses be paid as soon after my decease as may be." See Matter of Black, 1 Con. Sur. 477, 5 N. Y. Supp. 452. A mass is not peculiarly a part of a funeral service, like unto the office for the dead. It is the sacrament of the Eucharist, and a low mass is one said and not sung. (Cent. Dict.) In the religion of the Holy Roman Church masses are celebrated for the good of those who are dead, but in no sense is a mass so celebrated necessarily a part of the funeral service. I think that the conclusion reached by the learned surrogate in Matter of Black, supra, was correct.

It follows that the order must be reversed, and the order assessing the tax modified, by assessing a tax at the rate of 5 per cent. upon the legacy. All concur.

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## In re BROWER'S WILL.

(Supreme Court, Appellate Division, Second Department. April 20, 1906.)

1. WILLS—TESTAMENTARY CAPACITY—AGE—PRESUMPTION.
   That testatrix was a woman 96 years of age when she made her will was insufficient in itself to raise a presumption against testatrix's capacity.
   [Ed. Note—For cases in point, see vol. 49, Cent. Dig. Wills, § 94.]

2. SAME—EVIDENCE.
   In a proceeding for probate of a will, evidence *held* sufficient to sustain a finding that testatrix had testamentary capacity when the will was executed.

3. EVIDENCE—CONCLUSIONS OF WITNESS—MENTAL CAPACITY.
   On an issue concerning testatrix's testamentary capacity at the time she made her will, it was error for the surrogate to exclude a question addressed to testatrix's agent, as to whether her acts, which the agent had remembered and testified to, impressed him as rational or irrational.
   [Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 2242; vol. 49, Cent. Dig. Wills, §§ 113–119.]

4. WILLS—PROBATE PROCEEDINGS—EXCLUSION OF EVIDENCE—HARMLESS ERROR.
   Where, on an issue of testamentary capacity, the surrogate erroneously excluded a question addressed to testatrix's agent as to whether testatrix's acts impressed the agent as rational or irrational, and the acts referred to had been fully described by the agent, the error was not ground for reversal, under Code Civ. Proc. § 2545, prohibiting a reversal for an error of the surrogate in the admission of evidence which was not prejudicial.

Appeal from Surrogate's Court, Nassau County.

Application for the probate of the last will of Abigail Brower, deceased. From a surrogate's decree admitting the will to probate without contest, certain heirs appeal. Affirmed.

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Argued before HIRSCHBERG, P. J., and WOODWARD, JENKS, HOOKER, and MILLER, JJ.

Edwin T. Taliaferro, for appellant.

Charles H. Street (Leander B. Faber, on the brief), for respondents.

JENKS, J. I think that the decree was right. The testator was a woman aged 96, but these years in themselves raise no presumption against her capacity. Horn v. Pullman, 72 N. Y. 269. Four months before her death, at a meeting where only she, her regular physician, and an attorney who had but little previous acquaintance with her, were present, she, unaided, instructed the attorney as to the will, and was even acute enough to discuss the bearing of her advanced age upon her testamentary capacity. The will was duly executed before these gentlemen as attesting witnesses. It was a simple document, entirely natural in its benefactions. These two witnesses, together with a clergyman and an intimate woman friend, are clear in their testimony as to sanity and mental capacity. The opportunities of the woman friend especially to observe the mental powers of the testator were frequent, for she was a constant visitor. We find that some months after the execution of the will the testator stated to her sound (not fanciful) reasons why she had cut off a relative, and shrewd reasons why she did not make deposits in a certain bank. None of these witnesses is benefited by the will.

The contestants called three witnesses. One is a reputable lawyer, who had acted as agent for the testator in the collection of her rents, and who saw her for monthly accountings from January 22, 1904, until July 22, 1904. He testifies that within a few months—perhaps five, perhaps less than three—before her death he still continued to go over the accounts with her, or in her presence, but not with her alone, and that in this later period she did not seem to grasp them as before; that she said very little with reference to them. The witness had regarded her as the brightest woman of her years that he had ever known. Her physician testifies that death came from the general breaking up of old age, but that the testator had not reached the stage of mental senility before she died. Proof that after a long period of presumably satisfactory monthly accountings the testator was listless, indifferent, comparatively silent, or did not seem to grasp the accounts as before, is not to my mind cogent on the question of mental capacity to make a will at a near but earlier time. Mere physical debility might render one listless or indifferent in the matter of an account of rentals by a trusted agent, or in a like business routine, who nevertheless could and would rouse himself to the final important matter of testamentary disposition.

The second witness for the contestant was a physician who had attended the testator frequently while she lived in this borough, but not after 1901. He conversed with her as his patient only. He testifies that he found her weak, aged, and infirm, and generally ill abed; that her mental condition was very weak and her memory poor, and that he thought she was incapable of transacting business, and that it would be "pretty hard for her to remember the names of five, or any number, of her relatives." I comment that physical illness may go far to affect temporarily the mind; that this witness gained no knowledge of her

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business ability beyond his mere professional visits as a physician; that the witness Miller testifies that three years after, and within a few weeks of death, testator expressed regret that she had not gone to live in the country earlier, as her health was much improved, and at that time she was up and about, walking in to the dinner table, conversing on general topics, explaining the cutting off of a relative in her will, and giving shrewd reasons for the nondeposit of her moneys. Moreover, the lawyer who acted as her agent only knew the testator after this physician had ceased to see her, and for several years had monthly accountings with her thereafter, in which she showed such capacity and understanding as to prompt him to pay the tribute that I have mentioned. And finally, she certainly in her instructions to her lawyer named not five, but many more, relatives, with discrimination as to her bounty to them.

The testimony of the third witness for the contestant deals only with certain indorsements. It is uncertain, vague, and unsatisfactory, and at most unimportant.

The learned surrogate erred in excluding the question addressed to the agent as to whether the acts of the testator, which he had remembered and testified to, impressed him as rational or irrational. De Witt v. Barly, 17 N. Y. 340; Wyse v. Wyse, 155 N. Y. 371, 49 N. E. 942. But the acts were capable of description, and had been fully described, and so the court was at most only deprived of the opinion of a lay witness based upon facts which were themselves before the court. In view of the rule that obtains upon review of the Surrogate's Court (section 2545, Code Civ. Proc.; Matter of Seagrist's Will, 1 App. Div. 615, 37 N. Y. Supp. 496, affirmed 153 N. Y. 682, 48 N. E. 1107), and of the evidence for the proponents, I think that the ruling was not reversible error.

The decree is affirmed, with costs. All concur.

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## HARRIS v. BALTIMORE MACHINE & ELEVATOR WORKS.

(Supreme Court, Appellate Division, Second Department. April 20, 1906.)

1. MASTER AND SERVANT—INJURIES TO SERVANT—EMPLOYER'S LIABILITY ACT—ACTIONS—COMPLAINT.

A complaint against the master for injuries to a servant through the negligence of a superintendent alleged that plaintiff, being in defendant's employ, was directed by it to enter and use an elevator which it had constructed, and which was under its control, and that he did so; that the elevator was negligently constructed, in that the cable by which it was suspended was negligently fastened to the top of the car, and that by reason thereof, and of defendant's negligence in directing plaintiff to use the car, the cable became unfastened and the car fell. *Held*, that such complaint properly alleged a cause of action for negligence of defendant's superintendent, under Employer's Liability Act, Laws 1902, p. 1748, c. 600, without alleging that plaintiff was directed by "the superintendent" to use the car, and that such superintendent did the other negligent acts complained of.

2. SAME—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

In an action for injuries to a servant, evidence considered, and *held* that, whether defendant's superintendent was negligent, and whether

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plaintiff was guilty of contributory negligence, were questions for the jury.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 1064, 1089-1132.]

3. SAME—INSTRUCTIONS.

Where, in an action for injuries to a servant, the only negligence litigated was that of defendant through its superintendent, who under the employers' liability act was not plaintiff's fellow servant, but represented defendant, an instruction that defendant owed plaintiff the duty of reasonable care to see that the elevator in question was safe for the purposes for which plaintiff was using it at the time of the accident was not objectionable as making defendant liable for the negligence of plaintiff's fellow servants.

4. APPEAL—REVIEW—COSTS—EXTRA ALLOWANCE.

An order granting an extra allowance can only be reviewed by an appeal therefrom.

5. MOTIONS—ORDERS—ENTRY.

An order granting an extra allowance of costs appearing on the clerk's minutes is valid without a formal order signed by the trial judge.

Appeal from Trial Term, Kings County.

Action by Norman C. Harris against the Baltimore Machine & Elevator Works. From a judgment for plaintiff, and from an order denying defendant's motion for a new trial on the minutes, defendant appeals. Affirmed.

Action by servant against master for negligence. An agent was employed by the defendant to solicit orders for their electrical elevators in New York City, and install them. He hired the plaintiff and other skilled mechanics in that kind of work to do the work under his superintendence. A freight elevator the plaintiff was working on fell and hurt him. Its construction was that it was lifted by two cables which had to be fastened in an iron shackle, which was attached in turn to the top of the car. They ran through a hole in the shackle, and had to be fastened there by pouring in of molten babbitt (a metal harder than lead), in addition to their strands being turned up and knotted. They ran over a drum at the top of the shaft. The plaintiff knew they would have to be babbitted and that they would be dangerous if not fastened in that way, in that they were likely to pull out of the shackle and let the elevator drop. He did not babbitt them; he only turned up and knotted the strands. There was no babbitt there and no pot or furnace to heat it, he says. At this stage the said agent or superintendent sent him to work at another building installing an elevator. "At that time", the plaintiff testified, "I asked him how we were going to babbitt our cables; he said he would get a lead pot or furnace." He says the superintendent asked him at that time what there was still to do on the elevator, and he told him "babbitting the cables", putting the cables on the drum and putting in the counterweights. After working about two weeks or ten days on the other job the said superintendent told him he was going to put the elevator in order, and asked the plaintiff about the work. He again told the superintendent it was necessary to "babbitt the cables" and do the said two other things. The superintendent then took one of the workmen who was with the plaintiff away to work at the first elevator. Some days later he told the plaintiff to go back to work on the first elevator, and the plaintiff testified that the superintendent told him the elevator "was all right to run, all ready, only she ran too close to the front of the hatch." On the cross-examination he said what the superintendent said was "that he tried the elevator and found it all right"; and on the court immediately calling his attention to the difference he said he thought the words were that "the elevator was all right." The next day he and the superintendent went to work together in the elevator putting in the counterweights. They went up by the elevator to a floor and took on six or seven counterweights. They weighed about 125 pounds each. They then started to go up further in the elevator with the counterweights when the

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cables pulled out of the shackle and let the elevator drop to the bottom of the shaft. The plaintiff did not look before using the elevator to see if the babbitting which he left undone had been done. He could have looked from a floor above, or by standing by an opening on the floor and simply lowering or raising the elevator so its top would be before his eyes, or by getting up on the car, which anybody could do, as he testified.

The plaintiff was the only witness on his side, except the testimony as to his injuries. The superintendent was the only witness called against him. He denied that the plaintiff ever told him there was no pot or furnace or babbitt, or that the babbitting had not been done.

Argued before HIRSCHBERG, P. J., and WOODWARD, JENKS, RICH, and GAYNOR, JJ.

Theron G. Strong, for appellant.

Herbert T. Ketcham, for respondent.

GAYNOR, J. 1. At the close the learned trial judge ruled that the complaint alleged a cause of action under the employers' liability act (Laws 1902, p. 1748, c. 600) and charged the jury on that footing, viz., that if the plaintiff was hurt by the negligence of the superintendent he could recover, if he was free from contributory negligence. The complaint is now, as on the trial, criticised as not stating a cause of action under the statute. It alleges that the plaintiff, being in the employ of the defendant, was directed by it to enter an elevator which it had constructed and had under its control, and use the same, and that he did so; that it was negligently constructed in that the cable by which it was suspended was negligently fastened to the top of the car; and that by reason thereof, and of defendant's negligence in directing the plaintiff to use the car, the said cable became unfastened, and the car fell. In the last paragraph it alleges service of the notice required by the statute. The complaint is well drawn; it is barren of allegations of evidence. and other unnecessary allegations. It is said that the complaint should in strictness have alleged that the plaintiff was directed by the superintendent to use the car, and that such superintendent did the other negligent acts, in order to be deemed under the statute. The learned trial judge shared this view, but ruled nevertheless that the complaint could be eked out as sufficient. The pleader was entirely right in alleging that the negligence was that of the defendant. To have alleged that the negligence was that of the superintendent would have been unscientific and not in due form. The negligence to be recovered for under the statute is that of the defendant and not of the superintendent or any agent or employé, the very same as under the common law. The statute merely changes the common law rule by making the negligence of the superintendent that of the master in the cases where at common law it would be that of a fellow servant. The complaint should be for the negligence of the defendant in every case, now as always, and evidence that the superintendant did the negligent act makes out the allegation of the complaint. For a complaint to allege in any case that the defendant by his agent or servant did thus and so would not be scientific form. The proper form is that the defendant did it, and whether he did it personally or by an agent matters not; in either case he did it. Which way he did it is a matter of evidence, not of pleading. These are every day rules of pleading, too familiar to dwell over.

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2. The case was submitted to the jury to find whether the superintendent was negligent in not having the cables babbitted in the shackle, and directing the plaintiff to use the elevator in that condition. Assuming that the plaintiff when he was sent away from the work of installation to work on the elevator in the other building informed the superintendent that the babbitting had not been done, and again later on, as he says, and the superintendent then continued the work, he could be found negligent in not babbitting the cables, for concededly he had the elevator suspended by the cables from the drum, and set running while the plaintiff was working at the other place. without having the babbitting done.

3. Whether the plaintiff was guilty of contributory negligence in using the elevator with the superintendent after he was brought back to it after his absence of about two weeks without looking to see if the babbitting had been done meanwhile was a question for the jury. He was taken away from the work before the babbitting had been done and the cables set in the drum and the elevator set running. The superintendent told him that he would go on with the work, and when he was brought back the elevator was suspended by the cables from the drum and running. Whether this was not sufficient to induce a prudent person to understand and believe that the babbitting had been done was a question of fact, not of law, for the babbitting should have been done before the elevator was suspended and set running.

4. It must be owned that the essential questions of fact were close. It was the testimony of the plaintiff against that of the superintendent. But the defendant's side must have been seriously discredited in the minds of the jury by contesting that the superintendent was such. The plaintiff was put to much proof and was met with every objection that could be made in establishing that fact; and yet when the superintendent was put on the stand by the defendant he freely admitted he was superintendent, and there never was the slightest ground for denying it. In considering the weight and credibility of the evidence this justly counted for something, and sometimes the like counts for much. Trial judges see cases lost in this way every day.

5. There is an exception by the defendant to the charge of the trial judge in substance that the defendant owed the plaintiff the duty of reasonable care to see that the elevator was safe for the purpose for which he was using it at the time of the accident. This had reference to the uncontroverted fact that the superintendent did have the elevator suspended to its cables and set going during the plaintiff's absence, and had it running for him to work on when he came back. Construed with the whole charge, as it must be, and not isolated and technically, it can only refer to the negligence of the defendant through its superintendent, for that was the only thing litigated; and his negligence would under the statute be that of the defendant and not of a fellow servant. The statute took the superintendent out of the category of fellow servants. There was no claim of the negligence of any fellow servant or of any one except the superintendent throughout the trial. The whole tenor of a trial has to be considered in construing a charge. The charge was therefore not open to the construction that the defendant was made liable for the negligence of fellow servants.

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6. The order granting the extra allowance can only be reviewed by an appeal therefrom. The order appears on the clerk's minutes. That suffices without a formal order signed by the trial judge. Formerly all orders were entered by the clerk on his minutes, and that suffices still, although it has been much lost sight of in the growing formality of recent years. But there is no appeal from that order.

The judgment and order appealed from should be affirmed.

**Judgment and order affirmed, with costs. All concur.**

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## HERBST v. KELLOGG MFG. CO.

**(Supreme Court, Appellate Division, Second Department. April 20, 1906.)**

TRIAL—INSTRUCTIONS—ERRONEOUS ASSUMPTION AS TO EVIDENCE

**Where, in an action for injuries to a servant, the only negligence claimed was a violation of Labor Law, Laws 1897, p. 477, c. 415, § 70, providing that no child under 16 shall be employed in a factory unless a certificate executed by a health officer be filed in the office of the employer, and plaintiff testified that when he was employed nothing was said to or by defendant's superintendent as to plaintiff's age, though defendant's superintendent stated that plaintiff needed no certificate, an instruction to the effect that plaintiff had said that the superintendent told him that he would not need a certificate, after he had told the superintendent that he was not 16, was reversible error.**

Appeal from Trial Term, Kings County.

Action by Frank Herbst, an infant, by Frederick Herbst, his guardian ad litem, against the Kellogg Manufacturing Company. From a judgment in favor of plaintiff, and from an order denying a motion for a new trial, defendant appeals. Judgment and order reversed.

Argued before HIRSCHBERG, P. J., and WOODWARD, JENKS, RICH, and MILLER, JJ.

James Crooke McLeer (William E. C. Mayor, on the brief), for appellant.

Wm. E. Buckley, for respondent.

HIRSCHBERG, P. J. The judgment and order cannot be sustained. The action is for negligence, and the chief, if not the only, negligence litigated involved the violation by the defendant of Labor Law, Laws 1897, p. 477, c. 415, § 70. By that section it is provided that:

> "A child under the age of fourteen years shall not be employed in any factory in this state. A child between the ages of fourteen and sixteen years shall not be so employed, unless a certificate executed by a health officer be filed in the office of the employer."

The plaintiff was employed to work in defendant's factory when he was under 14 years of age. He was injured while at work. The action was brought under the labor law, supra, and was submitted to the jury on the theory that, in determining the question of the defendant's negligence, they could consider the fact that the plaintiff was under 16 years of age at the time of his employment, and that the defendant knew it, but, nevertheless, employed him without a certificate. The court charged the jury as follows:

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"Now, as to the question of the age of the plaintiff. The plaintiff says that when he went to engage himself to work for the defendant in this case the superintendent told him that it was not necessary for him to have a certificate after he had told the superintendent that he was not sixteen years of age."

This was excepted to by the defendant, but the court stated: "I think I will let that stand. I think he said so."

The plaintiff testified expressly that when he was employed nothing was said to or by the defendant's superintendent as to his age. His testimony on the subject was as follows:

"I didn't tell him I was sixteen years old when he employed me; I am sure of that. He didn't say anything about my age. I didn't tell him I was sixteen. He said I didn't need a certificate. That wasn't because I told him that I was sixteen years old."

The positive statement in the charge of the court, to the effect that the plaintiff did testify that he had informed the superintendent that he was not 16 years of age, adhered to after an exception had been taken and the attention of the court directed to the evidence upon the subject, may very well have misled the jury, and requires a reversal in the interests of justice.

Judgment and order should be reversed.

Judgment and order reversed, and new trial granted; costs to abide the event. All concur.

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## FIRST NAT. BANK OF CITY OF BROOKLYN v. GRIDLEY.

(Supreme Court, Appellate Division, Second Department. April 20, 1906.)

1. BILLS AND NOTES—INDORSEMENT—ACCOMMODATION INDORSEMENT.
   The fact that the maker of a note procures its discount for his own benefit is notice to the discounter that an indorsement is not in the usual course of business, but for the maker's accommodation.

2. SAME—TRANSFER BY INDORSEMENT.
   By the express provisions of Negotiable Instruments Law, Laws 1897, p. 730, c. 612, § 71, an indorsement of all the payees is necessary to give good title to the transferee.

3. ALTERATION OF INSTRUMENTS—NEGOTIABLE PAPER—STATUTES.
   Negotiable Instruments Law, Laws 1897, p. 725, c. 612, § 33, provides that, where an instrument is wanting in any material particular, the person in possession thereof has prima facie authority to complete it by filling up the blanks. *Held* that, where one of the payees of a note payable to the payees jointly indorsed it, and mailed it to the maker, and he altered the note by placing his own name in the place of one of the payees and by erasing the word "jointly," his conduct was not authorized by section 33.

4. BILLS AND NOTES—EFFECT OF INDORSEMENT—IMPLIED WARRANTIES.
   Negotiable Instruments Law, Laws 1897, p. 734, c. 612, § 116, provides that an indorser warrants to all subsequent holders that the instrument is genuine; that all prior parties had capacity to contract; that the indorser has no knowledge of any fact which would impair the validity of the instrument; that the instrument is valid and subsisting; and that on due presentment it shall be paid according to its tenor. Section 205, p. 745, provides that, where an instrument is materially altered without the assent of all parties, it is avoided except as against a party who has himself made, authorized, or assented to the alteration. *Held* that, where one of the payees of a note, made payable to the payees jointly, indorsed it and mailed it to the maker, who placed his own name in

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place of that of one of the payees, and struck out the word "jointly," there was no implied warranty on the part of the indorser extending to the changed condition of the note after it parted from her possession.

5. SAME—ACTION—QUESTION FOR JURY.

In an action on a note, *held* a question for the jury whether the note bore on its face such evidence of alteration as to charge the holder with notice of its infirmity.

6. SAME—PAYMENT BY NOTE—RENEWAL.

The mere giving of a renewal note does not operate as a payment, but the question is one of intention.

7. SAME—CANCELLATION.

By the express provisions of Negotiable Instruments Law, Laws 1897, p. 744, c. 612, § 204, where an instrument or any signature thereon appears to have been canceled, the burden is on the party who alleges that the cancellation was made unintentionally, or under a mistake or without authority.

8. SAME—NOTICE OF DISHONOR.

Negotiable Instruments Law, Laws 1897, p. 742, c. 612, § 180, provides that notice of dishonor may be waived either before the time of giving notice has arrived or after the omission to give due notice, and that the waiver may be express or implied. Defendant, who was one of the payees and accommodation indorsers on a note, indorsed another note "for renewal," and mailed it to the maker before maturity of the first note, and the maker inserted his name in place of that of one of the payees, and after maturity of the first note took it up by discounting the second one. The discounting bank had no notice until the time of the discount that defendant had indorsed the second note. *Held*, that the indorsement by defendant before the maturity of the first note did not amount to a waiver of notice of dishonor of the first note.

Appeal from Trial Term, Kings County.

Action by the First National Bank of the city of Brooklyn against Helen M. Gridley. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Argued before HIRSCHBERG, P. J., and WOODWARD, JENKS, HOOKER, and MILLER, JJ.

C. A. Hitchcock, for appellant.

Robert H. Wilson, for respondent.

MILLER, J. The plaintiff seeks in the alternative to recover upon the defendant's alleged indorsement of two promissory notes, of which the following are, respectively, copies:

"20,000.00. Four months after date, for value received, I promise to pay to the order of B. F. Tracy, M. S. Driggs, T. F. Goodrich, and Mrs. H. M. Gridley, at the First National Bank Brooklyn, N. Y. twenty thousand dollars ($20.000.00).

"New York, Jan. 6, 1902. C. M. Coburn."

Indorsed:

"Pay First Nat'l Bank of Brooklyn, or order, for renewal only.

"Mrs. H. M. Gridley.
"Thos. F. Goodrich.
"B. F. Tracy.
"Marshall S. Driggs."

"20.000 00/100 New York, May 6, 1902.

"Four months after date I promise to pay to the order of C. M. Coburn, Marshall S. Driggs, Thos. F. Goodrich, Mrs. Helen M. Gridley, and Benj. F. Tracy twenty thousand 00/100 dollars at the First National Bank, Brooklyn, N. Y., value received. C M Coburn.

"No.———. Due Sept 6."

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Indorsed on the back:

"Pay First Nat'l Bank, Brooklyn, or order. C. M. Coburn.
"For renewal:
"Helen M. Gridley.
"Tho. F. Goodrich.
"B. F. Tracy.
"Marshall S. Driggs.
"No a/c."

No notice of dishonor of the note maturing May 6th is claimed to have been given the defendant, but on or about April 29th she indorsed a note of which the following is a copy:

"20,000.00. New York, May 6, 1902.

"Four months after date I promise to pay to the order of Cornelius Van Cott, Marshall S. Driggs, Thos. F. Goodrich, Mrs. Helen M. Gridley, and Benj. F. Tracy, jointly, twenty thousand 00/100 dollars at First National Bank, Brooklyn, N. Y., value received. C. M. Coburn.

Indorsed:

"For renewal: Mrs. Helen M. Gridley."

And caused it to be mailed to the maker. This note was thereafter altered, without the knowledge, consent, or authority of the defendant, by substituting the name of the maker, "Coburn," in the place of the name of the payee, " Cornelius Van Cott," and by erasing the word "jointly," and, as thus altered, without the indorsement of said Van Cott, was delivered by the maker to the plaintiff on the 13th day of May. The transaction of said date is described by the president of the plaintiff as follows:

"When the note of May 6, 1902, was received by the First National Bank, it gave the check to Charles M. Coburn for twenty thousand dollars, less the discount for the four months. That would be about four hundred dollars less, I suppose—not exactly that, but pretty nearly that. Mr. Coburn added his own check for the difference, and paid the previous note with it—the note of January 6th. He took the previous note up by adding his own check to my check, and used it for paying the other note."

The note of January 6th was surrendered to the maker, Coburn, who canceled it. It does not appear that the plaintiff had any knowledge prior to said May 13th that the defendant had indorsed the note of May 6th. It may fairly be inferred that the defendant was an accommodation indorser, and that the manner in which the note was discounted sufficiently apprised the plaintiff of that fact. Natl. Park Bank v. G. A. M. W. & S. Co., 116 N. Y. 281, 22 N. E. 567, 5 L. R. A. 673; Smith v. Weston, 159 N. Y. 194, 54 N. E. 38.

The indorsement of all the payees was necessary to give good title to the transferee. Negotiable Instruments Law, Laws 1897, p. 730, c. 612, § 71; Allen v. Corn Exchange Bank, 87 App. Div. 335, 84 N. Y. Supp. 1001, and cases cited. The defendant, therefore, made the transfer of the note indorsed by her dependent upon the indorsement of said Van Cott and the other payees. She may have been unwilling to indorse a renewal note, except upon the condition that there should be an additional indorser in the person of said Van Cott. At any rate, she imposed such condition, and there are no facts that warrant the inference that the maker had authority to so alter the note as to render compliance with such condition unnecessary; and the claim that such authority

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was given the maker by section 33 of the negotiable instruments law is so obviously unsound as to merit no discussion. There certainly was no implied warranty on the defendant's part extending to the changed condition of the note after it parted her possession.

But it is claimed that the warranty provided by section 116 of the negotiable instruments law applies to the condition of the note when discounted by the plaintiff, and not simply to its condition when it left the defendant's hands. If this is the effect of the statute, it should be indicated by unmistakable language. The statute provides that "every endorser who endorses without qualification, warrants to all subsequent holders in due course" that the instrument is genuine in all respects what it purports to be. We think the fair construction of the statute makes such warranty applicable to the condition of the instrument on leaving the hands of the indorser. If there could be any doubt about this, such doubt is removed by section 205, which provides:

"Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided, except as against a party who has himself made, authorized or assented to the alteration and subsequent indorsers."

Obviously, the words "subsequent indorsers" mean those who indorse subsequent to the alteration. It is difficult to see how the defendant can be held liable for any act of Coburn in discounting a note which she had never indorsed, for such was the character of the note actually discounted. Coburn acted for himself in this transaction; he was the principal debtor; and I am unable to understand how in paying his own debt he can be said to have acted as the agent of a mere surety. If agency there was, it was to the knowledge of the plaintiff of such limited character as to preclude the defendant being bound by any departure from the strict terms of the agency.

The plaintiff, however, insists that it is a holder in "due course," and may therefore recover according to the "original tenor" of the note by virtue of section 205 of the negotiable instruments law. This position in inconsistent with the claim also made that the note of January 6th was not paid, else the plaintiff could not be a holder for value; and this illustrates the difficulties that beset a party who is unwilling to plant himself upon a given position. The plaintiff cannot recover on both of these notes, and it evidently is in such doubt as to the infirmities of each that it prefers to have the court undertake the burden of determining which is least objectionable. Moreover, upon the question whether the plaintiff is a holder in due course, a jury might say that the note bore upon its face such evidence of alteration as to charge the plaintiff with knowledge of its infirmity. But I shall assume that the plaintiff was a holder in due course. How is it possible to enforce payment from the defendant according to its original tenor? The note which she indorsed never had an inception, and it cannot be enforced according to its "tenor" without making Cornelius Van Cott a party to it, and the respondent does not suggest how that can be done. This is not a case where an alteration has been made in the amount of the note, in which case it is possible to charge a party in exactly the manner in which he expected to be charged. It is utterly impossible now to give vitality to the instrument according to its tenor at the time of the defendant's indorsement.

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Other reasons are suggested by the respondent for sustaining the judgment on the note of May 6th, but we do not deem them of sufficient merit to require discussion.

But it is urged that the first note was never paid, and that by indorsing the renewal note the defendant waived demand and notice of dishonor of the first. Of course, the mere giving of a renewal note does not operate as a payment, but the Court of Appeals has declared that the question is one of intention. Matter of Utica Nat. Brewing Co., 154 N. Y. 268, 48 N. E. 521. The transaction upon its face was a discount of the second note and a payment of the first with the proceeds, and the plaintiff's officer so characterized it. The cancellation of the second note by the maker upon its surrender to him must certainly be regarded as having been made with the consent of the plaintiff. It was produced upon the trial in its canceled condition. At least, if the plaintiff claimed such cancellation to have been unintentional, by mistake, or without authority, the burden was upon it to establish such fact. Section 204 of the negotiable instruments law. Section 200 of the negotiable instruments law provides, by subdivision 5, that a negotiable instrument is discharged "when the principal debtor becomes the holder of the instrument at or after maturity in his own right," and it was the rule at common law that, in the absence of fraud or mistake alleged and proven, a cancellation and surrender of an obligation by the obligee to the obligor operates as a release and discharge of liability thereon. Larkin v. Hardenbrook, 90 N. Y. 333, 43 Am. Rep. 176; Kent v. Reynolds, 8 Hun, 559, cited with approval in Jaffray v. Davis, 124 N. Y. 164—170, 26 N. E. 351, 11 L. R. A. 710; Schwartzman v. Post, 94 App. Div. 474, 84 N. Y. Supp. 922, 87 N. Y. Supp. 872.

The respondent urges, on the authority of Leary v. Miller, 61 N. Y. 488, that the note of January 6th was not discharged unless the note of May 6th was a good note; but this begs the question, for the note of May 6th was a good note as to all of the parties except the appellant. The plaintiff has already received the sum of $15,000 upon it from the other indorsers, who, so far as appears, indorsed after the alterations had been made, and are therefore liable for the entire amount, unless the plaintiff has released them. Moreover, the plaintiff does not now produce the second note, and offer to surrender it, insisting upon the claim that it is bad, or, at most, nothing more than a broken promise to pay the first note, and that therefore the plaintiff will elect to recover upon the first note. On the contrary, the plaintiff asks for a judgment on the second note. Under these circumstances, it seems clear that the court was not warranted in holding as matter of law that the parties did not intend the transaction of May 13th to operate as a payment of the note of January 6th.

But in any event the failure of the plaintiff to notify the appellant of the dishonor of the note of January 6th relieved her from liability thereon. Her contract was to pay the note in case of its dishonor by the maker upon presentment when due, and notice thereof to her. Prior to the negotiable instruments law, the decisions in this state were to the effect that demand and notice were unnecessary where the indorser was himself the principal debtor, where he had taken a general assignment of the maker's property, where the indorser had expressly or by



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implication waived demand and notice, and where the failure to make demand and give notice to the indorser could not possibly operate to his injury. Mechanics' Bank of New York v. Griswold, 7 Wend. 166; Commercial Bank of Albany v. Hughes, 17 Wend. 94; Sheldon v. Horton, 43 N. Y. 93, 3 Am. Rep. 669; Ross v. Hurd, 71 N. Y. 14, 27 Am. Rep. 1; Cady v. Bradshaw, 116 N. Y. 188, 22 N. E. 371, 5 L. R. A. 557; Nat'l Hudson River Bank v. Reynolds, 57 Hun, 307, 10 N. Y. Supp. 669; Smith v. Miller, 52 N. Y. 545. Waiver, however, will not be implied from doubtful or equivocal acts or language (Ross v. Hurd and Cady v. Bradshaw, supra), and injury will be presumed until it is made to appear that no damage could have resulted (Commercial Bank of Albany v. Hughes and Smith v. Miller, supra); and where excuse for nonpresentment and failure to give notice is relied upon, the facts furnishing such excuse must be alleged and proved (Clift v. Rodger, 25 Hun, 39). The only excuse for nonpresentment and failure to give notices of dishonor alleged is that the appellant waived presentment and notice of dishonor. It is unnecessary, therefore, to consider the point made by the appellant that the effect of the negotiable instruments law is to eliminate all excuses except those expressly enumerated in the statute. The plaintiff cannot argue, therefore, that the appellant was not harmed because that excuse is not allged, and, even if it were alleged, there is no proof to overcome the presumption of injury. Receiving no notice of dishonor, the appellant had the right to rely upon the belief that the note indorsed by her, and containing the indorsement of all the other payees stipulated by her, had been used to pay the note of January 6th. Had she received timely notice of dishonor, an investigation might have apprised her of the failure of the payee Van Cott to indorse; whereupon she may have been able to compel payment of the note by the maker. But it is not necessary to speculate. Upon the state of the pleadings and proof, the plaintiff must stand or fall upon the allegation of waiver.

The statute (section 180 of the negotiable instruments law) has not, as the respondent seems to think, changed the law on this subject. It is not claimed that the appellant herself did anything after May 6th from which a consent to remain liable on the note then dishonored can be inferred; but a waiver is sought to be implied from her indorsement "for renewal" of the note of May 6th, afterwards altered, some days before the maturity of said first note. There is no pretense, however, that the plaintiff had knowledge of such indorsement prior to May 13th, or that it was induced by any act of the appellant to forego giving notice of dishonor. The respondent claims that a waiver can be implied from a transaction not between the parties of which the holder is totally ignorant. The authorities relied upon in support of this contention do not sustain it. They are Sheldon v. Horton, Leary v. Miller, and National Hudson River Bank v. Reynolds, supra; but in each of these cases the act of the indorser from which the waiver was implied was known to the holder before maturity of the note, and the opinion in each case makes a point of that fact, and in Leary v. Miller point is also made of the fact that the question was not raised on the trial. Research of counsel, supplemented by our own, has failed to disclose a

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single case in which it has been held that a waiver could be implied from some act of an indorser not known to the holder before maturity of the note. On the contrary, it has been distinctly held that a notice of dishonor given by a stranger was ineffectual to charge an indorser. Chanoine v. Fowler, 3 Wend. 173. So far as I am able to discover, the doctrine of this case has never been questioned, but has been distinctly approved. See Walmsley v. Acton, 44 Barb. 312; Lawrence v. Miller, 16 N. Y. 235. Moreover, the negotiable instruments law (sections 161–162) provides that the notice may be given by or on behalf of the holder, or a party who might be compelled to pay it to the holder, or an agent. The argument of the respondent is based upon the supposition that the defendant knew the note was not to be paid, and that she need not be informed of a fact which she already knew. If this logic is good, it would necessarily follow that, if an indorser has timely notice of dishonor, the means and the person by whom such notice is given are immaterial. To be sure a waiver may be either express or implied. It is express when there is an agreement between the parties to the effect that the holder need not make a demand or give notice of dishonor; it is implied when the acts of the indorser communicated to the holder are such as to give the holder the right to believe that the indorser consents that there shall be no presentment and no notice of dishonor. In the latter case it is held that, even though the indorser did not intend so to consent, if the act was such as to lead the holder to so understand, and by reason thereof to forego making demand and giving notice of dishonor, the transaction in law amounts to a waiver. See cases cited supra; also, Cayuga County Bank v. Dill, 5 Hill, 403. To be sure a waiver is nothing more than a relinquishment of some right, which, being personal, requires no consideration for its support. It does not necessarily rest upon the doctrine of estoppel, but, according to the logic of all the cases, it results from an agreement between the parties, either express or implied. In the leading case of Sheldon v. Horton, supra, Judge Andrews prefaces his discussion with the declaration that the statement relied upon as constituting a waiver was communicated to the plaintiff, and that the defendant understood that such communication was to be made. Suppose the statement there relied upon had been made to a stranger without any intention of its being communicated to the plaintiff, and that in fact it was not communicated, could it be contended that it would have constituted a waiver? If so, we have only to carry the supposition one step further, and have the reductio ad absurdum. Suppose the statement had been a soliloquy susceptible of being proven, is it possible that the defendant could not have changed his mind?

The argument thus far has proceeded upon the theory that the appellant did know that the note was not to be paid, but in my judgment the proof fails to establish this proposition. It seems to me that the only consent to be implied from her act of indorsement was a consent that if Cornelius Van Cott, Thomas F. Goodrich, B. F. Tracy, and Marshall S. Driggs indorsed the note it should be used to renew the note maturing May 6th. She did not knew that all would indorse, and, as it turned out, one of them did not, and it seems to me, therefore, that,

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even had her act been communicated to the plaintiff, it would not have been excused from making demand and giving notice of dishonor upon the maturity of the note of January 6th, except a new note, indorsed in the manner stipulated by the appellant, were presented. This being so, I am wholly unable to comprehend upon what principle an absolute waiver can be implied from an equivocal act not communicated to the plaintiff. It is necessary in commercial transactions that the rules of liability of parties to negotiable paper should be fixed and certain. It is better that such rules be arbitrary than that they lack precision and certainty. The plaintiff cannot be permitted to succeed upon the proof in this case without introducing a rule fatal to the accuracy with which the liability of indorsers may be determined.

I recommend that the judgment be reversed, and a new trial granted; costs to abide the event. All concur; HIRSCHBERG, P. J., in result.

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## DEALY v. COBLE.

(Supreme Court, Appellate Division, Second Department. April 20, 1906.)

1. MASTER AND SERVANT—LIABILITY FOR INJURY TO THIRD PERSON.

A master whose servant, driving his sleigh, struck and injured a young boy, who had jumped on the runner, is liable therefor, if the act was committed in the scope of his employment, which was the case if, as there was evidence tending to show, it was done in the act of putting the boy off the sleigh, more than necessary force being used; and this though to avoid the first blow the boy had jumped off the runner, he having continued to run along with his hands on the back of the sleigh, with the evident purpose to get on the runner again.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 1217.]

2. SAME—CONTRIBUTORY NEGLIGENCE.

Contributory negligence is no defense to an action against a master for injury to a third person by his servant, acting in the scope of his employment, and using greater force than necessary in putting such person, a trespasser, off his sleigh.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 1266.]

3. APPEAL—HARMLESS ERROR—ERRONEOUS THEORY.

Though the view of the trial court, concurred in by defendant's counsel, but not by plaintiff's counsel, in an action against a master for injury to a trespasser by the servant of the master using greater force than necessary to put him off the master's sleigh, that the action was one for negligence, was erroneous, the judgment for plaintiff will not be disturbed; the facts warranting the finding by the jury casting liability on the master, and there having been no ruling that harmed him.

Appeal from Westchester County Court.

Action by Arthur J. Dealy, an infant, by D. Edmund Dealy, his guardian ad litem, against Robert Coble. From a judgment for plaintiff, and from an order denying a motion for new trial, defendant appeals. Affirmed.

Argued before WOODWARD, JENKS, HOOKER, and RICH, JJ.

Samuel F. Swinburne, for appellant.

Michael J. Tierney, for respondent.

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JENKS, J. The action is against a master for misconduct of his servant. The servant was driving the master's private sleigh, wherein were the children of the master, along a public highway. The plaintiff, a lad 10 years old, who jumped onto the runner of the sleigh, was struck by the servant with a whip. If the act was committed by the servant in the scope of his employment, the master was liable. Hewson v. Interurban St. Ry. Co., 95 App. Div. 112, 88 N. Y. Supp. 816, and authorities cited; Grimes v. Young, 51 App. Dip. 239, 64 N. Y. Supp. 859; Magar v. Hammond, 183 N. Y. 387, 76 N. E. 747. I think that the evidence justified a finding that the act was committed in the scope of the defendant's employment. The lad had jumped onto the runner of the sleigh, and it is clear enough that the servant, as the driver of the sleigh, was seeking to put him off. Indeed, the servant testifies that he told the lad to get off, that the lad refused, and that he thereupon struck the lad twice. If the jury were justified in finding that in the act of putting the lad off the sleigh the servant, through misjudgment or violence or temper, went "beyond the necessity of the occasion" (Rounds v. Del., Lack. & W. R. R. Co., 64 N. Y. 129, 136, 21 Am. Rep. 597), then the master might be held liable. The jury could have found properly that, in seeking to put off a schoolboy 10 years old from the runner of the sleigh, the servant passed beyond the bounds of necessity when he struck the lad in the forehead with the butt end of the whip, so that he fell to the ground stunned and bleeding, with a "pretty severe cut," that required the attention of the surgeon.

The learned counsel for the appellant contends that the servant was attempting to punish the lad for snowballing him, inasmuch as the plaintiff and his companion had thus annoyed the servant. The lad testifies that on this day, although there was snowballing among the boys, nothing was thrown at the driver or his horse. He is corroborated by his companions and by one of the children of the defendant in the sleigh, who testifies that, although snowballs had been fired at the horse and the man on that day, it was before "we got to Arthur Dealy" (the plaintiff), and that "Arthur didn't do any snowballing that day." The learned counsel also contends that the master is not liable because the boy had desisted before the assault. But the testimony shows that, even if the lad jumped off the runner to avoid the first blow or after receiving it, he was still running along with his hands on the back of the sleigh. This justifies a conclusion that he had not gone away, but still held onto the sleigh, evidently with the purpose of seeking to get onto the runner again.

The plaintiff complains that the servant, "without any legal cause or justification, carelessly, negligently, wrongfully, and violently struck the plaintiff upon the head and face," etc. The terms of the charge rather indicate that the learned court regarded the action as one for negligence, and the learned counsel for the appellant took that view, as is shown by his specific requests to charge. This was not the theory of the learned counsel for the plaintiff, however, as appears from his final request to charge. I think that his view was correct, in that there was no duty of affirmative care owed by the defendant to the plaintiff. Magar v. Hammond, supra.

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I think, however, that the facts warrant the finding by the jury casting liability upon the master, within the rules of liability under the authorities heretofore referred to, and the judgment must stand. See Johnson v. N. Y. C. & H. R. R. R. Co., 173 N. Y., at page 83, 65 N. E., at page 947. In such an action, contributory negligence is not a defense. Hewson v. Interurban St. Ry. Co., supra; Magar v. Hammond, supra. The defendant is not prejudiced by this view of the trial court, if such was its view, that was concurred in by his counsel, for there is no ruling, exception, request, or motion that harms him. Contributory negligence, under the circumstances, would be a question of fact for the jury, and not a question of law, as the learned counsel contended before the trial court.

The judgment and order must be affirmed, with costs. All concur.

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## DE AGRAMONTE v. CITY OF MT. VERNON.

(Supreme Court, Appellate Division, Second Department. April 20, 1906.)

1. NUISANCE—NUISANCE PER SE—USE OF CITY PARK.
   The display of fireworks in a city park is not a nuisance per se.
   [Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Nuisance, §§ 142–148.]

2. APPEAL—REVIEW—MATTERS CONSIDERED—CITY ORDINANCE.
   Laws 1892, p. 414, c. 182, §§ 236, 237, incorporating the city of Mt. Vernon, provide that copies of the ordinances of the city, certified by the city clerk, shall be evidence in all courts as if the originals were produced and proved, and that the ordinances may be read in evidence from the volume of the same, printed by authority of the common council. *Held* that, on appeal in an action against the city, an ordinance might be considered to sustain the judgment, though it was not read in evidence.

3. MUNICIPAL CORPORATIONS—TORTS—PUBLIC PARKS—DISCHARGE OF FIREWORKS.
   Where a city ordinance prohibited the discharge of combustible substances within the city limits except on permission of the mayor, and the mayor issued a permit to discharge fireworks in a certain park, the city was not liable for injuries arising from the negligent manner in which the licensee discharged a bomb; the permit not having authorized a discharge in such manner.

Appeal from Trial Term, Westchester County.

Action by Louisa De Agramonte against the city of Mt. Vernon. From a judgment in favor of plaintiff, and from an order denying a motion for a new trial, defendant appeals. Reversed.

Argued before HIRSCHBERG, P. J., and JENKS, HOOKER, RICH, and MILLER, JJ.

Isaac N. Mills, for appellant.
Paul Armitage, for respondent.

JENKS, J. In the evening of August 2, 1902, the plaintiff, when in a street of the city of Mt. Vernon, saw a flash of light, heard an explosion, felt a vibration of the earth, and was struck by a missile. Not far distant an Italian society was displaying fireworks in a celebration held in a city park. A crowd of 3,000 people had gathered. The plain-

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tiff's theory is that the missile was a piece of a pipe or tube broken and hurled through the air by the premature explosion of a bomb. Bombs are usually made either of wood or paper, and they are usually placed in a pipe or tube made fast in the earth, and fired from such tube to prevent injury in case of premature explosion. There is evidence that tends to sustain the plaintiff's theory of the cause of her injuries. The jury heard only evidence for the plaintiff. After the case was called on Friday, the then corporation counsel moved to dismiss on a statutory ground, but his motion was denied. The plaintiff's motion to amend her complaint, made upon notice, was granted under exception. Thereupon the jury was examined by both sides, accepted, and sworn. After the opening by the plaintiff, the trial was adjourned to the following Monday. At the outset on Monday the corporation counsel averred surprise in view of the amendment, and asked for the withdrawal of a juror. The court ordered that the trial proceed, and thereupon the corporation counsel withdrew, and took no further part in the trial. Thus the trial was practically an inquest. The attempt of the defendant to be relieved from the judgment obtained under these circumstances is presented by a separate appeal, brought on and heard with this appeal from the judgment.

This case may be discriminated from Speir v. City of Brooklyn, 139 N. Y. 6, 34 N. E. 727, 21 L. R. A. 641, 36 Am. St. Rep. 664, and Landau v. City of New York, 180 N. Y. 48, 72 N. E. 631, 105 Am. St. Rep. 709, by the fact that the fireworks were not displayed in a city street but in a city park. The display there was not a nuisance per se. In Crowley v. Rochester Fireworks Co. (N. Y.) 76 N. E. 470, Cullen, C. J., for the court says:

"It may well be that a discharge of fireworks in a city street, at least in a city densely populated, like the city of New York, constitutes a nuisance per se; but we are of the opinion that it is not necessarily illegal to exhibit a display of fireworks in an open space like a park, where an exhibition if conducted with care, involves no serious danger to persons or property. Opinion of Andrews, C. J., in Speir v. City of Brooklyn, 139 N. Y. 6, 34 N. E. 727, 21 L. R. A. 641, 36 Am St. Rep. 664."

There is no proof tending to indicate that the park was of such dimensions or of such location as to be an improper place for such a display. The plaintiff does not so contend, but her theory was (and the question submitted to the jury was based thereon) that this association used an improper tube to hold the bomb, whereby the premature explosion hurled the piece of iron against her. The jury has held the defendant liable for a negligent use of that kind of tube by the said association.

There is proof that a permit was issued by the mayor, but neither the permit nor its terms was proven, nor was the ordinance giving authority to the mayor in the premises read in evidence. I think, however, in discussing this appeal we may consider the ordinance as if read in evidence. Dunham v. Townshend, 118 N. Y. 281, 286, 23 N. E. 367; Sections 236, 237, c. 182, p. 414, Laws 1892. The ordinance prohibits—

"The firing of a gun, pistol, squibs, crackers, gunpowder, or other combustible substance in the streets or elsewhere within the city fire limits, under

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a penalty * * * provided, however, that this section shall not apply to the firing of crackers or fireworks on the Fourth of July, or to the day on which the anniversary of our independence shall be celebrated, or except by general permission of the mayor."

The permit was, in effect, a license to do an act not unlawful. Crowley v. Rochester Fireworks Co., supra. Given by authority, pursuant to ordinance, it merely authorized the act "to be done in a prudent, lawful, and careful manner." Village of Fort Jervis v. First Nat. Bank, 96 N. Y. 556, 557; Mayor v. Brady, 81 Hun, 444, 30 N. Y. Supp. 1121. There are authorities that, if the damages were due to the negligent doing of the act by the licensee, the defendant licensor is not liable merely because it licensed an act lawful and not per se dangerous. Shearman & Redfield on Neg. (5th Ed.) § 263; Masterton v. Village of Mount Vernon, 58 N. Y. 391, Dillon, Mun. Corp. (4th Ed.) § 953; Wheeler v. City of Plymouth, 116 Ind. 158, 18 N. E. 532, 9 Am. St. Rep. 837. In Wheeler's Case, supra, under a similar ordinance, the mayor granted permission to fire gunpowder in an anvil in a lot in the city where there were pebbles and gravel, and in firing the anvil pebbles and gravel were cast upon the appellant's building. The court (per Elliott, J.) held that:

"The act of the mayor in granting a permit did not create a liability against the city. The utmost that can be granted is that the act of the mayor constituted the wrongdoers the licensees of the corporation, and granting this, but by no means so deciding, the city is not liable for their act, because it is not shown that it was intrinsically dangerous. It is quite well settled that a municipal corporation is not liable for the acts of its licensees unless it is shown that they were authorized to perform an act dangerous in itself. City of Warsaw v. Dunlap, 112 Ind. 576, 11 N. E. 623, 14 N. E. 568; Dooley v. Town of Sullivan, 112 Ind. 451, 14 N. E. 566, 2 Am. St. Rep. 209; Ryan v. Curran, 64 Ind. 345, 31 Am. Rep. 123. Here there is nothing to show that the authorized act was intrinsically dangerous; on the contrary, the danger arose from the negligent manner in which the licensees performed the act."

In Cohen v. Mayor, 113 N. Y. 538, 21 N. E. 700, 4 L. R. A. 406, 10 Am. St. Rep. 506, the court, however, approve the rule that the licensor may be liable if proof be made "of negligence showing permission to use, or acquiescence in the use of, the mode after notice or knowledge on the part of the licensor." The mode adopted, and of which the complaint is made, was to lodge the bomb in a cast iron tube, and discharge the bomb from it. There is not the slightest proof that the permit authorized any such tubes. If the use thereof was negligent, the silence of the permit did not authorize such use, inasmuch as there was the implied condition that the act should "be done in a prudent, lawful, and careful manner." Authorities supra.

The plaintiff called an expert to testify that his employers, in setting off explosives, use the best of drawn steel half-inch tubes, reinforced with bands at top and bottom, anchored in the ground, so in case of an explosion the pieces cannot scatter. He testified that the exhibit shown to him was quarter of an inch cast iron, and that there was a difference in the power of resistance between the construction employed by his firm and cast iron, in that the latter would spread upon an explosion, but the former would not save in an extraordinary instance. He further testifies that he would not use an iron tube. I think we would go too far if we were to impute negligence from the absence

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of express prescription in the permit of the kind of tube that must be used. In any event, the permit was not read in evidence, and we are ignorant of its terms. It does not appear that either statute or ordinance regulated or prescribed the conditions for the discharge of bombs, and required that any permit therefor must definitely regulate the mode thereof. There is no proof that there was acquiescence or use of the mode after notice or knowledge on the part of the licensor. There is not a vestige of proof of any actual notice or knowledge as to the licensor. There are no circumstances which permit the conclusion that the licensor had constructive notice, or that it ought to have known of the use of the mode. I fail to see how, in the absence of direct information, the licensor could have acquired knowledge of the use of the iron tube, and that the use of it rather than a steel tube was negligent in itself, except by the consultation and employment of experts in the making and discharge of fireworks. Such knowledge is technical; therefore, the city must have employed men of technical acquirements or experts for information and for examination or supervision. In Fox v. Village of Manchester, 183 N. Y. 148, 75 N. E. 1116, the court (per Cullen, C. J.), speaking of the peril from electrical wires, say:

"Where, however, the danger to the traveler is not in the nature of an obstruction, but proceeds from the negligence of a third party in the use of the highway in a manner authorized by law, the municipality should not be held liable for that negligence unless it has notice thereof, or the condition is apparent and the danger obvious."

The learned chief judge then proceeds to define the degree of responsibility for electric light, poles, etc., as akin to that of awnings, gratings, etc. He then continues:

"To go further, however, and impose upon a municipality the duty of inspecting the insulation of the wires, the position in which they are strung, and similar matters involving technical knowledge, unless in the case of an obvious danger or exceptional occurrence, would place upon it a very onerous and unfair burden."

Two eminent judges, one after calling attention to the unguarded language often employed to express the measure of municipal duty under similar circumstances, have said: "There must be willful misconduct or culpable neglect to create liability." Andrews, J., in Hunt v. Mayor, 109 N. Y. 134, 16 N. E. 320; Earl, J., in Danaher v. City of Brooklyn, 119 N. Y. 241, 23 N. E. 745, 7 L. R. A. 592.

In the absence of all specific requirement by statute or ordinance, I think that upon the record the city cannot be held negligent, because after it had granted a permit for a display of fireworks in this public park its licensee may have used a tube in part constructed of cast iron a quarter of an inch thick. It is to be noted that the chief expert testifies he cannot tell from the piece produced what the original construction was, and the other describes it as a piece of wrought iron—"It was a piece of pipe. It is hard to tell from the looks of it which it was."

I advise that the judgment and order be reversed, and a new trial granted; costs to abide the event. All concur.

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## MUTUAL MILK & CREAM CO. v. PRIGGE.

(Supreme Court, Appellate Division, First Department. April 20, 1906.)

INFANTS—BREACH OF CONTRACT—INJUNCTION.

Where an infant 19 years of age, in consideration of employment by a milk company, contracts not to solicit business from the customers of the employer within three years after leaving its employ, an injunction will lie to restrain him from violating the agreement.

Ingraham and Clarke, JJ., dissenting.

Appeal from Special Term, New York County.

Action by the Mutual Milk & Cream Company against John Prigge. From an order enjoining defendant from soliciting orders for milk and cream, defendant appeals. Affirmed.

Argued before O'BRIEN, P. J., and PATTERSON, INGRAHAM, LAUGHLIN, and CLARKE, JJ.

Rudolph F. Rabe, for appellant.

Felix H. Levy, for respondent.

LAUGHLIN, J. The plaintiff had a milk route in the city of New York, and on the 15th day of August, 1905, the defendant entered its employ as a driver of a delivery wagon. The duties of the defendant were to deliver milk and cream and collect therefor. On the 31st day of August, 1905, as a condition of continuing in the employ of the plaintiff, the defendant signed a contract in writing, whereby he agreed, among other things, not to solicit business from the customers of the plaintiff or deliver milk or cream to them within three years after leaving its employ. It was agreed that the contract might be terminated on the part of either party by giving to the other one week's notice. The defendant was to receive $13 per week for his services as long as he remained in the employ of the plaintiff, payable semi-monthly. On the 7th day of November, 1905, the defendant without notice or cause severed his connection with the plaintiff, and thereafter entered the employ of a rival milk dealer, and solicited business from the customers of the plaintiff in violation of his agreement. At the time the contract was made the defendant was a minor of the age of 19 years. The action is brought to restrain the defendant from soliciting business from the plaintiff's customers or delivering milk or cream to them during the period of three years succeeding the time he left the employ of the plaintiff. He pleads infancy as a defense.

We are of opinion that the injunction was properly issued. This was an executed contract, the defendant received the benefit of the employment, and, for aught that appears, might have continued indefinitely in the plaintiff's employ thereunder. It does not appear that any undue advantage was taken of him. Although he had not arrived at the age at which all contracts with him would be binding, he was of sufficient age to appreciate the nature of this contract, and to know whether or not it was for his benefit. The terms imposed were not unusual or unreasonable. It was a perfectly proper condition for the plaintiff to insist upon as a condition precedent to the employment, or as a condition of continuance thereof, that its employé should not, after becoming ac-

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quainted with its customers, leave its employ, and solicit business for another in competition with it. This is not a question of the liability of an infant for damages for a breach of contract. The question presented is whether an infant shall be permitted to repudiate his contract without restoring what he has received thereunder, and, if restoration cannot be made, without being enjoined from making use of the knowledge he gained to the disadvantage and damage of his employer. The ordinary rule is that, although an infant may rescind an executed contract at will, he must restore, or offer to restore, to the party with whom he contracted what he received thereunder. Rice v. Butler, 180 N. Y. 578, 55 N. E. 275, 47 L. R. A. 303, 73 Am. St. Rep. 703; Pierce v. Lee, 36 Misc. Rep. 870, 74 N. Y. Supp. 927. This principle is applicable to the case at bar. Here he cannot surrender to the plaintiff the knowledge he acquired while in its employ concerning its customers and his acquaintance with them, which doubtless enables him to receive greater compensation from a rival dealer; and therefore, as a substitute for restoration, he should be enjoined from making use of that information, in violation of his agreement made at the time when he desired and obtained employment, and upon the faith of which he obtained the information and acquaintance. No case in point arising within this jurisdiction is cited, but a modern English case is cited, showing that this principle has been applied by the courts there. Evans v. Ware (1892) 3 Chan. Div. 502; Fellows v. Wood, 59 Law Term Rep. 513.

It may be said that people should not employ infants where a knowledge may be acquired which may be used disadvantageously to the employer. No man would engage the services of an infant if he could not impose the same condition for his own protection against the use of his formulas, trade secrets, and lists of customers that he could exact of an adult. There appears to be no good reason why infants should be excluded from this class of employment, which would necessarily result if the courts were to hold that the employer has no remedy against a violation of such conditions as those embraced in this contract.

It follows, therefore, that the order should be affirmed, with $10 costs and disbursements.

O'BRIEN, P. J., and PATTERSON, J., concur. INGRAHAM and CLARKE, JJ., dissent.

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## In re SANDS.

**(Supreme Court, Appellate Division, First Department. April 20, 1906.)**

1. DISCOVERY—EXAMINATION OF PARTIES BEFORE TRIAL—ORDER—CONSTRUCTION.

**Where, on an application for the examination of the officers of certain boat companies before trial, the affidavits failed to disclose that plaintiff had any cause of action against the E. Boat Company, and for that reason the order granting an examination of the officers of the H. Boat Company was specially limited and restricted to the transactions between plaintiff and it, such restriction was merely to prevent a direct examination concerning the affairs of the E. Boat Company, with a view to ascertaining whether or not the applicant had a cause of action against it, and**

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could not be relied on to enable the officers of the H. Boat Company to refuse to disclose facts essential to enable the applicant to frame his complaint as against it; though the examination incidentally might develop facts which would indicate that a cause of action also existed against the other company.

2. SAME—PROCEDURE.

An order for discovery to enable plaintiff to file a complaint, directing a witness to answer questions in writing, and verify the same before a notary public, and then file the answers with the clerk of the court, and serve a copy on the applicant's attorney, was erroneous, and should be so modified as to require the witness to appear before the court at special term, or before a referee at a time and place specified, to answer the questions.

Appeal from Special Term.

Application by Francis P. B. Sands for an order to examine the Electric Boat Company and the Holland Torpedo Boat Company, in an action to be brought, by an examination of its books and papers, and by the taking of testimony of certain officers of both companies. From an order requiring one Frost, a director of both companies, to answer certain questions, the boat companies and others appeal. Modified and affirmed.

Argued before O'BRIEN, P. J., and PATTERSON, INGRAHAM, LAUGHLIN, and CLARKE, JJ.

Delancey Nicol, for appellants.

James C. Bergen, for respondent.

LAUGHLIN, J. On a former appeal herein (98 App. Div. 148, 90 N. Y. Supp. 749) this court held that the applicant, Sands, failed to state a cause of action against the Electric Boat Company, and that therefore he was not entitled to an examination of that company. It appeared that Rice was president and Frost was a director of each company. The alleged cause of action is for commissions on sales of submarine boats to the Russian government during the war between Russia and Japan. It was contended on the argument of the former appeal and on the settlement of the order that, in view of the intimate relations between the Holland Torpedo Boat Company and the Electric Boat Company, and the knowledge of the officers to be examined concerning the affairs of each, there was grave danger that the public interests, as well as the interests of the Electric Boat Company, might be injuriously affected unless the examination were strictly limited to the transactions had directly by and with the Holland Torpedo Boat Company. It was also contended that, unless the examination were so restricted, an effort might be made to discover a cause of action against the Electric Boat Company, and thereby supply a defect in the moving papers. With a view to protecting the Electric Boat Company from a public disclosure of its business transactions in the premises, and to preventing the applicant from conducting an examination in order to discover whether or not he had a cause of action against it, in the order of this court made on that appeal, the examination of the Holland Torpedo Boat Company and its officers, who were also officers of the Electric Boat Company, was specially limited and restricted. The refusal to answer many of the questions propounded shows that

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the Holland Torpedo Boat Company and its officers have endeavored to take advantage of these provisions of the order for the purpose of preventing the applicant from obtaining the necessary facts to enable him to frame a complaint in an action against the company the examination of which was authorized. In the limitations and restrictions contained in the former order of this court, of course, it was not intended to grant immunity to the Holland Torpedo Boat Company, as appears to have been assumed by its counsel, from an examination into all the facts essential to enable the applicant to frame his complaint setting forth his cause of action against it, even though such examination incidentally developed the facts that would indicate that the applicant also had a cause of action against the Electric Boat Company. It was merely intended to prevent a direct examination concerning the affairs of the Electric Boat Company, with a view to ascertaining whether or not the applicant had a cause of action against it.

We have examined the numerous questions which were propounded to the witness Frost, and which he declined to answer, and which he was directed by the Special Term to answer, and are of opinion that they were all pertinent to the examination authorized by the former order, and were material to the ascertainment of facts essential to framing a complaint against the Holland Torpedo Boat Company. The order of the Special Term, however, directed that the witness answer the questions in writing, and verify the same before a notary public, and then file the answers with the clerk of the court, and serve a copy on the attorney for the applicant. There is no authority for this provision of the order, and the order should be modified by eliminating it, and substituting in place thereof a provision requiring the witness to appear before the court at Special Term, Part 2, or a referee at a time and place specified, and answer the questions, and all other questions necessary to elicit the facts essential to enable the applicant to frame his complaint in an action against the Holland Torpedo Boat Company; and, as so modified, the order should be affirmed, without costs. All concur.

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## RUDIGER et al. v. COLEMAN et al.

(Supreme Court, Appellate Division, Second Department. April 20, 1906.)

1. SPECIFIC PERFORMANCE—CONTRACTS ENFORCEABLE—AGREEMENT TO FORM CORPORATION.

   Specific performance of a contract to form a corporation cannot be decreed where the parties to it are hostile and unfriendly, and the by-laws agreed upon at the time of the contract contain little, if anything, showing the terms and details of the proposed incorporation.

2. APPEAL—MODIFICATION OF JUDGMENT—AFFIRMANCE.

   In an action to enforce specific performance of a contract to form a corporation to hold title to and manage certain property conveyed by plaintiffs to defendants, an interlocutory judgment decreeing specific performance, and ordering an accounting as to certain rents, cannot be sustained on appeal by striking out the erroneous provision for specific performance, since it is necessary that the questions of law involved should be determined in advance of the accounting.

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Appeal from Special Term, Kings County.

Action by Eugene A. Rudiger and another against James S. Coleman and others. From an interlocutory judgment, and from an order resettling and amending the findings of fact, and an order denying a motion to vacate and set aside the first mentioned order, plaintiffs appeal. Interlocutory judgment reversed, cause remanded, and appeal from the order dismissed.

Argued before HIRSCHBERG, P. J., and WOODWARD, JENKS, HOOKER, and MILLER, JJ.

John C. Waite, for appellants,
David McClure, for respondents.

HIRSCHBERG, P. J. The primary purpose of this action is to procure the rescission of an agreement made between the parties on June 16, 1899. Incidental to such purpose, equitable relief is asked for an accounting by the defendants, for a reconveyance by them to the plaintiffs of certain real estate which had been deeded by the plaintiffs to the defendants pursuant to the terms of the agreement, and further, for a decree impressing said property with a trust. At the time of the execution of the agreement, the defendants were under contract with the city of New York for the construction of the new Croton dam, in Westchester county. That work involved the use of large quantities of granite, covering many square miles of land in the neighborhood of the construction, and necessitated the building of bridges, abutments, and appurtenances, and the laying of many miles of roadway. The plaintiffs at that time were the owners of a certain farm near the site of the dam, and had also contracted for the purchase of another farm, on which farms were undeveloped granite quarries. The agreement provided for the deeding by the plaintiffs to the defendants of the one farm and the assigning of the contract for the other, and that these farms should in turn be conveyed by the defendants to a quarrying company immediately upon its formation, for which full paid stock of the company should be issued; 40 per cent. to be delivered to the plaintiffs and 60 per cent. to the defendants. It was further provided in the agreement that the expense of developing the quarries should be borne by the defendants, and that the latter would use the stone obtained from the quarries for the purpose of completing their contract with the city. The provision for the formation of the company, as contained in the agreement, is as follows:

"Within six months after the delivery of the deed and assignment of the contract, as herein provided, a corporation shall be formed for the purpose of quarrying and selling granite, and the execution of contracts in which granite is used, consisting of all the parties hereto, in accordance with a certificate and by-laws, a copy of which by-laws is hereto annexed."

The corporation was never formed, but the work of completing the dam and the other work alluded to in the agreement have been done by the defendants with the use of stone from the quarries on the farms. The complaint sets forth various alleged breaches of the conditions of the agreement on the part of the defendants, full performance on the part of the plaintiffs, and various specific charges of wrongdoing and waste, which it is unnecessary to detail.

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The interlocutory judgment does not adjudicate on the question of rescission, or of the reconveyance of the property, but, with the exception that an accounting is ordered as to certain rents, the operative part of the decree is limited to an adjudication requiring the parties to specifically perform the agreement for the formation of the quarrying company. The provision of the interlocutory judgment referred to is as follows:

"It is ordered and adjudged that the plaintiffs and the defendants make, sign, acknowledge, and file with the Secretary of State of the state of New York a certificate in the form required by law for the incorporation of a company, consisting of plaintiffs and defendants, for the purpose of quarrying and selling granite, and the execution of contracts in which granite is used."

The judgment cannot be sustained. It is not within the province of equity jurisdiction to compel the specific performance of a contract to form a corporation under the circumstances disclosed by this case. The parties were unable to agree upon the terms for the formation of such corporation, and are now hostile and unfriendly. Annexed to the agreement there is a proposed set of by-laws, but they contain little, if anything, showing the terms and details of the proposed incorporation. It follows that the judgment could not be enforced if the parties refuse to comply with it, and for that reason is objectionable in form and substance.

In Stocker v. Wedderburn, 3 K. & J. 393, the precise point was decided. There the owner of a patented invention entered into a contract with certain persons, who with himself were to form a company, to the promotion of which he was to give his services for two years, and to do his best to improve the invention for the benefit of the company; and it was held on demurrer that specific performance of the contract could not be decreed. The situation is similar to that presented in the case of an agreement for the formation of a copartnership, which, as a general rule, is not enforceable in equity. See Wilcox v. Williams, 92 Hun, 250, 36 N. Y. Supp. 944; Fargo v. N. Y. & N. R. R. Co., 3 Misc. Rep. 205, 23 N. Y. Supp. 360; Scott v. Rayment, L. R. 7 Eq. 112; Sichel v. Mosenthalm, 30 Beav. 371; Meason v. Kaine, 63 Pa. 335.

The interlocutory judgment cannot be modified by striking out the provision for specific performance, and affirming it as modified, as, in effect, a mere order of reference to take and state the account. Kirkwood v. Smith, 72 App. Div. 429, 75 N. Y. Supp. 1016. This is the only interlocutory judgment which can be made in the action, and it should determine the issues in advance of the accounting.

The interlocutory judgment should be reversed, and a new trial granted; costs to abide the final award of costs. The appeal from the order should be dismissed. It is to be regretted that the counsel for the appellants has polluted his voluminous brief by wholly unfounded aspersions on the conduct and motives of the learned trial justice. Because of this misconduct, all copies of the brief will be returned to him. All concur.

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## BUONGIERNO v. SCHILLER et al.

(Supreme Court, Appellate Division, Second Department. April 20, 1906.)

FRAUDULENT CONVEYANCES—PARTICIPATION BY GRANTEE—EVIDENCE.

Where, in a suit to set aside an alleged fraudulent conveyance, there was no finding that the deed was accepted by the grantee with a fraudulent intent, or that such grantee knew or shared in the fraudulent intent of the grantor, a judgment for plaintiff could not be sustained.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Fraudulent Conveyances, §§ 504–506.]

Appeal from Special Term, Queens County.

Action by Emma Buongierno, as administratrix of the estate of Ruggiero Buongierno, deceased, against Theresa Schiller, impleaded with George Schiller. From a judgment for plaintiff, defendant Theresa Schiller appeals. Reversed.

Argued before HIRSCHBERG, P. J., and WOODWARD, JENKS, and RICH, JJ.

A. T. Payne, for appellant.

J. Bohmbach, for respondent.

HIRSCHBERG, P. J. The judgment declares that a certain deed of real estate executed by the defendant George Schiller to the appellant, Theresa Schiller, is null and void, and should be canceled of record. This judgment is founded upon a decision that the deed was made by the grantor for the purpose of hindering and delaying and defrauding a creditor, namely, the plaintiff's decedent. The grantee alone appeals. There is no finding that the deed was accepted by the grantee with a fraudulent intent, or that the grantee knew or shared in the fraudulent intent of the grantor. While there is some slight evidence in the record on which such a finding might possibly be based, we think it best, under the circumstances, that a new trial should be granted. See Wadleigh v. Wadleigh (App. Div.; March 9, 1906) 97 N. Y. Supp. 1063.

Judgment reversed, and new trial granted; costs to abide the final award of costs. All concur.

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## CEBALLOS et al. v. MUNSON STEAMSHIP LINE.

(Supreme Court, Appellate Division, Second Department. April 20, 1906.)

APPEAL—MATTERS REVIEWABLE—EVIDENCE.

Where no motion for a nonsuit on the ground that the evidence did not establish a cause of action was made in the trial court, and on appeal there is no certificate that the case contains all the evidence, the court can review only the exceptions.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Appeal and Error, §§ 2916, 2917.]

Appeal from Trial Term, Kings County.

Action by Juan M. Ceballos and others against the Munson Steamship Line. From a judgment for plaintiffs, and from an order denying a motion for a new trial, defendant appeals. Affirmed.

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Argued before HIRSCHBERG, P. J., and JENKS, HOOKER, and MILLER, JJ.

Everett P. Wheeler, for appellant.
John H. Corwin, for respondents.

HIRSCHBERG, P. J. The important questions of law which are presented by this appeal were disposed of on a former appeal. See Ceballos v. Munson Steamship Line, 93 App. Div. 593, 87 N. Y. Supp. 811. It was then held that the contract sued upon was not void for uncertainty, or so absurd or unreasonable as to be unenforceable; and also that it was not necessarily in violation of the federal anti-trust law. Act July 2, 1890, 26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3200]. The verdict then rendered in the plaintiffs' favor was found to be against the weight of evidence, but the judgment of nonsuit which followed the rendition of the verdict was reversed, in order to submit the questions of fact to another jury.

Adopting that decision as the law of this case, there is no question of law now presented which seems to require a reversal of the second judgment. No motion was made for a nonsuit on the ground that the evidence did not establish a cause of action, and, as there is no certificate that the case contains all the evidence, we are limited to a review of the exceptions. The case of Rosenstein v. Fox, 150 N. Y. 354, 44 N. E. 1027, is cited by the learned counsel for the appellant as authority for the proposition that a certificate or statement that the case on appeal contains all the evidence is not required on the review of a judgment entered upon a verdict and of an order denying a motion for a new trial. That case, however, did not decide that such a certificate was not necessary in order to enable the appellant to obtain a review of the questions of fact involved in the controversy, but only decided that such a certificate was unnecessary in order to enable the appellant to obtain a review of the exceptions to the rulings of a trial judge or to his charge, although based upon the absence or insufficiency of the evidence. The headnote correctly states the scope of the decision in this respect, as follows:

"A certificate that the case on appeal contains all the evidence, or all the evidence upon the questions sought to be reviewed, is not required in an action tried by a jury to entitle the appellant to a review of the exceptions to the rulings of the trial judge, or to his charge, although based upon the absence or insufficiency of the evidence; and in such an action it must be assumed that the respondent procured to be inserted in the case all the testimony he regarded as essential to sustain the rulings and charge of the court."

The decision in Rosenstein v. Fox, supra, was based largely upon the case of Porter et al. v. Smith et al., 107 N. Y. 531, 14 N. E. 446. In that case the court said (at page 533 of 107 N. Y., page 446 of 14 N. E.):

"The theory upon which a case is prepared and settled has long been understood to be that the appellant should insert in it all the evidence bearing upon the questions intended to be raised, and the respondent add by amendment whatever he deemed necessary to a solution of those questions. An exception appearing in the proposed case serves as a notice to the respondent of an intention to raise the question of error in the ruling excepted to, and puts



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upon him the responsibility of adding by amendment any needed proof. Thus, on a motion for a nonsuit upon the ground that the evidence does not show a cause of action, an exception to the ruling warns the respondent that he must add any omitted fact essential in his judgment to sustain the ruling. And where, under the old Code, which permitted exceptions to findings of fact, such an exception was taken, it was notice of an intention to assail such finding as erroneous, and, if any proof necessary to sustain it was omitted from the proposed case, it became the duty of the respondent to supply it. We therefore held that the General Term, on appeal, should assume that the case contained all the evidence bearing upon the questions sought to be raised. Perkins v. Hill, 56 N. Y. 87. But the situation is radically changed by the provision of the new Code, forbidding exceptions to findings of fact. Under that practice, the respondent gets no warning or notice of an intention to review questions of fact, unless the case certifies that all the evidence has been included. If it so certifies, the respondent must look to it that nothing which he deems essential is omitted; but, if it does not so certify, he is not in fault for supposing that questions of law only are intended to be reviewed, and omitting to load the case with needless proof."

See, also, Iaquinto v. Bauer, 104 App. Div. 56, 93 N. Y. Supp. 388, and cases cited, to the effect that, upon an appeal in a jury case from an order denying a motion for a new trial made upon the minutes, the court is limited to a consideration of the exceptions taken at the trial, where the case does not show that all the evidence is returned.

The judgment and order should be affirmed.

**Judgment and order affirmed, with costs. All concur.**

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## MILLER v. VINING.

**(Supreme Court, Appellate Division, Second Department. April 20, 1906.)**

BROKERS—RIGHT TO COMMISSION—SALE MADE BY PRINCIPAL.

To entitle a real estate broker to commissions, he must be the procuring cause of the sale, and, if his efforts fail, his employer is not precluded from thereafter negotiating with the purchaser produced by the broker, even on the same terms, without being obliged to pay the commissions.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Brokers, §§ 85–89.]

Appeal from Municipal Court, Borough of Brooklyn, Fifth District.

Action by Charles E. Miller against Clarence Vining. From a judgment for plaintiff, defendant appeals. Reversed.

Argued before HIRSCHBERG, P. J., and HOOKER, GAYNOR, RICH, and MILLER, JJ.

Moore, Ashley & Linton, for appellant.

MILLER, J. The plaintiff has recovered a judgment for broker's [illegible]s on a sale of a house by the defendant to one Donohue. It is undisputed that the plaintiff was employed at the agreed compensation of $100; that he introduced the purchaser to the defendant; that different negotiations were had, resulting in a failure of the parties to agree; that thereafter, the negotiations being broken off, the plaintiff undertook to sell other properties of different people to the proposed purchaser; and that about a month afterwards, without the intervention of the plaintiff, the defendant and said purchaser came together on different terms, resulting in a sale.

It is elementary that to be entitled to commissions the broker must be the procuring cause of the sale, and, if his efforts fail, his employer

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is not precluded from thereafter negotiating with the purchaser introduced by him, even on the same terms, without being obliged to pay commissions. The broker takes the risk of bringing the minds of the parties together so as to effect a bargain, and, if he fail, the mere fact that his efforts may have led to subsequent negotiations, which, under more favorable circumstances, have resulted in sale, does not alone entitle him to a commission. Wylie v. Marine National Bank, 61 N. Y. 415; Sibbald v. Bethlehem Iron Co., 83 N. Y. 378, 38 Am. Rep. 441; Donovan v. Weed, 182 N. Y. 43, 74 N. E. 563.

We think that, upon the entire proof, the plaintiff has failed to bear the burden of proving that he was the procuring cause of the sale.

The judgment should therefore be reversed, and a new trial ordered; costs to abide the event. All concur.

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## PEARSALL et al. v. STEWART et al.

**(Supreme Court, Appellate Division, Second Department. April 20, 1906.)**

**FRAUDULENT CONVEYANCES—WANT OF CONSIDERATION—SOLVENCY OF GRANTOR.**

**A conveyance without substantial consideration cannot be set aside as fraudulent against the grantor's creditors, where after the conveyance he has sufficient property with which to meet his debts.**

**[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Fraudulent Conveyances, §§ 144, 145.]**

Appeal from Special Term, Kings County.

Action by Thomas E. Pearsall and others against Thomas H. Stewart and another. From a judgment in favor of plaintiffs, defendants appeal. Reversed.

Argued before JENKS, HOOKER, RICH, and MILLER, JJ.

Reno R. Billington, for appellants.

Frederick W. Sparks, for respondents.

PER CURIAM. The eighth finding of fact, that the conveyance and transfer by the defendants of the property in question was made with intent to hinder, delay, and defraud the plaintiffs, is without sufficient evidence to support it, and, as such a finding is essential to the judgment in plaintiffs' favor, the latter must also fall. There is, perhaps, evidence which tends to show that the transfer by one defendant to the other (his wife) was for a nominal consideration; but there is no suggestion in the evidence that at the time of such transfer the husband was not the owner of ample other property with which to pay his debt to the plaintiffs and every other he might owe. The return unsatisfied in May, 1904, of an execution against his property does not make a satisfactory showing that he had no property in August, 1901, at the time of the transfer.

There is no direct evidence of fraudulent intent. The plaintiffs ask that it be inferred from the fact of a conveyance without substantial consideration, while the grantor was indebted to them, and that by reason of the transfer he defeated the making of the plaintiffs' claim: but the inference may not be indulged, in the absence of proof that he had

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not other sufficient property with which he might meet his debts. So long as he kept enough to pay his debts with, he was free to give his wife as much as he wished.

The judgment should be reversed, and a new trial granted.

**Judgment reversed, and new trial granted; costs to abide the final award of costs.**

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## DOYLE v. DELANEY.

(Supreme Court, Appellate Division, First Department. April 20, 1906.)

1. PLEADING—COMPLAINT—NATURE OF RELIEF—LEGAL OR EQUITABLE.
   Where facts are stated in a complaint sufficient to constitute a cause of action, whether legal or equitable, the complaint is not demurrable for want of facts because both legal and equitable relief are demanded, when plaintiff is entitled to legal relief only.
   [Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, §§ 107-110.]

2. SAME—ALTERNATIVE RELIEF.
   Where, in an action on a legal demand, plaintiff demanded judgment that defendants account to him for the sum of $3,500 and for such other and further relief as the court may allow, or that plaintiff have judgment for $3,500 and for costs and disbursements, etc., the demand for alternative relief did not condemn the entire pleading.
   [Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 143.]

3. SAME—PRAYER.
   Where a complaint demanded judgment that defendants account to plaintiff for the sum of $3,500 and for other and further relief, or that plaintiff have judgment for $3,500 and costs, etc., the demand for a money judgment for $3,500 in the alternative was equivalent to a demand for a legal remedy.
   [Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 143.]

O'Brien, P. J., dissenting.

Appeal from Special Term, New York County.

Action by Thomas S. Doyle against Joseph M. Delaney, impleaded with others, etc. From an interlocutory judgment sustaining defendant's demurrer to plaintiff's amended complaint, plaintiff appeals. Reversed.

Argued before O'BRIEN, P. J., and PATTERSON, McLAUGHLIN, LAUGHLIN, and HOUGHTON, JJ.

R. L. Cutting, for appellant.
W. J. Barr, for respondent.

PATTERSON, J. The plaintiff appeals from an interlocutory judgment sustaining a demurrer to the complaint interposed by the defendant Joseph M. Delaney. It was held by the court below that the complaint did not state facts sufficient to constitute a cause of action against the demurrant. Briefly summarized, the allegations of that pleading are as follows: That the defendant Delaney and Frank Healy were copartners under the firm name of J. M. Delaney & Co., and the other defendants were copartners under the firm name and

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style of Post & Co. That on May 27, 1903, the plaintiff entered into a contract with Joseph M. Delaney in the following words:

"New York, May 27th, '03.

"Memo. agreement bet. Jos. M. Delaney and T. S. Doyle whereby it is mutually agreed that Mr. Doyle will open an acct. with Post & Co., with ten thousand dollars to be used as margin to buy one thousand shares United States Leather Co. pref. stock on advice of Mr. Delaney, who is to have one-half interest in any profits that may result, and who also becomes liable for one-half of any loss that may result from said account. Mr. Doyle agrees to buy and sell on advice of Mr. Delaney, but will not be obligated to hold more than one thousand shares of U. S. L. pref. stock on the acct. at one time, and the account is to be closed not later than July 15th, '03.

"[Signed] Joseph M. Delaney."

That pursuant to the agreement, on or about May 27, 1903, the plaintiff opened an account with Post & Co., and Delaney directed that firm to buy five shares of the stock, and the plaintiff caused 500 other shares to be transferred from an account he had with Henry Clews & Co. to Post & Co., and the plaintiff deposited with Post & Co. $7,000 in cash. Plaintiff then alleges that 500 shares which were to be bought by the defendants Post & Co. for him were never bought in fact. That no actual purchase was made, and that an account rendered of the purchase by Post & Co. to the plaintiff was wholly fictitious. That the defendants assumed and exercised entire and absolute control over the stock and over the moneys which the plaintiff had deposited with Post & Co. That the defendants (all of them) falsely and fraudulently stated to the plaintiff that the whole 1,000 shares of stock had been sold by Post & Co. at a loss of more than $7,000, and the plaintiff, relying upon such statements and representations of the defendants, accepted the sum of $3,500 from Joseph M. Delaney, one of the defendants herein, in full settlement. That the defendants well knew that the statements and representations were false, and that they were made by the defendants for the purpose and with the intent of deceiving and defrauding the plaintiff, and the plaintiff relied on the statements and representations so made. That since the acceptance by him of the $3,500 (which amount represents the one-half loss which would have been chargeable to the defendant Delaney), the plaintiff has been informed and believes that the preferred stock of the United States Leather Company was caused to be sold by the defendants without any loss whatever, and that the $7,000 deposited by the plaintiff with Post & Co. was converted by the defendants (all of them) to their own use, and that the defendants without authority fraudulently caused the said stock and money of the plaintiff to be transferred from the account of plaintiff to the account of one B. E. Taft, who was an employé and agent of the firm of J. M. Delaney & Co., and who had an account with Post & Co., but said Taft had no interest whatever in said account, and was a mere dummy. That the defendants fraudulently, and by devices unknown to the plaintiff, pretended that the United States Leather stock was sold at a loss of $7,000 or over, but the plaintiff is informed and believes that, if the said stock was sold, there was no actual loss whatever by such sale. That the plaintiff demanded from the defendants an account of the transactions purported to have been had for his account, but the only account plaintiff has been able to obtain is an al-

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leged account annexed to the complaint. That the defendants refused to render plaintiff any other or further account. Whereupon the plaintiff demands judgment against the defendants that the defendants account to him for the sum of $3,500, and for such other and further relief as the court may allow, or that plaintiff have judgment for $3,500, and for the costs and disbursements of this action.

Evidently, the demurrer was sustained on the ground that all the allegations of the complaint are framed for equitable relief, and that such relief only is demanded, in which case, if a good cause of action in equity is not alleged, the complaint is demurrable, even though the facts show that the plaintiff has a good cause of action at law. As we read this complaint, the plaintiff has not set forth facts which would entitle him to an accounting against the defendant Delaney. The specific charge against him is that he perpetrated a fraud upon the plaintiff with respect to the stock and money belonging to the plaintiff, and that by false and fraudulent representations he induced the plaintiff to accept the sum of $3,500, whereas, by reason of the acts and conduct of Delaney and Post & Co., he (the plaintiff) is entitled to receive from them the full sum of $7,000, which he had deposited with Post & Co. upon the initiation of the transaction with them. The demand in the complaint for equitable relief is only for an accounting with respect to $3,500. There is no demand for a general accounting, and there is an alternative demand for a money judgment of $3,500. Therefore, in this complaint a legal cause of action against Delaney is stated, with a demand of judgment against him for an amount of money to which the plaintiff conceives himself to be entitled by reason of the fraud which he alleges was perpetrated upon him. Where facts are stated in the complaint sufficient to constitute a cause of action, whether legal or equitable, the complaint is not demurrable on the ground that it does not state sufficient facts, because both legal and equitable relief are demanded when the plaintiff is entitled to but one. Mitchell v. Thorne, 134 N. Y. 536, 32 N. E. 10, 30 Am. St. Rep. 699. Here the cause of action against Delaney is legal. The demand for alternative relief does not condemn the whole pleading. The fact that an accounting is demanded, and that under the circumstances the plaintiff could not maintain the action in that aspect, does not render the complaint demurrable upon the ground that it does not state facts sufficient to constitute a cause of action. To quote the language of Follett, J., in Wisner v. Consolidated Fruit Jar Co., 25 App. Div. 362, 364, 49 N. Y. Supp. 500:

> "On the facts set forth in the complaint, the plaintiff has no equitable cause of action against Delaney, but has a legal one; and, having demanded a money judgment as well as equitable relief, the complaint is not demurrable on the ground that it does not state facts sufficient to constitute a cause of action. Porous Plaster Co. v. Seabury, 43 Hun, 611; Wetmore v. Porter, 92 N. Y. 76."

In the case at bar the demand for alternative relief for a money judgment for $3,599 is the equivalent of a demand for a legal remedy. No set form of words is necessary, if the intent of the pleader is made apparent. The much discussed case of Black v. Vanderbilt, 70 App. Div. 16, 74 N. Y. Supp. 1095, is not applicable here. In that case no alternative relief was demanded, and it conclusively appeared that the complaint was framed for equitable relief alone.

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The interlocutory judgment should be reversed, with costs, and the demurrer overruled, with costs, with leave to the defendant Delaney to withdraw the demurrer and answer the complaint, on payment of costs in this court and in the court below, within 20 days after service of the order to be entered on this decision. All concur, except O'BRIEN, P. J., who dissents.

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## HAIGHT v. HAIGHT & FREESE CO.

(Supreme Court, Appellate Division, First Department. April 20, 1906.)

1. BROKERS—FIDUCIARY RELATION OF PARTIES—ACTIONS FOR ACCOUNTING.
   Where a broker accepts from a client orders to purchase and sell securities, and receives certain sums to be applied thereon, such a fiduciary relation exists between them as entitles the client to an accounting in equity of the transactions between them.
   [Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Brokers, § 31.]
2. SAME—PURCHASES AND SALES ON MARGIN—RECOVERY OF DEPOSIT BY PRINCIPAL.
   Where a client intrusts to brokers a sum of money as margin for the purchase and sale of securities, but in fact no purchases or sales were ever made except by offsetting orders to purchase and sell against similar orders from other clients, this did not constitute a fulfillment of the plaintiff's orders; and he is entitled to recover the amount deposited, with interest, though his contract with them provided that any other client might be the purchaser or seller, and that they should not be obliged to disclose the name of the client in any event.

Appeal from Special Term, New York County.

Action by William C. Haight against the Haight & Freese Company. From a judgment (92 N. Y. Supp. 934) in favor of plaintiff, defendants appeal. Affirmed.

Argued before O'BRIEN, P. J., and INGRAHAM, McLAUGHLIN, CLARKE, and HOUGHTON, JJ.

Albert I. Sire, for appellant.

William P. Maloney, for respondent.

INGRAHAM, J. The complaint alleges that the defendant is a domestic corporation, engaged in the business of buying and selling stocks, bonds, and securities as stockbrokers upon margin and otherwise; that between the 3d day of February, 1902, and the 14th day of October, 1902, the plaintiff paid over and delivered to the defendant, as his stockbroker and agent, for and upon transactions in the purchase and sale of various corporate stocks and securities, and as margins on the plaintiff's orders to the defendant to purchase and sell various stocks and securities, sums aggregating $17,095, of which various sums were from time to time thereafter withdrawn by the plaintiff from the defendant, aggregating about $8,648.10; that the defendant from time to time claimed to have made purchases and sales upon said accounts, and to have transactions for the purchase and sales of stock and securities for and on behalf of the plaintiff, until about the month of October, 1902; that between the 6th day of October and the 10th day of October the said defendant, as the plaintiff's broker and agent, claim-

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ed to have in his possession, and to hold for on account of the plaintiff, various shares of stock mentioned; that on the 14th day of October, 1902, the plaintiff demanded a statement of the defendant, showing the condition of the plaintiff's account, which the defendant refused to deliver; that on or about the 10th or 12th day of October, 1902, the defendant, without notice to the plaintiff, and while the plaintiff had ample margin to secure his account, and without any request for margin or demand for payment from the plaintiff, claimed to have sold out the said alleged stocks which it then claimed to be holding and carrying for the plaintiff; that thereupon the defendant claimed that the plaintiff's account was closed, and that the money deposited by the plaintiff was exhausted; that plaintiff since that time has demanded an accounting from the defendant, which was refused; that the said transactions of the defendant, purporting to be purchases and sales of stocks and securities for the plaintiff, were in fact not purchases or sales of stock; and that the defendant did not sell or purchase stock for the plaintiff as claimed, but had from time to time provided for the alleged execution of said orders of the plaintiff to purchase or sell, as the case was, mere orders or alleged agreements with other person or persons throughout the United States and Canada to sell stock or buy stock in reverse of the order given by the plaintiff. The answer admits that the plaintiff deposited with the defendant various sums of money as margin for the purchase and sale of the stock and other commodities, as shown in an account annexed to the answer, between the 3d of February and the 14th of October, 1902, and alleges that the defendant, at the request of the plaintiff, executed his orders as shown in said account; and further alleges that, upon the plaintiff's orders to buy and sell stocks and other commodities upon margin, the defendant did execute the same, as shown in said account, and that upon such transactions the margin of plaintiff became exhausted, and that, as the plaintiff's margin with the defendant was exhausted, it did, upon due notice to him, sell the same. The defendant claims that the plaintiff was not entitled to an accounting; that the only relief that the plainiff could have was in an action at law either for damages or to recover the amount due to the plaintiff under the arrangement between the parties, and that, therefore, it was entitled to a dismissal of the complaint.

The right of the plaintiff to an accounting must depend upon the relations that existed between him and the defendant. If the relation was in its nature fiduciary, then the plaintiff has a right to come into a court of equity, and require the defendant to account for its acts in relation to the transactions between the parties. The character of the relations which would justify an action for an accounting is discussed in Marvin v. Brooks, 94 N. Y. 71. It is there said:

"But the jurisdiction of the latter court over trusts and those fiduciary relations which partake of that character remains, and in such cases the right to an accounting seems well established. But the existence of a bare agency is not sufficient. If it was, it would draw into equity every case of bailment in which an account existed."

And quoting with approval from Foley v. Hill, 2 H. of L. Cas. 28, where it was said:

"The court added, however, that as between principal and factor the equitable jurisdiction attached, because the latter partook of the character of a

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trustee, and that 'so it is with regard to an agent dealing with any property; * * * and though he is not a trustee according to the strict technical meaning of the word, he is quasi a trustee for that particular transaction,' and therefore equity has jurisdiction. * * * An accounting is always proper in cases of partnership, yet where the parties were not partners, but the relation existing was that of a quasi partnership, and the position of the party sued involved 'the same trust, duties, and obligations,' the right to an accounting was declared. * * * In this case Brooks stood relatively to Marvin as his agent to purchase for him one-half of the Ward interest, and when intrusted with Marvin's money to be so applied, at a price to be by him determined, and to cover the whole of an unknown interest, he stood in a fiduciary relation, and became a quasi trustee of the money in his hands and of the property purchased, and Marvin has the right to call him to an account in equity."

This case has been since followed, and has been considered as establishing the jurisdiction of a court of equity to require a person occupying the relation of broker, who receives money from another to invest under his directions, to settle and adjust the accounts between them. It is alleged in the complaint, and admitted in the answer, that the plaintiff deposited with the defendant various sums of money to be used in the purchase of securities; the defendant to hold the securities purchased to secure the purchase price over and above that furnished by the plaintiff. There was thus, I think, established a relation which was fiduciary in its nature, which entitled the plaintiff to resort to a court of equity to require the defendant to account for the money which the defendant has received, and as to the disposition that he had made of it, and thus to adjust the accounts between the parties, and determine the balance due from one to the other. In this connection it is proper to notice that the defendant does not allege that the plaintiff has an adequate remedy at law, and no objection is taken in the answer that the plaintiff cannot maintain an action for an accounting; but, on the contrary, setting forth the relation that existed between the parties, the defendant sets up a counterclaim, alleging that the plaintiff delivered to the defendant worthless securities, alleging them to be of great value, upon which the defendant gave the plaintiff credit, and that by reason of the plaintiff giving orders to the defendant to buy and sell stocks upon such worthless margin, and which orders the defendant executed, the defendant has paid out, by plaintiff's orders, and to his account, the sum of $1,123.67; that the defendant has tendered the said worthless securities to the plaintiff, and demanded the payment of that sum, which the plaintiff has refused to pay; and the defendant therefore demands an affirmative judgment against the plaintiff for that sum, with interest.

The defendant accepted from the plaintiff orders to purchase and sell securities, and received therefor certain sums of money to be applied upon such purchases and securities, which were to be held as security for any payment that the defendant should make upon a purchase by him of these securities ordered to be purchased for the plaintiff; and this relation, I think, gives to the plaintiff the right to come into a court of equity, and call upon the defendant to account for the transactions by which it executed the plaintiff's orders. The relation being

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thus established, and the fact that sums of money were paid by the plaintiff to the defendant to apply on account of the orders given to the defendant to purchase securities, the defendant was bound to account in relation to the transactions that it has had under the order of the plaintiff. Unless it had expended these moneys, or incurred obligations on behalf of the plaintiff, he was entitled to recover the balance due him of the moneys that he had deposited with the defendant. To prove his case, the plaintiff introduced in evidence the examination before trial of the manager of the defendant's New York office, From the testimony of this witness, it appeared that the defendant maintained various branches or agencies throughout the United States and Canada, at which branches and agencies they had various dealings with other customers in relation to orders for the purchase and sale of stocks and other securities. The method by which they transacted this business was that these orders to purchase and sell securities were offset against each other. It appears, as a matter of fact, but few, if any, stocks were actually purchased or sold on account of these various transactions; that when the plaintiff would give an order to the defendant to purchase a certain number of shares of stock, the defendant would report to him that such a number of shares had been purchased at the prevailing market price, and that subsequently those accounts could be balanced on the defendant's books by charging to him, as purchase for his account, the stocks that other customers of the defendant had ordered sold; and orders received at these branch agencies or offices thus offsetting the purchase which it had been ordered to make for the plaintiff. It is not alleged or proved that any of these customers ever had any stocks to sell, or that when the plaintiff's orders were actually executed the defendant's manager in New York had knowledge of these other various transactions, or what particular transactions would be applied to the fulfillment of the plaintiff's orders. There was thus no real transaction, but merely a bookkeeping account, whereby purchases and sales offset each other. There was no actual purchase on account of this plaintiff of any stock in fulfillment of his orders, no stock that the defendant ever held for the plaintiff, and it follows that the defendant never really purchased any stock for the plaintiff, or ever had in its possession or under its control the stock that the plaintiff ordered the defendant to purchase. All of these accounts upon which the defendant bases its defense were thus shown to be false upon their face. They represented that the defendant had purchased stock for the plaintiff, when in fact no such stock had been purchased; and, assuming that there had been an accounting based upon the purchase of these stocks by the defendant, which the plaintiff had accepted as true, when it subsequently appeared that these accounts were fraudulent upon their face, as being based upon a purchase of stock when none in fact was made, such accounts were entirely insufficient to bind the plaintiff.

It is quite impossible to examine in detail the evidence in this case, as it is quite voluminous, but it is entirely clear that all through this transaction there was never a real purchase or sale of stock by the defendant on account of the plaintiff, and all these credits and debits based upon an actual purchase or sale of stock were purely fictitious

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and fraudulent, and the court below was right in refusing to adopt them as representing any transactions for which the plaintiff was chargeable.

The defendant, however, seeks to sustain this transaction by introducing the orders signed by the plaintiff, which it is claimed the defendant executed. These orders were directed to the Haight & Freese Company, and were as follows: "Buy for my account, subject to stipulations on reverse side, which are part of our agreement." Then followed the number of shares of stock that the plaintiff desired the defendant to purchase, and this was signed by the plaintiff. On the reverse side of this order was printed the following:

"This order may be executed in any city or place, either on any exchange, through a member thereof, and subject to its customs and rules, or by private purchase, as Haight & Freese Company may elect, and any other client of Haight & Freese Company may be the seller. But Haight & Freese Company is not to be obliged to disclose the name of any client in any event. The purchase may be made delivery on purchaser's demand. Haight & Freese Company may pledge for any amount the securities when bought, mingled with the securities of other customers or of the brokers themselves, and may loan any stock, giving the borrowers the right to sell and to return different certificates, and may, without any demand of, or notice to, me whatever, and on my exchange, or by private sale, close out all transactions on margin—(1) as to the securities, whenever margin is less than one-half of one per cent. of the aggregate of the par value of all the securities being carried for me on margin, and (2) as to the commodities, whenever margin is exhausted. All others to buy, hereafter or heretofore given, are to be considered as subject to the above, unless otherwise expressly stipulated therein."

On the back of the order to sell was a stipulation substantially the same, leaving out the provisions giving to the defendant the right to pledge the securities purchased. Assuming that such a contract was valid and would be enforced, there was contemplated an actual purchase of securities for the account of the plaintiff, or a sale of securities for his account; and to justify the defendant in charging the plaintiff with a transaction under such an order it was necessary to show that some securities were actually bought or sold. A mere bookkeeping account, charging up orders of other customers for the sale of the securities, or orders of other customers to purchase them, where there was no stock either sold or bought which was not an actual transaction, would not, as I view it, even under this agreement, be a transaction which would justify a charge against the plaintiff. This testimony discloses that there never was any stock purchased or sold, or intended to be purchased or sold, on account of this plaintiff, and there was never any real transaction in relation to this purchase or sale, except the bookkeeping entries charging the defendant with stock that he never purchased; and, there being no actual transactions, the defendant was not entitled to charge against the plaintiff any of these fictitious charges. There having, therefore, been actually no transactions upon the plaintiff's orders, the defendant had never carried out the plaintiff's orders, and the plaintiff was entitled to recover from the defendant the amount that he had paid to the defendant on account of these transactions, less the amount that he had withdrawn. The court having taken the accounting and having ascertained that amount, it was justified in taking and stating the accounts, and having ascer-

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tained the balance and directing a judgment for the plaintiff for the amount due.

I think the finding of the trial court was clearly sustained by the evidence; that when the court found, as it did, upon evidence which justified the finding, that "no bona fide sales or purchases of stocks were made for or on behalf of plaintiff in his said accounts, and all of the said transactions and purchases and sales were fictitious and bogus, and mere bookkeeping entries, with no foundation in fact," and that the amount due to the plaintiff is undisputed, and that an interlocutory judgment and account was unnecessary, and that the balance of the money remaining in the defendant's hands belonging to the plaintiff is $8,446.90, and the interest thereon is $1,340.35, making in all the sum of $9,787.25, the conclusion of law necessarily follows that the plaintiff was entitled to judgment against the defendant for that amount.

The judgment appealed from should be affirmed, with costs. All concur.

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## ROSENTHAL v. NEW YORK, S. & W. R. CO.

(Supreme Court, Appellate Division, First Department. April 20, 1906.)

1. RAILROADS—TRESPASSERS ON TRACK—DUTY OF RAILROAD.
   A railroad owes no duty to a trespasser on its track other than not to intentionally, wantonly, or recklessly injure him.
   [Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 1238.]
2. SAME—LICENSEE—DUTY TO LICENSEE.
   The license of a licensee on a railroad track is subject to the railroad's right to operate its road, and the railroad owes him no duty other than not to intentionally, wantonly, or recklessly injure him.
   [Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 1236.]
3. SAME—NEGLIGENCE—EVIDENCE.
   Where defendant railroad's engineer, on discovering plaintiff's intestate in a place of peril on a railroad bridge, and for the purpose of getting him into a position of safety, stopped the train, and invited intestate to board the engine, the failure of the engineer to appreciate that cars which had been cut off the rear of the train in order to make a flying switch might overtake the train when it was brought to a standstill, and thus cause it to move forward and injure intestate before the latter boarded the engine, was not negligence.

Appeal from Trial Term, New York County.

Action by Marks N. Rosenthal, as administrator, etc., against the New York, Susquehanna & Western Railroad Company. From a judgment for plaintiff, and from an order denying a motion for a new trial, defendant appeals. Reversed.

Argued before O'BRIEN, P. J., and INGRAHAM, McLAUGHLIN, CLARKE, and HOUGHTON, JJ.

Frederic B. Jennings, for appellant.

T. B. Chancellor, for respondent.

McLAUGHLIN, J. It appeared from the plaintiff's proof that on the 16th of August, 1901, plaintiff's intestate was walking on the ties across a single track bridge of the defendant which spans the Delaware

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river at a place called "Delaware Water Gap." The rails and the ties upon which they rested were elevated about three feet above the cross-beams or girders, which extended between two and three feet from the track to abutments, on which they rested. After entering upon the bridge, the intestate saw a freight train approaching, and thereupon he and his companion (a sister) got down from the track, and stood upon one of the girders at its outer end, supporting themselves by clinging to an iron rod, which was part of the bridge. The engineer of the train saw them while in this position, and he thereupon brought the train to a stop some 15 or 20 feet from where they stood, and beckoned to them to come back upon the track, and get onto the engine. This they proceeded to do, and when within a few feet of the engine the train suddenly started, plaintiff's intestate was thrown from the bridge and killed, and his sister seriously injured. This action was brought to recover damages for the death of the intestate, upon the ground that the same was caused by defendant's negligence. The plaintiff had a verdict, and from the judgment entered thereon, and an order denying a motion for a new trial, defendant has appealed.

At the trial no proof was offered, nor was any claim then or upon the argument of this appeal made, that the engine was started by the engineer. On the contrary, it affirmatively appeared by testimony of defendant's witnesses (and they were not contradicted) that the sudden starting of the train was due to cars which had been cut off by what was termed "a flying switch" coming in contact with the rear end of the train. It also appeared without contradiction that it was customary for the defendant to cut off cars in this way, and then proceed with the balance of the train across the bridge; the cars which had been cut off following of their own momentum.

The respondent contends that the intestate was in a place of safety when he was invited to board the engine, and that it was a negligent act on the part of defendant's engineer to bring his train to a stop, and extend the invitation which he did, knowing, as he must, that the moving cars which had been cut off were liable to collide with the train, and thus move it forward. The trial court charged the jury that the plaintiff's intestate was a trespasser upon the bridge, and that negligence could not be predicated upon the failure of the engineer to remember and appreciate that the cars which had been cut off were coming upon the bridge, and might collide with the rear of his train; but he submitted to the jury, against defendant's exception, whether or not, under all the circumstances, defendant's servants in charge of the train and engine excercised reasonable and ordinary care to avoid the accident.

I am of the opinion that the exception was well taken. The law as thus announced did not correctly state the rule governing the rights of the parties. It is apparent that defendant's engineer, or whoever was in charge of the engine, and beckoned plaintiff's intestate and companion to board the engine, did what seemed for the moment not only a safe, but proper, thing to do, in order to relieve them from either an actual or supposed danger. It may well be doubted, under the facts proved, whether the intestate and his companion were, as con-

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tended by the respondent, in a place of safety, or that they would not have been injured had the train proceeded without stopping. But, assuming the contention to be correct, and the engine and cars did not project sufficiently over the rail to brush them off the girder where they were standing, nevertheless the jar of the train or fright might have caused them to fall. In any event, it cannot be said that the mere stopping of the train, and inviting them from a place of possible peril to one of supposed safety was either an unreasonable, negligent, or wanton act. The law as laid down by the trial court was that the plaintiff's intestate was a trespasser. This being so, the defendant and its employés owed no duty to him other than not to intentionally, wantonly, or recklessly injure him. Sutton v. N. Y. C. & H. R. R. Co., 66 N. Y. 243; McKenna v. N. Y. C. & H. R. R. Co., 8 Daly, 304; Thomas on Negligence (2d Ed.) p. 240.

But it is insisted by the respondent that the intestate was a licensee, and the trial court therefore erred in holding that he was a trespasser. It may well be doubted whether the evidence was sufficient to sustain a finding that the intestate was a licensee, but, even if this be assumed, and that the court on appeal is not bound by the law of the case as laid down by the trial court, it does not aid the respondent, because the intestate's license was subject to the defendant's right to operate its road, and the rules with respect to intentional, wanton, or reckless acts equally applies. Keller v. Erie R. Co., 183 N. Y. 67, 75 N. E. 965; Nicholson v. Erie Ry. Co., 41 N. Y. 525; Lagerman v. N. Y. C. & H. R. R. Co., 53 App. Div. 283, 65 N. Y. Supp. 764. It certainly cannot be said that the act of the engineer, even if he did momentarily forget or fail to appreciate that the cars which had been cut off might collide with the train, and cause it to move forward while the intestate and his companion were getting aboard the engine, was a negligent, reckless, or wanton act. On the contrary, what was done was manifestly by way of precaution to avoid injury. The trial court, therefore, correctly charged that negligence could not be predicated upon the failure of defendant's engineer to appreciate that the moving cars in the rear might come on and hit that portion of the train which was brought to a standstill, and thus cause it to move forward.

The respondent's attorney challenges the correctness of the rule as to the necessity of proof of reckless, wanton, and intentional acts as against a trespasser, and insists that the rule is that, when one sees another in a place of danger, although a trespasser, he should use reasonable care to avoid injuring him. But there is no conflict between the two rules. The difficulty arises in failing to distinguish between passive and active negligence. One having a superior right of way upon a railroad track, for example, need not be actively vigilant in discovering a trespasser; but when he has discovered him, then he must be active in not injuring him. Lack of activity, under such circumstances, becomes reckless conduct. This rule is well illustrated and the distinction is pointed out in the case of Weiler v. Manhattan Ry. Co., 53 Hun, 373, 6 N. Y. Supp. 320, affirmed 127 N. Y. 669, 28 N. E. 255. Here, when the engineer discovered plaintiff's intestate and his companion upon the bridge, he immediately brought his train to a stop, instead of

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running by and taking the chances of injuring them. He could hardly, in reason, have been expected to do anything else. The position they were in was apparently a very dangerous one. Had he proceeded with his train, and they had been thrown or fallen from the bridge, the accident, if possible, would have been even more deplorable than it was, and the engineer would have been justly censurable for not stopping the train before passing, and affording them an opportunity to get from a place of at least apparent danger to one of safety. The invitation of the engineer to board the engine was for the purpose of getting them into a position of safety, and, while it resulted in an unfortunate accident, it did not make him nor the defendant responsible for the consequence.

The judgment appealed from is attacked upon other grounds, but the conclusion at which I have arrived renders it unnecessary to pass upon them.

If the foregoing views be correct, then it follows that the judgment and order appealed from must be reversed, and a new trial granted, with costs to appellant to abide event. All concur.

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## ROSENTHAL v. NEW YORK, S. & W. R. CO.

**(Supreme Court, Appellate Division, First Department. April 20, 1906.)**

APPEAL—ARGUING SEVERAL CASES AS ONE.

**Where, on appeal, two cases are argued together as one, it is proper for the court to consider the facts appearing in each to apply to both.**

**[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Appeal and Error, § 3197.]**

Appeal from Trial Term, New York County.

Action by Pauline Rosenthal against the New York, Susquehanna & Western Railroad Company. From a judgment dismissing the complaint, plaintiff appeals. Affirmed.

Argued before O'BRIEN, P. J., and INGRAHAM, McLAUGHLIN, CLARKE, and HOUGHTON, JJ.

T. B. Chancellor, for appellant.

Frederic B. Jennings, for respondent.

McLAUGHLIN, J. The plaintiff in this action was the companion of plaintiff's intestate in Rosenthal, Adm'r, v. New York, Susquehanna & Western R. R. Co. (decided herewith) 98 N. Y. Supp. 476, and she was injured under the circumstances detailed in the opinion in that case. She was nonsuited at the close of her own testimony, and some of the facts developed by the defendant in that case do not appear in this. The two cases, however, were argued together as one, and it would be quite proper for the court to consider the facts appearing in each to apply to both. It is not, however, necessary to do this, because the plaintiff testified she did not think the engineer started the engine on purpose, and in a colloquy with the defendant's counsel her attorney stated that he had her correct her testimony by having her testify to that effect. In addition, she testified that other cars ran into

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the train, and pushed it ahead. It thus appears, in substance, that, while the plaintiff was on the track and about to board the engine, the train suddenly started, not by any act of the engineer, but because moving cars ran into the standing train, and pushed it ahead. The developed facts, therefore, as well as the claim and attitude of the plaintiff upon the trial, show substantially the same situation as appears in the companion case, and the rules there stated apply with equal force to this case, and show, if our conclusion in the other case be correct, that the nonsuit in the present one was properly granted.

The judgment appealed from, therefore, should be affirmed, with costs. All concur.

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## In re MILLIGAN'S ESTATE.

(Supreme Court, Appellate Division, Second Department. April 20, 1906.)

1. WORK AND LABOR—SERVICES RENDERED BY MEMBER OF FAMILY.

When a member of the family, after he is 21 continues to live with the family, and thereupon and thereafter renders services, the law will not imply a promise to pay for the services.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Work and Labor, §§ 11½, 48, 49.]

2. EXECUTORS AND ADMINISTRATORS—CLAIMS—EVIDENCE—SUFFICIENCY.

Testimony of claimant that he remained on the farm of his father up to the latter's death; that he worked for $15 and his clothing per month; that he made his home there; that the money was for the value of services in addition to the board and clothing furnished by his father—was insufficient to establish the claim against the father's estate.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 903½.]

3. SAME.

Where claimant's sister, whose interest was presumably adverse to that of the former, testified that claimant did hard and continuous daily work, taking her mother's place in their deceased father's house, and further testified to a conversation between claimant's husband and decedent, establishing an agreement by decedent to pay claimant on condition that she remain at home and take up the duties of a working housekeeper, claimant's husband giving evidence of a specific agreement by decedent to pay claimant a stated sum for the services, was sufficient, together with claimant's testimony as to the agreement, to establish the claim against decedent's estate.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 903½.]

4. SAME—STATUTE OF LIMITATIONS—DUTIES OF EXECUTOR.

It is the duty of an executor to raise the question of the statute of limitations as to an alleged claim against the estate.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 753.]

5. PAYMENT—APPLICATION.

Where neither the debtor nor creditor has made application of a payment on a general account, the court may do so in an action to recover a balance claimed due.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Payment, §§ 115, 116.]

6. EXECUTORS AND ADMINISTRATORS—CLAIMS—PAYMENT—APPLICATION.

Where payment of a claim by an administrator was objected to on the ground that the same was fraudulent and excessive, and it appeared

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that one of the items of the claim was outlawed, but the administrator's voucher showed that the claim for balance due and for rent largely exceeded the payment for which claimant receipted in full, such payment might be applied to the balance or to the rent, on proof that the same were justly due.

7. SAME—OBJECTIONS—IMPEACHING PAYMENTS—BURDEN OF PROOF.
Where payments by an administrator are objected to, the burden of impeaching them is on the contestant.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 901.]

8. SAME—SUFFICIENCY OF EVIDENCE.
Where, on the settlement of decedent's estate, the payment of a professional bill of a physician was objected to, on the ground that the services were rendered to intestate's son, who was not a minor, but it was shown that the physician was the family doctor, and that the services were rendered to intestate's son while a member of the household, and there was no proof that such son was not a minor, the objection was not sustained.

Appeal from Surrogate's Court, Orange County.

In the matter of the judicial settlement of the estate of John Milligan, deceased. Appeal from a decree of the Surrogate's Court allowing certain claims. Reversed.

Argued before WOODWARD, JENKS, HOOKER, GAYNOR, and RICH, JJ.

Charles C. Elston, for appellant.

William P. Gregg, for respondents.

JENKS, J. The administrators are charged with $1,690.71, and are credited with $1,071.79, of which the expenses of administration are $329.16 and debts of the deceased are $610. The balance for distribution is $618.92. Of this sum Agnes M. Welsing is to retain $311.78 in part payment of her claim of $1,096, and Frank Milligan is to retain $307.14 in part payment of his claim of $1,080. Mrs. Welsing and Mr. Milligan are daughter and son of the intestate, respectively, and his administrators. They received their letters on April 23, 1904. On January 2, 1905, Mr. Milligan filed a claim against the estate, dated November 12, 1904, "To services rendered as farm worker and manager at $15 per mo. for 6 years, $1,080." On January 2, 1905, Mrs. Welsing filed a claim against the estate, dated May 18, 1904, for services from April 1, 1898, to November 12, 1900, 31½ months, at $12 per month, $378; to services as housekeeper February 8, 1901, to April 1, 1903, at $15, $386; to services as housekeeper per agreement with Louis C. Welsing, April 1, 1903, to April 1, 1904, at $1 per day, $365—in all $1,129, with credits of $33. These claims were stated in the account. Another daughter of the intestate contested the account, and trial was had before the surrogate. At the first hearing the contestant appeared in person without attorney, and other children of the intestate appeared likewise. At that hearing Mr. Milligan, the claimant, testified that his father was a farmer; that he resided with his father up to the time of death, and worked on the farm. When a member of a family, after he is 21, continues to live with the family, and thereupon and thereafter renders services, the law will not "imply



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a promise to pay on either side." Williams v. Hutchinson, 3 N. Y. 312, 53 Am. Dec. 301; Reid v. Farrar, 6 N. Y. St. Rep. 199; Marion v. Farnan, 68 Hun, 383, 387, 22 N. Y. Supp. 946; Wilsey v. Franklin (Sup.) 10 N. Y. Supp. 833. So far as any express contract or understanding is concerned, the claim rests upon the oral testimony of the claimant alone, and even that testimony is vague and indefinite. He testifies:

"I worked for fifteen dollars and my clothing per month. I made my home there. The fifteen dollars was for the value of services in addition to the board and clothing, which was furnished by my father. I worked for fifteen dollars a month and my board and clothing."

This is all of the evidence that bears upon the question of contract. I think that this claim is not established by the "very satisfactory testimony" required by the rule in such cases. Matter of Marcellus, 165 N. Y. 70, 76, 58 N. E. 796; Walbaum v. Heaney, 104 App. Div. 412, 414, 93 N. Y. Supp. 640; Van Slooten v. Wheeler, 140 N. Y. 624, 35 N. E. 583.

I think that upon the evidence the first and second items of Mrs. Welsing's claim cannot be allowed, for the reasons heretofore stated.

I am not prepared to hold that the evidence is insufficient to support the third item. The evidence of the sister Eleanor Milligan, whose interest is presumably adverse to that of the claimant, is that the latter did hard and continuous daily work, taking her mother's place in her father's house after she married Mr. Welsing. Eleanor Milligan testifies to a conversation between Mr. Welsing, her husband, and her father which establishes an agreement by the father to pay his daughter on condition that she would remain at home, and take up the duties of a working housekeeper; and Mr. Welsing gives evidence of a specific agreement to pay his wife a stated sum for the services. That such an agreement should be made is entirely natural; that the services were performed is beyond question. The claim was not stale, and the claimant was permitted to testify that she demanded wages, and to state a plausible reason why they were not paid to her by her father.

The administrators were allowed a payment to Mr. Vaninwegen. His claim is objected to as "fraudulent, excessive, and trumped up." The voucher in the record is for a balance of $202; note due February 27, 1895, $376; interest $208; rent from April 1, 1899, to April 1, 1904, at $200 a year, $950; and certain items that, after credits, make the amount of $1,149.15. It appears that the claimant receipted in full for $360.

The point is made that it appears that the note is outlawed. It is certainly the duty of an executor to raise the question of the statute of limitations. Matter of Goss, 98 App. Div. 489, 90 N. Y. Supp. 769; Butler v. Johnson, 111 N. Y. 204, 18 N. E. 643. But the voucher shows that the claim for "balance" and for rent largely exceeds the payment. When neither the debtor nor the creditor has made application, the court may do so, and certainly the payment of $360 may be applied to the "balance" if that was shown to be justly due, or to the rent under like conditions. Livermore v. Rand, 26 N. H. 85. The objection may be regarded as challenging the payment, and there

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should be more clear and explicit testimony as to that fact; the burden of impeaching them, of course, remaining with the contestant. Boughton v. Flint, 74 N. Y., at page 484.

The payment of a professional bill of a physician was met by the objection that the services were rendered to the son of the intestate, who was not a minor. The physician was the family doctor, the services were shown as rendered to the intestate's son, who was a member of his household, and there is, moreover, no proof that he was not a minor. The objection to the payment to Mr. Welsing for services was not sustained.

The decree in so far as it allows the claims of Mr. Milligan, Mrs. Welsing, the payment to Mr. Vaninwegen, and commissions, must be reversed, and a new hearing be ordered upon these matters before the surrogate. All concur.

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## In re SCHREIBER'S WILL.

**(Supreme Court, Appellate Division, First Department. April 20, 1906.)**

WILLS—PROBATE—EVIDENCE.

Under Code Civ. Proc. § 2623, providing that, if it appears to the surrogate that a testator was competent to make a will and not under restraint, it must be admitted to probate, there must be positive evidence that the testator was competent and not under restraint.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, §§ 138, 421, 697, 698.]

Ingraham, J., dissenting.

Appeal from Surrogate's Court, New York County.

In the matter of the last will and testament of Jane Schreiber, deceased. From a decree admitting the will to probate, an appeal is taken. Reversed.

Argued before O'BRIEN, P. J., and McLAUGHLIN, INGRAHAM, CLARKE, and HOUGHTON, JJ.

Charles O. Maas, for appellant.

James Ridgway, for respondent.

McLAUGHLIN, J. On the 19th of October, 1904, Jane Schreiber died, leaving what purported to be her last will and testament, which bore date October 14, 1904, and upon proceedings taken by the executrix therein named the same was admitted to probate, against the objections of decedent's husband, as her last will and testament, valid to pass personal property, and he has appealed.

The validity of the decree of the surrogate's court admitting the will to probate is challenged principally upon the ground that there was (a) no proof to establish testamentary capacity of the testatrix; and (b) that the proof was insufficient to justify a finding that there was a due execution and publication of the instrument as a last will and testament. The two subscribing witnesses were the only ones sworn in the probate proceedings, neither of whom, by way of opinion or otherwise, gave any testimony whatever bearing on the subject of

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testamentary capacity of the testatrix, or that she was at the time of the execution not under restraint.

Section 2623 of the Code of Civil Procedure expressly provides that, "if it appears to the surrogate that the will was duly executed and that the testator at the time of executing it was, in all respects, competent to make a will and not under restraint," then it must be admitted to probate. The phrase "if it appears to the surrogate" as used in this section implies there must be some evidence given tending to show that the person who made the will was competent to make it, and at the time of its execution not under restraint. Evidence is the only way by which a fact can be made "to appear" to one acting in a judicial capacity. This must be so, otherwise there would be no way of reviewing an official act. This section, therefore, is equivalent to a positive requirement that the fact of competency must be established, in the first instance, by sufficient evidence by the proponents of a will. This is usually done by the subscribing witnesses (Miller v. White, 5 Redf. Sur. 321), inasmuch as the proponent has the affirmative of the issue (Matter of the Will of Cottroll, 95 N. Y. 336; Matter of Freeman, 46 Hun, 458); and unless it be done probate should be refused (Matter of Goodwin's Will, 95 App. Div. 183, 88 N. Y. Supp. 734). Indeed, if there could have been any doubt upon the subject, it was removed by Matter of Ramsdell, 16 N. Y. St. Rep. 281, where probate was denied upon this express ground, and the decree of the surrogate was affirmed by the late General Term (3 N. Y. Supp. 499), which in turn was affirmed by the Court of Appeals in 117 N. Y. 636, 22 N. E. 1130. And to the same effect is Matter of Goodwin's Will, supra, and Kingsley v. Blanchard, 66 Barb. 317.

It is undoubtedly true there is a presumption, as contended by the respondent, partly of law and partly of fact, that every man is sane. But this presumption is not enough, in view of the section of the Code referred to, to be the basis of a finding that a testator, at the time an alleged will was made, was competent to make it and not under any restraint.

The evidence bearing upon the execution and publication of the will is quite meager. The will, as already indicated, was made only a few days before the testatrix's death, and at a time when it is quite evident that she was very ill. The witness McMullen testified:

"I went over there, and I was asked to sign the paper, and I done so. It was read over to Mrs. Schreiber. After it was read over to Mrs. Schreiber, she signed her name. The pen broke. It was with her paralyzed hand she done it."

The witness does not say who requested her to sign, nor is there anything in her testimony to indicate—other than the reading of the will, and that thereafter the testatrix signed it—that she knew when she did so it was her will.

As to the other witness, she testified:

"The will was read, and she recognized me. She nodded to me. * * * I was requested to sign that—to write our names. Mrs. Schreiber requested it."

Just how the request was made does not appear, but the witness further stated:

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"I heard the paper read. It was read to us all. She nodded to me that I should sign it. She could not speak very well. She was paralyzed, but she was conscious. She recognized me when I came in, and nodded to me, but could speak very little."

This is substantially all the testimony there is bearing upon the question of the execution and publication, and, while it may be sufficient, nevertheless, it is so unsatisfactory I think there should be a further hearing on the subject.

I am of the opinion, therefore, that the decree of the surrogate should be reversed and an order made under section 2588 of the Code of Civil Procedure, directing the trial by a jury of the questions of the competency of the testatrix, as well as the due execution and publication of the will, with costs to the appellant to abide the event, payable out of the estate.

All concur, except INGRAHAM, J., who dissents.

INGRAHAM, J. (dissenting). I do not think that, under section 2623 of the Code of Civil Procedure, the surrogate is bound to reject a will because the subscribing witnesses do not state that in their opinion the testator had testamentary capacity, when there is no evidence to justify a finding that the testator had no testamentary capacity at the time of the execution of the will. Under section 2623 it must appear to the surrogate that the testator, at the time of executing the will, was in all respects competent to make a will and not under restraint; but where it appears that the will was duly executed as required by the statute, there is sufficient before the surrogate to justify him in determining that the testator was competent to make a will and not under restraint. In this case there was no evidence to justify a finding that the testatrix had not testamentary capacity. In Matter of Ramsdell's Will (Sup.) 3 N. Y. Supp. 499, the only subscribing witness who was alive when the will was offered for probate expressly testified that his interview with the testatrix concerning the provisions of the will that he prepared at her request, and upon her statements and conversations and the character of the instructions given to him for the drawing of the will, he was of the opinion that she was not of sound mind. That was the only testimony as to the mental condition of the testatrix when she made the will. In that case the surrogate refused to admit the will to probate, and his decree was affirmed by the General Term of the Supreme Court and by the Court of Appeals. That case is not an authority for holding that where a will is proved to have been executed by a testator who apparently is able to understand what he is doing, and there is no evidence of any lack of testamentary capacity, the surrogate is bound to reject the will because there was no affirmative evidence, except the circumstances concerning the preparation and execution of the will, as to the testator's testamentary capacity. In Matter of Goodwin's Will, 95 App. Div. 183, 88 N. Y. Supp. 734, the question as to the testamentary capacity of the testatrix was inquired into, and the testimony of physicians and lawyers was taken as to her condition, and the court held that all the proof on that subject tended to show that the testatrix was not competent to make a will. In Kingsley v. Blanchard, 66 Barb. 317, the question was as to

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the due execution of the will, and the court, after calling attention to the provision of the Revised Statutes then in force, which was, in substance, the same as that of the Code of Civil Procedure, said:

"Neither of the witnesses say whether the testatrix was or was not a person of sound mind. The proof of the fact, then, must be derived from the circumstances proved before the Surrogate."

And then, after discussing those facts, the court said:

"It cannot be claimed that from a single intelligent remark or act capacity could be presumed. The wildest maniac may, and sometimes does, utter a sensible remark, or do a sensible act. * * * If the facts above referred to should be held presumptive of capacity, in the absence of any evidence leading to the opposite conclusion, their weight in this case is greatly weakened, if not entirely overcome, by the evidence as to the condition of the testatrix at the time of the execution of the will."

Then, after discussing that evidence, the court said:

"While I am not prepared to say that there is not some evidence of capacity in the case, yet I must say that, taking all the facts of the case into consideration, it seems to me to be a proper question to be presented to the jury."

Neither of these cases is an authority for the proposition that the court could not determine from the acts of the testatrix and the circumstances under which the will was executed that she had testamentary capacity, and that such a determination should be reversed upon appeal, where there was no evidence that the testatrix had not testamentary capacity.

I think the evidence in this case is sufficient to justify the admission of the will to probate, and that the decree should be affirmed.

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## PEOPLE v. JAFFE.

(Supreme Court, Appellate Division, First Department. April 20, 1906.)

1. RECEIVING STOLEN GOODS—ELEMENTS OF OFFENSE.

The prosecution on a trial for a violation of Pen. Code, § 550, making it a crime for a person to receive stolen property knowing the same to have been stolen, must prove that the property was stolen property, and that at the time accused received the same he knew that it had been stolen.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Receiving Stolen Goods, §§ 1, 4, 5.]

2. CRIMINAL LAW—OFFENSES—ATTEMPTS.

Whether an attempt to commit a crime has been made is determinable solely by the condition of the actor's mind and his conduct in the attempted consummation of his designs, and the fact that the crime attempted could not be committed is immaterial.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 51.]

3. RECEIVING STOLEN GOODS—ATTEMPTS.

Pen. Code, § 550, punishes the receiver of stolen property knowing that the same is stolen. Section 34 provides that an act done with intent of committing a crime, but failing to effect its commission, is an attempt to commit the crime. A clerk stole goods from his employer, intending to sell them to accused. Subsequently the clerk confessed, and the employer recovered the goods, and later he redelivered them to the clerk to sell to the accused. The evidence was sufficient to warrant a finding that

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**accused on receiving the goods believed that they were stolen. *Held*, that accused could not be convicted of receiving stolen property, but he could be found guilty of an attempt to commit the offense.**

Appeal from Court of General Sessions, New York County.

Samuel Jaffe was convicted of an attempt to receive stolen goods, and he appeals. Affirmed.

Argued before O'BRIEN, P. J., and McLAUGHLIN, INGRAHAM, CLARKE, and HOUGHTON, JJ.

Henry W. Unger (Abraham Levy, on the brief), for appellant.

Robert C. Taylor and Wm. Travers Jerome, Dist. Atty., for the People.

CLARKE, J. The defendant was indicted for the crime of criminally receiving stolen property, in that:

**"Twenty yards of cloth, of the value of twenty-five cents per yard, of the goods, chattels, and personal property of F. Norton Goddard, Wilmer A. Baldwin, and Joseph Mathers, copartners in trade, then and there doing business in and by the firm name and style of J. W. Goddard & Sons, by a certain person or persons to the grand jury aforesaid unknown, then lately before feloniously stolen, taken and carried away from the said copartners, unlawfully and unjustly did feloniously receive and have; the said Samuel Jaffe then and there well knowing the said goods, chattels, and personal property to have been feloniously stolen, taken, and carried away."**

Section 550 of the Penal Code provides that:

**"A person who buys or receives any stolen property * * * knowing the same to have been stolen * * * is guilty of criminally receiving such property."**

The gist, therefore, of the crime charged in the indictment was the receiving stolen property, knowing the same to have been stolen. Upon such charge the people were required to prove that the property received was, as matter of fact, stolen property, and that at the time defendant received the same he knew that it had been stolen. The proof shows that some time prior to October 6, 1902, the date laid in the indictment, a clerk in the employ of Goddard & Sons stole goods from that firm, and, as he claims, sold them to the defendant, who kept a small tailor shop. No charge is made against the defendant with respect to these earlier transactions. Their relevancy was upon the question of the defendant's knowledge that the goods which the indictment charges he received were stolen. The proof as to the goods covered by the indictment tended to show that Sadler, the clerk, stole the roll of cloth, which he rewrapped, and placed in a certain place in the store, from which place Donegan, another employé, took it to a certain shoe store, at which place, some three days afterwards, Sadler got the roll. Goddard & Sons had discovered the facts, or Sadler had made a confession. At any rate, Mr. Marratt, the manager of Goddard & Sons, was at the shoe store when Sadler got the roll, and followed him out, and went with him to police headquarters, followed by several detectives. At police headquarters the package was opened. Marratt identified the goods as the property of Goddard & Sons, cut the piece up into three parts, and marked each for identification. Marratt then carried the cloth up as far as Twenty-Third street, and hand-

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ed to Sadler. Marratt testified that in everything he did he acted as the representative of the Goddards, with full authority, and that it was done pursuant to a prior arrangement with the police detective who was in charge; that Sadler was sent to the shoe store pursuant to that arrangement, and that his instructions, the cutting of the goods, and his going to the place of defendant, Jaffe, were all pursuant to this arrangement. "His authority was to endeavor to sell these goods to the defendant." Sadler, in accordance with this arrangement and these instructions, took the cloth to Jaffe, who gave him $2.50. The evidence is sufficient to have warranted the jury to find that the defendant received the goods believing them to have been stolen. So, also, the evidence is sufficient to warrant the finding that the goods had been stolen.

The District Attorney conceded upon the trial, and the entire case, from first to last, by all parties, was tried upon the assumption, however, that when these goods were received by the defendant they had lost the character of being stolen goods. This may be clearly demonstrated from this extract from the record:

"The Court: It is conceded here that the property in question was first stolen, * * * and subsequently taken back into the possession of Goddard & Sons.

"Mr. Jerome: So that at the time of its alleged receipt by this defendant, or prior to the time of its alleged receipt by this defendant, its possession had been recovered by the owner.

"Mr. Levy: And before they had gotten into the possession of the defendant?

"Mr. Jerome: Yes.

"Mr. Levy: In other words, there had been a recovery by the owner of the property.

"Mr. Jerome: So that at the time the goods were actually conveyed to this defendant they were not then and there stolen goods.

"Mr. Levy: They had lost the character of being stolen goods.

"Mr. Jerome: That is entirely correct."

The District Attorney's brief upon this appeal states as follows:

"Various passages in the record show that the people conceded on the trial, as they now concede on this appeal, that because of the interception the goods lost their character as stolen property."

Upon those concessions and upon this record, therefore, the question as to whether or not, by retaking the stolen goods for a short time, marking them for identification, and redelivering them to the thief for the purpose of having him deliver them to the receiver, under the belief on the receiver's part that they were stolen—in short, setting a trap for him—destroyed their quality as stolen goods, and prevented conviction of the crime charged in the indictment, is not in the case, and upon it we express no opinion. A conviction of an attempt to commit the crime charged was asked, and the jury upon that proposition found the defendant guilty.

The question here is, was the defendant properly found guilty of an attempt to receive stolen property, knowing the same to have been stolen, when it is conceded that the goods were not stolen property when received by him, and therefore it was impossible for him to know that they were stolen. Can he be convicted of the attempt, when the crime attempted was impossible of commission? Section 34 of the Penal Code provides that:

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"An act done with intent to commit a crime, and tending but failing to effect its commission, is an attempt to commit that crime."

And section 35 thereof provides that:

"Upon the trial of an indictment, the prisoner may be convicted of the crime charged therein, or of a lesser degree of the same crime, or an attempt to commit the crime so charged, or of an attempt to commit a lesser degree of the same crime."

The learned counsel for the defendant states his position as follows:

"The learned District Attorney concedes that it was legally impossible for the defendant to commit the crime charged in the indictment upon the state of facts disclosed at the trial. Therefore, the question presents itself whether one can, in contemplation of our Penal Code and the criminal law, so attempt to do what is legally impossible as to make himself punishable for the attempt to commit the legal impossibility."

In People v. Moran, 123 N. Y. 254, 25 N. E. 412, 10 L. R. A. 109, 20 Am. St. Rep. 732, the indictment charged the defendant with an attempt to commit the crime of grand larceny in the second degree by attempting to steal from the person of an unknown woman certain goods unknown, of the alleged value of $10. The proof showed that the defendant was seen to thrust his hand into the pocket of a woman, and withdraw it empty. The woman was lost in the crowd, and of course no proof was offered to show that she had anything of value in her pocket which could have been the subject of larceny. Ruger, C. J., said:

"We are of the opinion that the evidence was sufficient to authorize the jury to find the accused guilty of the offense charged. It was plainly inferable from it that an intent to commit larceny from the person existed, and that the defendant did an act tending to effect its commission, although the effort failed. The language of the statute seems to us too plain to admit of doubt, and was intended to reach cases where an intent to commit a crime and an effort to perpetrate it, although ineffectual, co-existed. Whenever the animo furandi exists, followed by acts apparently affording a prospect of success, and tending to render the commission of the crime effectual, the accused brings himself within the letter and intent of the statute. To constitute the crime charged, there must be a person from whom the property may be taken, an intent to take it against the will of the owner, and some act performed tending to accomplish it; and, when these things concur, the crime has, we think, been committed, whether property could in fact have been stolen or not. In such cases, the accused has done his utmost to effect the commission of the crime, but fails to accomplish it for some cause not previously apparent to him. The question whether an attempt to commit a crime has been made is determinable solely by the condition of the actor's mind and his conduct in the attempted consummation of his design. So far as the thief is concerned, the felonious design and action are then just as complete as though the crime could have been, or in fact had been, committed, and the punishment of such offender is just as essential to the protection of the public as of one whose designs have been successful."

This case has been cited and followed a number of times since its rendition, and expresses the law of the state. There was no money in the pocket; hence larceny could not possibly be committed. But one having feloniously intended to take whatever was in the pocket, and having done an act to effectuate that purpose, to wit, inserting the hand therein, the crime of attempting to commit larceny was committed.

In People v. Gardner, 144 N. Y. 119, 38 N. E. 1003, 28 L. R. A. 699, 43 Am. St. Rep. 741, the defendant was indicted for an attempt to commit the crime of extortion by attempting to obtain $150 from

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Catherine Amos, by threatening to accuse her of keeping a house of prostitution. The Penal Code provides (section 552) that:

"Extortion is the obtaining of property from another with his consent induced by a wrongful use of force or fear or under color of official right."

Section 553:

"Fear such as will constitute extortion may be induced by a threat * * * to accuse a person of any crime."

Catherine Amos testified that for nine years she had been the keeper of a house of prostitution in New York; that the defendant agreed with her that if she would pay $150 to him he would not accuse her of the crime; and that she been acting as a decoy for the police, and trying to induce the defendant to receive the money from her under such circumstances as would render him guilty of a crime, and enable the police to arrest and convict him of it. The conviction was set aside by the General Term, and the discharge of the defendant ordered (73 Hun, 70, 25 N. Y. Supp. 1072, 1075), Mr. Justice Follett saying, inter alia:

"We take it to be a general rule, having few, if any, exceptions, that unless the completed act, accomplished as intended and attempted, will constitute a crime, no step or steps taken to perpetrate the act will amount to a criminal attempt. * * * So in the case at bar it was a legal impossibility to commit the crime of extortion as against the woman Amos, because she inveigled the defendant to commit the act, and was not put in fear by him."

That was a ruling on the precise point presented in the case at bar, to wit, that the goods not having the character of stolen goods, the completed act, accomplished as intended and attempted, would not constitute a crime, and therefore, as it was a legal impossibility to commit the crime, no steps taken could constitute an attempt. Mr. Justice O'Brien, in his dissenting opinion, said:

"If the reasoning applied to the absence of fear is good, then, unless all the elements essential to constitute the crime are present, an indictment and conviction must fall, because a conviction for an attempt cannot be sustained except in a case where the crime itself is consummated."

The Court of Appeals overruled the General Term, for while the reversal of the judgment was sustained on errors in excluding evidence, the order was modified by granting a new trial, and the opinion, it seems to me, disposed completely of the question of "legal impossibility" as affecting criminal attempts. Judge Earl said:

"The evidence tended to show the existence of every element constituting the crime of extortion except that Mrs. Amos, paying the money exacted by the defendant, was not actuated by fear. It is urged on behalf of the defendant that the fact that his threats did not inspire fear inducing any action on the part of Mrs Amos—an element essential to constitute the completed crime of extortion—renders it impossible to sustain an indictment and conviction for the lesser crime of an attempt at extortion. * * * The threat of the defendant was plainly an act done with intent to commit the crime of extortion, and it tended, but failed, to effectuate its commission, and therefore the act was plainly, within the statute, an attempt to commit the crime. The condition of Mrs. Amos' mind was unknown to the defendant. If it had been such as he supposed, the crime could have been, and probably would have been, consummated. His guilt was just as great as if he had actually succeeded in his purpose. His wicked motive was the same, and he had brought himself fully and precisely within the letter and policy of the law. This

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crime, as defined in the statute, depends upon the mind and intent of the wrongdoer, and not on the effect or result upon the person sought to be coerced. * * * In Rex v. Holden, Russ. & Ry. 154, it was held, on an indictment under a statute against passing or disposing of forged bank notes with intent to defraud, that it was no defense that those to whom the notes were passed knew them to be forged, and therefore could not be defrauded. In Reg. v. Goodchild, 2 Carr. & K. 293, and Reg. v. Goodall, 2 Cox, Cr. C. 41, it was held, under a statute making it a felony to administer a poison or use any instrument with intent to procure the miscarriage of any women, that the crime could be committed in a case where the woman was not pregnant. It has been held in several cases that there may be a conviction of an attempt to obtain property by false pretenses although the person from whom the attempt was made knew at the time that the pretenses were false, and could not, therefore, be deceived. * * * So far as I can discover, there is absolutely no authority upholding the contention of the learned counsel for the defendant that, because the defendant did not inspire fear in the mind of Mrs. Amos by his threats, and thus could not have been guilty of the completed crime of extortion, therefore he cannot be convicted of attempting to commit the crime. That contention is, as I believe, also without any foundation in principle or reason."

In People v. Sullivan, 173 N. Y. 122, 65 N. E. 989, 63 L. R. A. 353, 93 Am. St. Rep. 582, Chief Judge Cullen cited with approval People v. Moran, supra. In People v. Mills, 178 N. Y. 274, 70 N. E. 786, 67 L. R. A. 131, the court again reviewed the subject of attempts; Judge Vann saying:

"Felonious intent alone is not enough, but there must be an overt act shown in order to establish even an attempt. An overt act is one done to carry out the intention, and it must be such as would naturally effect that result, unless prevented by some extraneous cause."

People v. Moran, People v. Gardner, and People v. Sullivan were all cited with approval. In People v. Conrad, 102 App. Div. 566, 92 N. Y. Supp. 606, affirmed in 182 N. Y. 529, 74 N. E. 1122, upon conviction of the crime of attempting to commit the crime of abortion, and in People v. Du Veau, 105 App. Div. 381, 94 N. Y. Supp. 225, upon conviction of the crime of an attempt to commit the crime of robbery in the first degree, the same questions were examined, and the same result was reached; so that it appears that there can be no doubt from those repeated decisions that it is now the settled law of this state, as formulated in People v. Moran, that "the question whether an attempt to commit a crime has been made is determinable solely by the condition of the actor's mind and his conduct in the attempted consummation of his designs."

It is true that we have not found a case where there has been a conviction of the crime of attempting to receive stolen goods. But by our statutes receiving stolen goods knowing them to have been stolen is a substantive crime; and by our statutes an attempt to commit a crime is also a crime; and, the test being as above pointed out, I can see no reason upon principle to differentiate this attempt from any other. In the case at bar the evidence tends to show that the defendant had said to Sadler, prior to his theft of these particular goods, that he would take a roll of these linings; that Sadler took the note to Jaffe; that Jaffe examined it; that Sadler told him where the roll came from; that Jaffe measured the goods and paid for them. These facts, if found, were enough, under the doctrine of the cases cited, to establish the at-

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tempt to receive stolen goods knowing them to have been stolen, taken in connection with the other evidence as to knowledge or belief, denial of the purchase, and concealment of the goods.

We have examined the exceptions, and find no error committed to the prejudice of the defendant.

The judgment of conviction should be affirmed. All concur.

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**PEOPLE ex rel. MICHALES v. AHEARN, President of Borough of Manhattan.**

**(Supreme Court, Appellate Division, First Department. March 9, 1906.)**

1. **MANDAMUS—COMPELLING REINSTATEMENT IN OFFICE—PARTIES.**
   **The present incumbent, appointed to fill the position from which relator was removed, is not a necessary party to mandamus to compel relator's reinstatement.**
2. **MUNICIPAL CORPORATIONS—HEAD OF BUREAU—REMOVAL—REINSTATEMENT.**
   **To entitle the head of a bureau to the protection of Laws 1901, p. 636, c. 466, § 1543, which provides that no head of a bureau shall be removed until he has been allowed an opportunity to make an explanation, an alternative writ of mandamus to compel his reinstatement must allege that the bureau from which he was removed was one created by charter or by an official who was given by the charter authority to create bureaus.**

**Patterson and Laughlin, JJ., dissenting.**

Appeal from Special Term, New York County.

Mandamus by the people, on the relation of William H. Michales, against John F. Ahearn, president of the borough of Manhattan. From an interlocutory judgment overruling a demurrer to an alternative writ upon the ground that there was a defect of parties, and that the alternative writ did not state facts sufficient to constitute a cause of action, defendant appeals. Reversed.

Argued before O'BRIEN, P. J., and PATTERSON, INGRAHAM, LAUGHLIN, and CLARKE, JJ.

Theodore Connoly and W. B. Crowell, for appellant.

Tompkins McIlvaine, for respondent.

INGRAHAM, J. The relator presented a petition to the Supreme Court, alleging that on or about the 1st day of January, 1902, he was duly appointed to the position of superintendent of sewers for the borough of Manhattan, the city of New York, by the then president of the said borough; that he thereupon accepted the said position and duly qualified and has duly performed the duties of that position up to the 4th day of January, 1904; that on the 4th day of January, 1904, the relator was ejected from the said position by persons claiming to act under the authority of the new president of the borough of Manhattan of the city of New York, the defendant in this proceeding; that in the office of the president of the borough of Manhattan there is the office of the commissioner of public works and that in the office of the commissioner of public works there were and had been at all times in the peti-

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tion mentioned numerous bureaus, among which was the bureau of sewers; that there was a chief of said bureau of sewers who was designated as the "Superintendent of Sewers"; that no charges had ever been preferred against the relator, nor was he allowed an opportunity of asking an explanation concerning his removal; and that such removal was contrary to the Constitution of the state of New York and the civil service law, the rules made thereunder by the municipal civil service commission, and the provisions of the charter of the city of New York. On this petition an alternative writ of mandamus was granted. The defendant demurred to the writ upon the grounds (1) that there was a defect of parties; and (2) that the writ does not state facts sufficient to constitute a cause of action. I do not think that the present incumbent of the position, appointed to fill the position from which the relator was removed, is a necessary party to this proceeding to reinstate the relator. While it may be that the present incumbent could be made a party as interested in the result of this proceeding, his presence is not at all essential to a complete determination of the question at issue between the relator and the defendant, the appointing officer. If the relator's removal was illegal, the final order reinstating him would be a command to the appointing officer; but the relator could obtain no relief in this proceeding against the person who has been appointed to the position for which he had been removed. The cases in which a veteran applies for a mandamus, where a summary proceeding by way of mandamus is given him, where he has been denied his right to priority of appointment, do not apply to a case like the present, for in such a case there was a vacancy to which an appointment was duly made, in violation of the right of a veteran to priority to appointment, and in determining the question there is involved the right of the appointee to the position to which he had been appointed, and in such a proceeding he is entitled to be heard. But in this case the relator was duly appointed and in office. If his removal was illegal, he has never been deprived of his office, and this application is to enforce his right to continue in the office from which he was illegally removed. The person appointed in his place, if he was illegally removed, has no right to the office and never had a right to it. If the relator's contention is correct, he still holds the position and is entitled to its emoluments, and this proceeding is to enforce that right. With the validity of the appointment of the person who has taken his place he has no concern. See People ex rel. Corkhill v. McAdoo, 98 App. Div. 312, 90 N. Y. Supp. 689.

The second question is as to whether the alternative writ states facts sufficient to entitle the plaintiff to a peremptory writ. The relator relies upon section 1543 of the charter of New York (chapter 466, p. 636, of the Laws of 1901), which is as follows:

"The heads of all departments and all borough presidents (except as otherwise specially provided), shall have power to appoint and remove all chiefs of bureaus (except the chamberlain), as also all clerks, officers, employés and subordinates in their respective departments, except as herein otherwise specially provided, without reference to the tenure of office of any existing appointee. But no regular clerk or head of a bureau, or person holding a

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**position in the classified municipal civil service subject to competitive examination, shall be removed until he has been allowed an opportunity of making an explanation."**

The relator's right to reinstatement must depend upon his holding the position of the head of a bureau within this section of the charter. The alternative writ alleges that on or about the 1st day of January, 1902, the relator was duly appointed to the position of superintendent of sewers for the borough of Manhattan, city of New York, by the then president of the said borough, thereupon accepted the said position and duly qualified; that "in the office of the president of the borough of Manhattan there is the office of the commissioner of public works, and that in the office of the commissioner of public works there are, and have been at all times hereinafter mentioned, numerous bureaus, among which is the bureau of sewers; that there is a chief of said bureau of sewers, and said chief is designated as the 'Superintendent of Sewers'"; and then follows a statement as to the duty of the relator as such superintendent. This provision of the charter, so far as it relates to the head of a bureau, was included in the charter of 1873 and in the consolidation act (chapter 410, p. 1, Laws 1882) in substantially the same form as in the present charter. By each of those charters certain bureaus were expressly created. Under the charter of 1873 (section 28, c. 335, p. 491, Laws 1873), no regular clerk or head of a bureau could be removed "until he has been informed of the cause of the proposed removal, and has had an opportunity of making an explanation"; and it was held by the Court of Appeals in the case of People ex rel. Emerick v. Board of Fire Commissioners, 86 N. Y. 149, that this provision related only to the head of those bureaus established by the charter, and not to bureaus established by the departments without legislative authority merely for administrative purposes, and this principle was reaffirmed in the case of People ex rel. Cummings v. Koch et al., 2 N. Y. St. Rep. 110, affirmed without opinion in 103 N. Y. 650.

In the present charter (chapter 466, p. 636, of the Laws of 1901) we find that there are created separate bureaus in several departments. Thus there are five bureaus in the finance department (section 151); three in the law department (sections 258, 259, 260); three in the fire department (section 727); two in the health department (section 1179); and the bureau of buildings in the office of each borough president (section 435). Except, however, in relation to the law department and the tenement house department, there is no authority in the charter granting power to the heads of departments to create additional bureaus; and if the rule adopted in the cases above cited is to be applied, and this provision held to apply only to the bureaus specifically created by the charter, or created under the power conferred by it, it would appear that the relator is not the head of a bureau and protected from removal. By section 96 of the charter (Laws 1897, p. 30, c. 378) there was created in the city of New York a department of sewers, the head of which was called the "Commissioner of Sewers" (section 555). By section 458 of the charter the commissioner of sewers was authorized to organize such bureaus as he should from time to time

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deem necessary to the proper discharge of the duties of his department. By section 1608 of the charter of 1897 (chapter 378, p. 555, Laws 1897) all provisions of the consolidation act, so far as the subject-matter thereof is revived and repeated in the charter, are repealed. By that act a department of sewers was created, the head of which was called the "Commissioner of Sewers," who was to be appointed by the mayor. He was given cognizance and control of all subjects relating to public sewers and drainage of the city. Sections 555 and 556. No bureaus, however, were created in his department, and no authority was given to him to create bureaus therein. By section 389 of the present charter (Laws 1901, p. 166, c. 466) all powers theretofore vested in the commissioner of sewers were vested in the city of New York, "and as matter of administration devolved upon the president of the borough within which is situated the territory to which or to the official representatives of which said powers and duties heretofore appertained, to be by him executed in accordance with the provisions, discretions and limitations of this act"; and by section 390 the commissioner of sewers, as constituted by the charter of 1897, was required to turn over and deliver to the borough presidents of the various boroughs included within the city of New York all maps, plans, etc., relating to sewers. By section 383 of the charter the president of the borough was authorized to appoint and remove at pleasure a commissioner of public works for his borough, who may discharge all of the administrative powers of the president of the borough relating to streets, sewers, public buildings, and supplies conferred upon him by the act. He was given power to appoint a secretary and such assistant clerks and subordinates as he might deem necessary, if provision is made therefor by the board of estimate and apportionment and the board of aldermen; and such secretary, assistant clerks, and subordinates were to hold office at the pleasure of the president, subject to the provisions of the civil service law. He was then given cognizance and control of all subjects relating to the public sewers and drainage of his borough. His power to appoint and remove all of his subordinates is unlimited, except so far as he should be restrained by the civil service act. There is established a bureau of buildings in the office of each borough president (section 435), the president of the borough being authorized to appoint a superintendent of buildings for the borough, and the bureau of buildings is the only bureau authorized by the charter in the office of the borough president.

There is no bureau of sewers thus established by the charter, and no authority that I can find which authorizes the president of the borough to constitute a bureau of sewers in his department. The powers vested in the commissioner of sewers under the charter of 1897 were vested in the city of New York. Section 389. Whatever power thenceforth existed in the commissioner of sewers under the charter of 1897, or under the consolidation act, to create separate bureaus, was thus vested in the city, and, if it was sought to exercise powers establishing a bureau, it would have to be done by the legislative body of the city (the board of aldermen). The alternative writ of mandamus does not allege that there has ever been created in the office of borough president,

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either by the board of aldermen or by any other lawful authority, a bureau of sewers. The alternative writ alleges that in the office of the president of the borough of Manhattan there is the office of the commissioner of public works, and that in the office of the commissioner of public works there are and have been at all times thereinafter mentioned numerous bureaus, among which is the bureau of sewers, and that there is a chief of said bureau of sewers, and that said chief is designated as superintendent of sewers; and this allegation is admitted by the demurrer. I do not think this allegation is sufficient to sustain this proceeding, because the provision of the charter upon which the relator relies only applies to the heads of bureaus specifically created by the charter, or under its authority; and to entitle the relator to the protection of this provision it is necessary that he should allege that he was at the head of a bureau created by the charter, or by an official who was given by the charter authority to create bureaus.

The fact that there was in the office of the commissioner of public works bureaus, of which one was the bureau of sewers, unless such bureau was actually created by the charter, or by an officer authorized by the charter to create bureaus, would not be sufficient to protect the person at the head of such bureau, if such bureau was not one created by the charter or under its authority. People ex rel. Emerick v. Board of Fire Commissioners, 86 N. Y. 149. To entitle the relator to this relief, I think the alternative writ must allege that the bureau of which he claimed to be a member was one established by the charter. There is no allegation that this bureau was established by municipal authority, or that it was established by the president of the borough, or the commissioner of public works. He simply alleges that there existed in the office bureaus. That is not an allegation that bureaus had been established under the provisions of the charter to which the section of the charter upon which he relies applied.

I think the judgment appealed from should be reversed and the demurrer sustained, with $50 costs and disbursements. All concur, except PATTERSON and LAUGHLIN, JJ., who dissent.

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(111 App. Div. 578.)

## MISHKIND-FEINBERG REALTY CO. v. SIDORSKY.

(Supreme Court, Appellate Division, First Department. March 9, 1906.)

1. PROCESS—PUBLICATION—SUFFICIENCY.

Where defendant in a foreclosure proceeding was given notice thereof by publication of summons, it was immaterial that, at the time of the order of publication of the summons as against her, a supplemental and amended summons had been ordered for the purpose of bringing in the tenants of the property, and a title based upon the foreclosure was marketable.

2. SAME—DEFECTS—AMENDMENT.

In an action between the vendor and purchaser of land involving the sufficiency of the vendor's title which was based on a decree of foreclosure, it appeared that the order of publication of summons in the action of foreclosure did not comply with Code Civ. Proc. § 440, which provides that such order must contain a direction that, on or before the day of the first publication, the plaintiff shall deposit in a specified post office

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**one or more copies of the summons, complaint, and order. The order objected to complied with such provision, except that instead of using the word "complaint" it said "notice of object of action hereto annexed." The order was complied with by mailing the notice of object of action, and the statute was complied with by mailing the complaint. Subsequently, on notice to all the parties who had appeared, an order was entered amending the former order nunc pro tunc so that it complied with the statute. Code Civ. Proc. §§ 721–723, authorize the amendment of orders and judgments, and section 3345 provides that the rule of the common law that a statute in derogation of the common law is strictly construed does not apply to this act. *Held*, that the vendor's title was marketable, notwithstanding the irregularity.**

**Ingraham, J., dissenting.**

Action by the Mishkind-Feinberg Realty Company against Louis Sidorsky, for specific enforcement of a contract of sale of real property. Submission on agreed statement of facts. Judgment for defendant.

Argued before O'BRIEN, P. J., and McLAUGHLIN, INGRAHAM, CLARKE, and HOUGHTON, JJ.

Arnstein & Levy (Emil Goldmark, of counsel), for plaintiff.
J. A. Seidman, for defendant.

CLARKE, J. This is a submission of a controversy upon an agreed statement of facts, pursuant to the provisions of sections 1279–1281 of the Code of Civil Procedure. The parties entered into a contract in writing and under seal, under which the defendant agreed to sell and the plaintiff agreed to buy a certain piece of land with the buildings thereon, situated in the city of New York and known as 217 East 102d street. The defendant agreed to deliver "a proper deed containing the usual full covenants and warranty for the conveying and assuring to the party of the second part, or the assigns of the party of the second part, the fee simple of the said premises free from all incumbrance except as herein stated." The plaintiff raised certain objections to defendant's title, and the sole question here is: Is the title marketable?

The defendant acquired title through mesne conveyance from one Donald, who was the purchaser upon a foreclosure sale. On the 29th of June, 1897, one Pollack, the then owner of the fee, executed and delivered his bond and mortgage to Peter Donald for the payment of $14,000 on the 29th day of June, 1902, with interest at 5 per cent. payable semiannually. Said mortgage was duly recorded. Thereafter said Pollack conveyed said premises to one Rickerson, and on May 29, 1899, Rickerson conveyed to Herman Rosenblum, who became the owner subject to said mortgage. On July 3, 1899, said Rosenblum executed a mortgage to Sigmund Cohn for $500. On October 31, 1899, Herman Rosenblum executed a mortgage to Simon Rosenblum for $3,000. This mortgage was assigned to Mollie Weinberg, and on November 2, 1900, Mollie Weinberg assigned said mortgage to Mary Rabinovitch; the assignment being recorded November 7, 1900. On November 14, 1900, Peter Donald commenced an action to foreclose the first mortgage for $14,000 for nonpayment of interest. The owner of the equity, Herman Rosenblum and his wife, Sigmund Cohn, the owner of the



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second mortgage for $500, and Mary Rabinovitch, the assignee of record of the third mortgage, as well as other parties, were made parties defendant. On December 4, 1900, an order was made and entered directing that the summons and complaint be amended by striking out two unnecessary defendants and by adding 28 others, all of whom were tenants of the premises sought to be foreclosed; and accordingly a supplemental and amended summons and complaint were on that day issued. The said supplemental and amended summons named all the old defendants, except those two stricken out, and all the new defendants, but was directed to the new defendants only. Thereafter, and on January 29, 1901, an order was made directing that the summons be served upon the defendant Mary Rabinovitch by publication. The affidavits upon which the order was made sufficiently showed the nonresidence of said defendant, and that her then address was No. 12 Fair street, Paterson, N. J. The order provided:

"That service of the summons in the above-entitled action upon the said defendant Mary Rabinovitch be made by publication thereof in two newspapers. * * * That on or before the day of the first publication as aforesaid plaintiff deposit in the general post office of the borough of Manhattan, city, county and state of New York, a copy of the summons and notice of object of action hereto annexed and of this order contained in a securely inclosed postpaid wrapper directed to the said Mary Rabinovitch at No. 12 Fair street, Paterson, New Jersey."

There was deposited in the post office, directed as required, on the 16th day of February, 1901, the summons as originally made and served on the other defendants; that is, containing the name of Mary Rabinovitch and others, but not including the 28 tenants as to whom the supplemental summons was directed to be issued. To this summons was attached a notice directed to the defendant Mary Rabinovitch, as follows:

"The foregoing summons is served upon you by publication, pursuant to an order of the Honorable P. Henry Dugro, a justice of the Supreme Court of the state of New York, dated the 29th of January, 1901, and filed with the complaint in the office of the clerk of the county of New York on the 5th day of February, 1901, at the courthouse in the borough of Manhattan, New York."

There was also inclosed and mailed notice of object of action, notice of order of publication, complaint, affidavits, and order of publication, and order amending order of publication. Thereafter, and on May 3, 1901, judgment of foreclosure and sale was entered and a referee appointed to sell, who on May 28, 1901, after due notice of sale, sold the premises to the plaintiff in said action, Peter Donald, for $13,400, resulting in a judgment for deficiency for $3,061.52.

The first objection raised was that, at the time of the order of publication of the summons as against Mary Rabinovitch, a supplemental and amended summons had been ordered to be issued containing the names of the 28 tenants of the premises; that the publication and depositing in the post office of the original summons was not the publication of the summons in the action. It seems sufficient to say that, so far as she was concerned, she was named in the original summons, and, being summoned to defend the action on her own account, it does not seem a

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matter of moment that the names of the tenants of the property, made parties only for the purpose of foreclosing their rights, if any under their tenancies, could in any way affect her.

The second objection was that the order of publication did not conform to the provisions of section 440 of the Code of Civil Procedure. The part of that section material to this objection is as follows:

"It [the order] must also contain * * * direction that on or before the day of the first publication, the plaintiff deposit in a specified post office one or more sets of copies of the summons, complaint and order, each contained in a securely closed postpaid wrapper directed to the defendant at a place specified in the order."

The order complied with that provision, with the exception that, instead of the word "complaint," it said "notice of object of action hereto annexed." As matter of fact, the order was complied with by mailing the notice of object of action, and the purpose of the statute was complied with by mailing also the complaint. Subsequent to this objection being taken, and on August 19, 1904, on notice to all the parties who had appeared, an order was made and entered in said action amending said order nunc pro tunc as of the original date by striking out the words "notice of object of action" and inserting the word "complaint," upon proof being presented that a complaint as well as notice of object of action was mailed to the defendant Mary Rabinovitch, and that the words "notice of object of action" were used in said order by oversight and mistake and were due to a clerical error, and that the word complaint was intended to be used.

Plaintiff claims that no jurisdiction was ever acquired over Mary Rabinovitch because the order of publication was jurisdictionally defective. Two recent cases in this court are cited by plaintiff. In Eleventh Ward Bank v. Powers, 43 App. Div. 178, 59 N. Y. Supp. 314, it appeared that the order did not specify the post office in which the copy of the summons, complaint, and order were to be deposited. It did not direct that a copy of the order be mailed to the defendant to be served. It did not direct that the order be served on or before the day of the first publication of the summons. No copy of the order was mailed to the defendant, and this court held on those facts that there was no service. In Stuyvesant v. Weil, 41 App. Div. 557, 58 N. Y. Supp. 697, the objection was that the defendant's title was defective, as the defendant claimed, under a certain mortgage foreclosure wherein the owner of the equity of redemption "was not named as a party defendant in either the summons or the complaint" and did not appear therein prior to the entry of judgment, and the court, therefore, had no jurisdiction of the person of said owner. It appeared that the name of the owner of the equity was Mary J. Stockton, and that in the foreclosure proceedings the summons and complaint named Emma J. Stockton, instead of Mary J. Stockton, and as so written they were served on Mary J. Stockton, who did not, however, appear or answer at any time before the judgment or sale. Subsequently an ex parte order was entered "that the summons and complaint, and all other papers herein, be amended by striking out the name 'Emma J. Stockton' where the same appears, and inserting in lieu thereof the name

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'Mary J. Stockton' as one of the defendants in this action." No amended notice of pendency of action was filed, nor was any amended or supplemental summons issued or served. The court said:

"The person sued by the wrong name never appeared, and, unless the court obtained jurisdiction, it is difficult to determine upon what principle it could amend and thereafter proceed to determine the rights of the parties. * * * If here, intending to sue Mary J. Stockton, the summons had included the name of Emma J. Brown, it would not be claimed in a suit intended to affect the former, and in which she was actually served with the summons directed to Emma J. Brown, that the court, without her appearance, thereby acquired jurisdiction over her. 'Emma J. Stockton' may be nearer to the name of the person intended than 'Emma J. Brown,' yet, if it is sufficient merely to have the right persons served, regardless of having them correctly designated in the summons, then seemingly there would be nearly as strong argument in favor of sustaining the jurisdiction of the court in one case as the other. Mary J. Stockton would be no more required to attend a summons issued against Emma J. Stockton than she would be if it were issued against Emma J. Brown. In each instance it is directed to another person"—and held the title unmarketable.

Upon appeal to the Court of Appeals (167 N. Y. 421, 60 N. E. 738, 53 L. R. A. 562) the judgment of this court was unanimously reversed; the learned chief judge concluding his opinion with these words:

"We have not alluded to the decisions of the several Special and General Terms which the Appellate Division felt called upon to follow. Their foundations were laid long before sections 721 and 723 of the Code came into existence as marking features of a distinct legislative policy to stop the sacrifice of things of real substance upon the altar of mere technicality, and hence a discussion of them can serve no useful purpose."

It seems to me that beyond question it would be "the sacrifice of things of real substance upon the altar of mere technicality" to destroy a title to real estate because an order required the deposit in the post office of a notice of the object of the action, instead of a copy of the complaint, when, as matter of fact, not only the notice, but the complaint as well, and all of the other papers required by the Code to be served, were so deposited. An order may not be made nunc pro tunc which will supply a jurisdictional defect by requiring something to be done which has not been done; but, where the thing itself has been done, when the object looked at by the Code in requiring it to be done has actually been accomplished, the power to make the order express the fact does exist. The object in requiring that the order should contain a direction that the complaint should be deposited in the post office was that the complaint should be so deposited in order that the defendant might receive it and be placed in position to defend his rights upon the information so conveyed that they were attacked. That was done in the case at bar, and the proper and necessary papers were sent to the then present address of the defendant, which address appeared upon the recorded assignment of the mortgage in question, recorded only seven days before the commencement of the suit, and stated by her attorney who attended to said assignment to be her then address.

Considering the facts in the case at bar, and considering not only the provisions of sections 721, 722, and 723 of the Code of Civil Pro-

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cedure, but section 3345 as well, which expressly provides that "the rule of the common law that a statute in derogation of the common law is strictly construed does not apply to this act," and applying the doctrine of the Court of Appeals as expressed in the Stuyvesant Case, supra, I am of the opinion that the objections to the title are not well taken, and that judgment should go for the defendant upon this submission, with costs. All concur, except INGRAHAM, J., who dissents.

INGRAHAM, J. (dissenting). I do not think that a purchaser should be compelled to accept this title. The order of publication concededly fails to comply with section 440 of the Code of Civil Procedure. That section is mandatory and provides that the order must contain a direction that on or before the day of the first publication the plaintiff deposit in a specified post office one or more sets of copies of the summons, complaint, and order, contained in a securely closed postpaid wrapper, directed to the defendant at a place specified in the order. This is not an order of the court, but an order of a judge, and it has been many times held that the order, to give to the court jurisdiction in the action, must strictly comply with this mandatory provision of the statute. The summons was published under this order, and the sole jurisdiction of the court to subsequently decree a foreclsoure of the mortgage and a sale of the defendant's property, who was sought to be served under this order, is the publication of the summons as therein directed. This defendant is not now before the court, and the judgment in this action would not be binding upon her. The purchaser was entitled to a marketable title, free from serious doubt. I do not think that a title based upon a judgment entered in an action where the summons was served upon the owner of the equity of redemption pursuant to an order which fails to comply with this section of the Code is a marketable title. The order amending the order of publication entered long after the judgment was entered, not made by the judge who signed the original order, I do not think cures the defect, if the failure of the original order of publication was insufficient to give the court jurisdiction in the action.

I think therefore that, as the plaintiff should not be compelled to take this title, judgment should be directed for the plaintiff upon this submission.

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## NIEWENHOUS v. MANHATTAN RY. et. al.

(Supreme Court, Appellate Division, First Department. March 9, 1906.)

TRIAL—INVOLUNTARY NONSUIT—POWER TO DISMISS.

**In an action for injury to property by interference with the easements of access, light, and air, a dismissal of the complaint was erroneous, where the plaintiff's proof showed that he was entitled to some fee damage, though he failed to establish that he had suffered any diminution in rental value.**

**[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 360.]**

Appeal from Special Term, New York County.

Action by Sisbrand Niewenhous against the Manhattan Railway

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and another to recover for injury to property by interference with the easements of access, light, and air. From a judgment dismissing plaintiff's complaint on the merits, plaintiff appeals. Reversed.

Argued before O'BRIEN, P. J., and PATTERSON, McLAUGHLIN, LAUGHLIN, and HOUGHTON, JJ.

Vincent P. Donihee, for appellant.

J. Osgood Nichols, for respondents.

PER CURIAM. The plaintiff's proof failed to establish that he had suffered any diminution in rental value, but we think it did show that he was entitled to some fee damage. A dismissal of his complaint was, therefore, error.

The judgment must be reversed, and a new trial granted, with costs to the appellant to abide the event.

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(111 App. Div. 669.)

## In re RICKETTS.

(Supreme Court, Appellate Division, First Department. March 9, 1906.)

1. MUNICIPAL CORPORATIONS—OFFICERS—PROMOTION—CIVIL SERVICE—CONSTITUTIONAL LAW.

A rule of a municipal civil service commission requiring a specified period of service in the next lower grade before examination for promotion does not violate Const. N. Y. art. 5, § 9, providing that promotions in the civil service shall be made according to merit and fitness to be ascertained, so far as practicable, by examinations, which, so far as practicable, shall be competitive.

2. SAME—VALIDITY.

A rule of the civil service commission of New York City, requiring applicants for examination for promotion to have served a stated period in the next lower grade does not violate Laws N. Y. 1899, p. 805, c. 370, § 15, providing that promotions shall be based on merit and competition, as the section further provides that promotions shall be based on the superior qualifications of the person promoted as shown by his previous service.

3. SAME—CIVIL SERVICE COMMISSION—POWERS.

Under the New York civil service law, Laws 1899, p. 803, c. 370, § 13, subd. 6, providing that a municipal civil service commission may refuse to examine an applicant who lacks any of the established preliminary requirements, the commission has power to require applicants for examination for promotion to have served a stated period in the next lower grade.

4. SAME—CIVIL SERVICE RULE—REASONABLENESS.

A rule of a municipal civil service commission requiring applicants for examination for promotion to have served for not less than six months in the next lower grade is reasonable and proper.

5. CONSTITUTIONAL LAW—JUDICIAL POWERS—REVIEW OF CIVIL SERVICE RULES.

The court has power to review a rule of a municipal civil service commission setting up requirements for examination for promotion in the civil service and to declare the rule invalid if it is unreasonable and improper.

Appeal from Special Term, New York County.

Mandamus by George F. Ricketts against William F. Baker and others, composing the municipal civil service commission of the city of New York. From an order denying the writ, petitioner appeals. Affirmed.

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Argued before O'BRIEN, P. J., and INGRAHAM, McLAUGHLIN, CLARKE, and HOUGHTON, JJ.

Weed, Henry & Meyers (Richmond Weed, of counsel), for appellant.

William B. Crowell (Theodore Connoly, on the brief), John J. Delany, Corp. Counsel, for respondents.

CLARKE, J. The appellant is an assistant foreman in the fire department of the city of New York. He applied to the Special Term of the Supreme Court for a writ of mandamus directed to the commissioners composing the municipal civil service commission of the city of New York, requiring them forthwith to permit him to enter and take part in a certain examination for promotion to the office of foreman in the fire department of said city, held by said commission on or about the 6th day of December, 1905, to examine him for said office, and to rate his merit and fitness for promotion to said office pursuant to law, and to certify his name, if he be found eligible for such promotion, to the fire commissioner of said city, in his appropriate place, upon the eligible list made up as a result of said examination. The appellant alleged in his petition that he had been duly appointed to the position of fireman February 1, 1896, and became, prior to January 1, 1899, a fireman of the first grade, and on July 19, 1905, was duly promoted, pursuant to due examination and certification, under the civil service law and rules, to the position of assistant foreman. He alleges that upon application made by the fire commissioner, the civil service commission in the month of February, 1905, called an examination for the purpose of examining candidates for promotion to the position of foreman in the fire department, and that numerous persons eligible to be examined were notified of the time and place of such examination; that the municipal civil service commission has declined to recognize petitioner's rights to be examined or to permit him to enter the examination, upon the ground that he has not served for six months in the position of assistant foreman, as required by rule 15, subd. 2, of the rules of the municipal civil service commission, adopted and promulgated December 4, 1903, which provides that:

"Examination for promotion shall be ordered as often as may be necessary to meet or to anticipate the needs of the higher grades, and so far as practicable shall be held periodically. Except where otherwise provided by law, such examination shall be open, in each case, to all persons who shall have served with fidelity for not less than six months, in positions of the same group or general character, in the grade next lower, in the same department, office, or institution."

Subdivision 5 of said rule also provides that:

"No person shall be admitted to an examination for promotion, who lacks any preliminary qualification for the position to be filled, fixed by law, or by these rules. * * *"

The petitioner further alleged that the requirements of said rule 15, subd. 2, that said promotion examination shall be open only to persons who shall have served with fidelity for not less than six months in positions in the grade next lower in the same department is invalid, and that other rules in pari materia in regard to rating are invalid and "de-

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prive your petitioner of his right to compete in said examination for promotion to the office of foreman and greatly prejudice him in his occupation and in his standing in the public service of the city of New York, and that they unlawfully restrict the competition for promotion to such position, and that they are arbitrary and unreasonable, and of no effect." The Special Term denied the writ, and the petitioner appeals. Appellant claims that the civil service commission had no power to establish the rule in question; that it is invalid and unconstitutional, in that it unlawfully restricts competition for promotion.

Section 9 of article 5 of the state Constitution provides that:

"Appointments and promotions in the civil service of the state and of all the civil divisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained, so far as practicable, by examinations, which, so far as practicable, shall be competitive. * * * Law shall be made to provide for the enforcement of this section."

The existing civil service law, passed in obedience to that mandate of the Constitution, is chapter 370, p. 795, of the Laws of 1899. Section 10 of said act provides that:

"The mayor of each city in this state shall appoint and employ suitable persons to prescribe, amend, and enforce rules for the classification of offices, places, and employments in the classified service of such city, and for appointment and promotions therein and examination therefor * * * not inconsistent with the Constitution and the provisions of this act, and shall amend the same from time to time. * * * Such rules herein prescribed and established * * * shall be valid and take or continue in effect only upon the approval of the mayor of the city and of the state civil service commission. * * * Subject to the provisions of this act and of said rules, the municipal commission of any city shall make regulations for and have control of examinations and registration for the service of such city and shall supervise and preserve the records of the same."

Section 6 of said act provides that:

"The rules prescribed by the state and municipal commissions pursuant to the provisions of this act shall have the force and effect of law."

Section 15 thereof provides that:

"Vacancies in positions in the competitive class shall be filled, so far as practicable, by promotion from among persons holding positions in a lower grade in the department, office or institution in which the vacancy exists. Promotions shall be based upon merit and competition and upon superior qualifications of the person promoted as shown by his previous service, due weight being given to seniority."

It thus appears that upon the commission is conferred the power to establish rules and regulations not inconsistent with the Constitution and the provisions of said act, which rules and regulations, upon approval by the mayor and the state civil service commission, have the force and effect of law. The rule providing for six months' service in the next lower grade does not offend any constitutional provision. The appellant claims that because the Constitution provides that "promotions * * * shall be made according to merit and fitness to be ascertained, so far as practicable, by examinations, which, so far as practicable, shall be competitive," it is a violation of the principle of competitive examination to require a period of service in the next lower grade before promotion. I find no such limitation in the Constitution.

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The reiteration of the words "so far as practicable," establishes the fact that the constitutional convention and the people, who approved its work, were distinctly aware that competitive examinations were not always practicable, and that the results thereof would not always produce the best results in the public service. The Constitution, therefore, instead of a hard and fast rule, left some leeway. Especially is it true in regard to promotions that much more than mere proficiency in paper examination is requisite for the determination of efficiency. Above all, in what might be called those quasi military bodies, the police and fire departments, where discipline in the rank and file and effectiveness in fighting crime and fire depend so much upon the coolness, skill, steadiness, experience, and qualities of command in the superior officers. So the Constitution provided that, so far as practicable, examinations should be had and, so far as practicable, be competitive, and directed the Legislature to provide for the enforcement of the section.

The appellant claims the rule to be a violation of the civil service act, because, he says, that act says "promotions shall be based upon merit and competition," and that the commission has no right to restrict competition by any period of service in the lower grade. But the act says:

> "And upon the superior qualifications of the person promoted, as shown by his previous service, due weight being given to seniority."

Section 728 of the charter (chapter 466, p. 306, Laws 1901) also provides:

> "Promotion of officers and members of the force shall be made by the fire commissioner as provided in section one hundred and twenty-four of this act on the basis of seniority, meritorious service in the department and superior capacity as shown by competitive examinations."

So far from establishing appellant's point, those provisions seem to me to be warrant for the rule. We are dealing with promotion from one grade to another, from a subordinate to a position of command. What better test of ability to command can be given than by service as second in command? How are "seniority and meritorious service" in the grade below, and the "superior qualifications of the person promoted as shown by his previous service," to be ascertained and given their due weight, if there has been no service in the lower grade? For entrance into the service—and the provisions as to competitive examination are the same in both Constitution and law—the rules provide certain preliminary qualifications, as, for instance, height, and weight, and age. These qualifications are not prescribed in the statute, but are wisely left to the commission, the law providing in subdivision 6 of section 13 of the civil service law:

> "Such commission may refuse to examine an applicant, or after examination, to certify an eligible who is found to lack any of the established preliminary requirements for the examination or position for which he applies."

The law, therefore, contemplates the establishment by rule of "preliminary requirements." For a promotion, six months' service in the inferior grade is such a preliminary requirement. The commission has the power to make such requirement. The question for the court is,

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Was the rule reasonable, designed to carry out the purpose of the law and not to defeat it? We think this rule, to be reasonable and proper, designed to promote the efficiency of the service, and in harmony with the spirit of the civil service provisions of the Constitution and laws made thereunder. The court has the power to review such a rule and to declare it invalid if it does offend such spirit and purpose, and it will not hesitate, in a proper case, to exercise such power.

In the case at bar, the decision of the court below was right, and the order appealed from should be affirmed, with $10 costs, and disbursements. All concur.

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(111 App. Div. 548.)

## RUDOMIN v. INTERURBAN ST. RY. CO.

(Supreme Court, Appellate Division, First Department. March 9, 1906.)

1. DAMAGES—ISSUES AND PROOF—PERSONAL INJURIES.

In an action for personal injuries, the complaint alleged that plaintiff sustained a compound fracture of his skull; that his arm, elbow, ankle, legs, and back were cut, bruised, and contused; that the fracture was a permanent and incurable injury, and was and would be "the cause of plaintiff's being, becoming, and remaining afflicted with diseases"; and that by reason of his said injuries "his physical and mental abilities have been and will remain impaired, lessened, and destroyed." *Held*, that plaintiff was entitled to prove an impairment of his eyesight, as well as any diseases directly traceable to the fracture of the skull or the injury to his arm, elbow, ankle, and leg.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, §§ 441-446.]

2. APPEAL—EXCEPTIONS—INSTRUCTIONS.

In an action for personal injuries, plaintiff's counsel, in presenting the case to the jury, stated that he proposed to offer proof that plaintiff's eyesight had been impaired. Defendant's counsel then objected that such proof would not be admissible under the complaint, and the court sustained the objection, and so instructed the jury, to which an exception was taken. The question was also presented on the examination of plaintiff's witness when the testimony was excluded by the court, and an exception taken thereto. *Held*, that plaintiff was not required to take an exception to the charge of the jury bearing upon the question of damages.

Appeal from Trial Term, New York County.

Action by Joseph Rudomin against the Interurban Street Railway Company. From a judgment for a part only of the amount claimed, plaintiff appeals. Reversed.

Argued before O'BRIEN, P. J., and PATTERSON, McLAUGHLIN, LAUGHLIN, and HOUGHTON, JJ.

George J. Gruenberg, for appellant.

Bayard H. Ames, for respondent.

McLAUGHLIN, J. This action was brought to recover damages for personal injuries alleged to have been sustained by reason of defendant's negligence in suddenly starting a car which plaintiff was about to board. The injuries received were serious. The skull was fractured to such an extent that it became necessary to remove a piece of bone about two inches long, by one and a half to one and three-quar-

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ters inches wide, from the left side of the forehead, which left the brain exposed except for the skin and the covering on the brain itself. He was also injured in other respects. Plaintiff had a verdict for $2,000, and from the judgment entered thereon he has appealed.

At the trial he sought to show as a result of the injury an impairment of the eyesight. The testimony, however, bearing on this subject was excluded, and an exception taken on the ground that such proof was inadmissible under the allegations of the complaint. He also attempted to show that, as a result of his injuries, he was suffering at the time of the trial from varicose veins. This testimony was also excluded for a similar reason.

The main question presented, therefore, on this appeal is whether, under the allegations of the complaint, plaintiff was entitled to make this proof. The complaint alleged that by reason of the negligence of the defendant "the plaintiff sustained a compound fracture of his skull, his arm, elbow, ankle, legs, and back were cut, bruised, and contused, and the said fracture made it necessary to have, and the plaintiff did have, a surgical operation performed on his skull and have certain bones and pieces of skull and pieces of skin and flesh extracted and removed therefrom, which left his brain at the said break in an exposed condition and without any protection other than the skin which has grown over the said break; that the said break in the plaintiff's skull is a permanent and incurable injury, and is and will be the cause of the plaintiff's being, becoming, and remaining afflicted with diseases; that by reason of his said injuries the plaintiff has suffered and will continue to suffer great physical pain and mental anguish, and his physical and mental abilities have been and will remain impaired, lessened, and destroyed." I am of the opinion that under this allegation the plaintiff was entitled to prove an impairment of the eyesight or any other impairment of his mental or physical abilities, as well as any disease with which he was afflicted, which he could prove was directly traceable to or proximately flowed from the fracture of the skull, the injury to "his arm, elbow, ankle, legs, and back."

The leading case on the subject as to what can be proved in an action of this character under a general allegation of bodily injuries is Ehrgott v. Mayor, 96 N. Y. 264, 48 Am. Dec. 622. There the allegation was that the plaintiff had "suffered great bodily injury; that he became and still continues to be sick, sore, and disabled," and it was held that this was a sufficient allegation to entitle the plaintiff to prove a disease of the spine. But it is claimed that the rule laid down in this case has been qualified to a certain extent by the more recent case of Kleiner v. Third Avenue Railroad Co., 162 N. Y. 193, 56 N. E. 497. This case does not, in express terms, either modify or qualify the rule laid down in the Ehrgott Case, nor do I think, when carefully considered, it changes the rule there stated. The rule now seems to be that under a general allegation of bodily injuries the plaintiff may prove any injury to his person, and, if the defendant desires that they should be more definitely stated, then it should move to have them made more specific or for a bill of particulars. But, where the complaint specifies

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the injuries received, then proof cannot be given of any other injuries unless they necessarily and immediately flow from those named.

In the Kleiner Case the allegation of the complaint was that the plaintiff had received severe and painful contusions to her head, body, and arms, and that her scalp had been lacerated, "whereby she sustained severe nervous shock and concussion of the brain and injured her eyesight and she was for a time rendered unconscious, and she thereby sustained permanent injuries and was injured for life." Under this allegation the plaintiff was permitted to prove that the dorsal muscle of the right side was paralyzed, and that she suffered from vertigo, curvature of the spine, and other diseases. This was held error; the court holding that the principle in the Ehrgott Case did not apply, inasmuch as the plaintiff had specified the injuries which she had sustained, and that the allegation was that she "thereby sustained permanent injuries, thus in effect limiting her permanent injuries to those previously alleged." In the case now before us the allegation is that the injury to the skull is and will be the cause of plaintiff's becoming and remaining afflicted with diseases. He was, therefore, entitled to prove that he was afflicted or would be afflicted with any disease which was the direct result of this injury, whether it be an impairment of the eyesight or varicose veins. Then, too, under the allegation that by reason of the injuries specified plaintiff's "physical and mental abilities have been and will remain impaired," he was entitled to prove that his ability to see had either been wholly or partially destroyed. Impairment of the eyesight, either complete or partial, resulting from an injury to the skull, if not a disease, is certainly an impairment of one's physical ability to see.

That plaintiff was entitled to make this proof is clearly established by numerous decisions of this court. In Eichholz v. Niagara Falls H. P. & M. Co., 68 App. Div. 441, 73 N. Y. Supp. 842, affirmed 174 N. Y. 519, 66 N. E. 1107, the complaint alleged that the plaintiff "was greatly shocked and bruised about his body, his spinal column strained and injured, and his leg bruised, and the cords and muscles lacerated, torn, and disconnected from the bone and otherwise injuring plaintiff and causing him great pain and suffering, and he was rendered sick, sore, and lame, and now is and ever since has remained sick, sore, and lame." It was held that this allegation was sufficient to warrant the admission of proof that the plaintiff, as the result of the accident, was suffering from diabetes. In Graham v. Bauland Co., 97 App. Div. 141, 89 N. Y. Supp. 595, the complaint alleged that the plaintiff was seriously and permanently bruised and injured, and it was held that proof was admissible, tending to show an impairment of eyesight and hearing. In Mullady v. Brooklyn Heights R. R. Co., 65 App. Div. 549, 72 N. Y. Supp. 911, it was held that an allegation in the complaint that the plaintiff sustained serious and lasting bodily injuries to his head, limbs, and nervous system entitled him to prove, not only impairment of eyesight, but hearing. And to the same effect is Quirk v. Seigel-Cooper Co., 43 App. Div. 464, 60 N. Y. Supp. 228.

A case which seems to be directly in point is Radjaviller v. Third

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Ave. R. R. Co., 58 App. Div. 11, 68 N. Y. Supp. 617, in which the opinion of this court was delivered by the present presiding justice. There the complaint alleged that the plaintiff sustained severe injuries on her left foot, left arm, left side of her head, and her entire left side. It was there held that this allegation entitled the plaintiff to introduce proof to the effect that she sustained an injury to her left ear. See, also, Bolte v. Third Ave. R. R. Co., 38 App. Div. 234, 56 N. Y. Supp. 1038; Garbaczewski v. Third Ave. R. R. Co., 5 App. Div. 186, 39 N. Y. Supp. 33. Here the injuries are alleged, as it seems to me, in a much more general way than in some of the cases cited. The allegation is that the injury to the skull has been, is, and will be, the cause of plaintiff's becoming and remaining afflicted with diseases. If, as already suggested, an impairment of the eyesight is a disease, then proof would be admissible under this allegation; and this applies equally to the proof as to the varicose veins. Then, under the allegation, as to the injury to the skull, plaintiff's "physical and mental abilities have been and will remain impaired," he was entitled to show an impairment of any of the physical conditions of the body, which, of course, included seeing.

But it is suggested that the appellant is not in a position to take advantage of these rulings, inasmuch as no exception was taken to the charge to the jury bearing upon the question of damages. There was no necessity for taking an exception in order to raise the errors here alleged. When the plaintiff's counsel opened the case to the jury, he stated that he proposed to offer proof that the plaintiff's eyesight had been impaired. Defendant's counsel then objected that such proof would be inadmissible under the complaint, and the court held that such proof was inadmissible and so instructed the jury, to which an exception was taken. The question was also presented sharply when the plaintiff put Dr. Wolff, an eye expert, upon the stand, and, after qualifying him, asked the following question: "State what you found to be his condition." The objection then was interposed that, if it were sought to show an impairment of the eyesight, it was inadmissible under the complaint. Plaintiff's counsel stated that the purpose of this proof was to show that the plaintiff had lost the power of his eyesight by the fracture of his skull. The objection was sustained and an exception taken. And a similar ruling was made and an exception taken when proof was offered as to the varicose veins, and in excluding this proof I think the court erred and a new trial should be ordered. Other errors are alleged which would require serious consideration; but, inasmuch as there must be a new trial, it is unnecessary to here consider them.

The judgment and order appealed from, therefore, should be reversed, and a new trial ordered, with costs to appellant to abide the event. All concur.

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(111 App. Div. 543.)

## SCHMALHOLZ v. SCHMALHOLZ.

(Supreme Court, Appellate Division, First Department. March 9, 1906.)

1. DIVORCE—ALIMONY PENDENTE LITE.
   Where a wife obtained a judgment of separation awarding her alimony, in a subsequent action by her for absolute divorce the court had no authority to grant her alimony pendente lite.
2. SAME—COUNSEL FEES.
   Where a wife obtained a judgment in an action for a separation awarding her alimony, in a subsequent action by her against the husband for an absolute divorce she might be allowed a counsel fee.

Appeal from Special Term, New York County.

Action by Edward B. Schmalholz against Margaret B. Schmalholz. From an order granting alimony and counsel fee, complainant appeals. Affirmed.

Argued before O'BRIEN, P. J., and McLAUGHLIN, INGRAHAM, CLARKE, and HOUGHTON, JJ.

Max Schleimer, for appellant.

Benno Loewy, for respondent.

INGRAHAM, J. Prior to the commencement of this action, in an action in which this defendant was plaintiff, a judgment of separation was obtained awarding her alimony of $120 per month. That judgment remains unreversed and unmodified. Subsequent to the entry of that judgment this action was commenced to obtain an absolute divorce from the defendant upon the ground of adultery. She denied the charge, and interposed a counterclaim demanding an absolute divorce from the plaintiff. Whereupon a motion was made at the Special Term asking that alimony be awarded her during the pendency of the action, and for counsel fee to enable her to defend this action and to prosecute her counterclaim. The court below granted alimony at the rate of $200 per month, inclusive of alimony awarded in the separation action and counsel fee of $1,000.

I do not think the court had in this action the power to award the plaintiff alimony. By the judgment in the separation action the obligation of the defendant therein for the support of his wife was fixed at the sum of $120 per month. This was the limit of the liability of the husband for the support of his wife while that judgment remained in force; and the wife would have no claim upon the husband for support, except as there provided.

While it may be true that the court had power to modify that judgment, an application for that purpose must be made in the action in which it was entered. The defendant here, having denied the allegations against her and set up a counterclaim charging the plaintiff with adultery and asking a judgment of divorce, she should be awarded a reasonable sum to enable her to meet this charge. The counsel fee awarded her was, however, excessive.

The order appealed from should be modified by striking out the provision as to alimony, and by reducing the counsel fee to $500; and as thus modified affirmed, without costs of this appeal. All concur.

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## CHANDLESS v. GLOBE STORAGE & CARPET CLEANING CO.

(Supreme Court, Appellate Term. February 27, 1906.)

1. CHATTEL MORTGAGES—ASSIGNMENT OF DEBT—EFFECT.
The transfer of part of several notes secured by a chattel mortgage passes an interest in the mortgage without any formal assignment thereof.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Chattel Mortgages, § 453.]

2. REPLEVIN—EVIDENCE—TITLE OF THIRD PERSON.
In an action of replevin, evidence *held* sufficient to show that a third person was entitled to the property.

Appeal from Municipal Court, Borough of Manhattan, Tenth District.

Replevin by Lenore Chandless against the Globe Storage & Carpet Cleaning Company. From a judgment for plaintiff, defendant appeals. Reversed.

Argued before SCOTT, P. J., and GIEGERICH and GREENBAUM, JJ.

John C. Shaw, for appellant.

Louis Jersawitz, for respondent.

GREENBAUM, J. Plaintiff brought replevin against defendant, a warehouse company with whom she had stored the chattels, the subject-matter of this action. The only defense involved on this appeal is that a third person, one John E. Shaw, was entitled to the chattels, and that the testimony warranted a finding to that effect.

Section 116 of the New York Municipal Court act provides:

"The defendant may, by answer, defend, on the ground that a third person was entitled to the chattel, without connecting himself with the latter's title." Laws 1902, p. 1528, c. 580.

The facts are as follows: One Olga Burns was originally the owner of the chattels, which consisted of a lot of household effects used in connection with a boarding house. Said Burns, through the agency of one Dora H. Blakeley, sold them to one Sadie H. Bicknell for $2,000, by the payment of $500 in cash, and the balance in a series of notes of $50 each, aggregating $1,500, secured by a chattel mortgage on the property sold. Upon the consummation of the transaction, the vendor, Burns, who became indebted in the sum of $150 to said Blakeley for commissions in effecting the sale, instead of paying her in cash, delivered to her the first three of the series of notes received from Bicknell, aggregating $150, indorsed by said Burns, together with a written instrument, duly signed, whereby the latter duly transferred to Dora H. Blakeley all her "right, title, and interest to the payments to be made by Sadie H. Bicknell" on the first three notes above described, and which are specifically stated in said instrument as "secured by a certain chattel mortgage executed to me by the said Sadie H. Bicknell"; the mortgage being further identified as that covering the chattels in suit. It appears that plaintiff's title to the goods is based upon a written in-

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strument executed some time after the transactions above set forth by Olga Burns, which purports to be an absolute bill of sale of chattels "sold to me [Olga Burns] by Belle Phillips by bill of sale January 17, 1905," and which also contains the following language: "Also all my right, title, and interest in the chattel mortgage for $1,500, made by Sadie H. Bicknell to me, dated on or about May 5, 1905." It may be inferred from the testimony, which is not satisfactorily nor concisely presented, that Olga Burns became repossessed of the household effects on account of the default in the payment of the notes, and that the last described instrument was designed to vest the title to the chattels in plaintiff by bill of sale and by a surrender of the mortgage and $1,350 of unpaid notes; the balance of the $1,500 notes in the hands of Burns for which the mortgage was given as security. The three notes held by Blakeley were not paid, and were duly protested for nonpayment.

The effect of the judgment rendered in behalf of plaintiff was to declare that Shaw was not, under the proofs, shown to have been entitled to the chattels. The transfer of the three notes by Burns to Blakeley passed an interest to the latter in the mortgage without any formal assignment of the mortgage. Jackson v. Blodget, 5 Cow. 202; Jackson v. Willard, 4 Johns. 41; Kortright v. Cady, 21 N. Y. 343, 78 Am. Dec. 145.

The circumstances attending the alleged transfer of title from Burns to plaintiff lead to the conclusion that the notes amounting to $1,350 were discharged, so that the only outstanding claims against the mortgaged property were the three notes delivered to Blakeley, and by her assigned to Shaw. No question of priority of rights under the mortgage as between Shaw and defendant can arise where the mortgage is effective only to the extent of the three unpaid notes. Indeed, if there could be any question of priority, it must necessarily be resolved in favor of Shaw, because the notes held by him are indorsed by Burns, making her personally liable thereon, and necessarily subordinating her rights under the mortgage to those of defendant.

It seems clear that defendant established that John E. Shaw, a third person, was entitled to the chattels. As it appears that appellants have given notice of an application for an order of restitution, as required by section 323 of the Municipal Court act (Laws 1902, p. 1582, c. 580), the judgment will be reversed, and restitution of the replevied chattels and a new trial ordered, with costs to the appellant to abide the event. All concur.

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## BRISTOL HOTEL CO. v. PEGRAM.

(Supreme Court, Appellate Term. February 27, 1906.)

1. EVIDENCE—PAROL—VARYING WRITTEN CONTRACT.

In an action for rent, evidence that prior to the execution of the lease the landlord represented that the building in which the apartments to be rented were located was to be used only for apartments to be leased for a month or longer to tenants with approved references was inadmis-

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sible where the lease was silent in respect to such exclusive use of the building.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 1736–1745.]

2. LANDLORD AND TENANT—CONSTRUCTION OF LEASE.

In a lease of apartments in a building the words "known as the Bristol Apartment Hotel," following the word "building," were merely descriptive of the character of the hotel, and not indicative of an agreement that no portion of the building should be devoted to purposes inconsistent with the use of a building as an apartment hotel.

3. SAME—EVICTION OF TENANT.

The use of a building as a hotel for transients was not sufficient to constitute an eviction of tenants to whom apartments were leased for the term of a year.

Appeal from Municipal Court, Borough of Manhattan, Second District.

Action by the Bristol Hotel Company against Walter M. Pegram. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Argued before SCOTT, P. J., and GIEGERICH and GREENBAUM, JJ.

Weil, Wolf & Kramer, for appellant.

Henry Pegram, for respondent.

GREENBAUM, J. This action was brought by the plaintiff to recover, under a written lease for one year, the sum of $240, the unpaid rent for the last four months of the term. The plaintiff leased to the defendant a suite of rooms in the building described in the lease as the "Bristol Apartment Hotel," and defendant entered into the occupancy of the rooms, and paid rent for eight months. The defendant moved out upon the expiration of the eighth month, and set up as defense to this action "a general denial and breach of contract." As the pleadings were oral, and as the parties evidently tried the case also upon the theory of the defense of "eviction," it may be assumed that that defense also was interposed.

The defendant, under plaintiff's objection that the testimony tended to contradict the written lease, was permitted to give proof of the fact that before he executed the lease he was told by the plaintiff's then manager that the occupancy of the building would be exclusively devoted to apartments leased for the month or longer to tenants with approved references, and that it was in reliance upon this guaranty that defendant signed the lease. Defendant was further permitted to show that shortly before he moved from the premises he learned that rooms in the building were rented to transient guests for the day, as is usual in hotels, and that a considerable portion of the hotel was thus occupied. It was not only not claimed that the transient guests were objectionable or improper, but it was expressly disclaimed that any such objection was entertained by defendant, who frankly avowed that he moved without ever having objected to the use of the hotel building for transient guests, and without assigning any reason for his moving out.

The testimony relating to the representations alleged to have been made before the hiring, that apartments only were to be leased in the



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building, was admitted, not as tending to vary the terms of the lease, but in explanation of the meaning of the phrase "apartment hotel." It is not apparent how the so-called "explanation" would affect the rights of the parties under the lease. Assuming that an "apartment hotel" was one where all the rooms were rented in apartments under leases for a term of one month or upwards, it by no means follows, in the absence of an express covenant that no portion of the building would be rented otherwise than in apartments, as aforesaid, that plaintiff was guilty of a breach of any contract with defendant when it undertook to lease rooms in the building to transient tenants. If the testimony to which objection was taken was designed only to explain the phrase "apartment hotel," it merely had the effect of showing what would seem to me in this case a wholly unnecessary fact, unless a description amounted to a contract that no portion of the building might be leased otherwise than in apartments. So far as the testimony may tend to show that the parties contemplated a restriction of occupancy to leased apartments for a term of a month or more, it would have the effect of varying the terms of the written lease, which is silent in respect to any such exclusive use of the building, and would be inadmissible. Van Derhoef v. Hartmann, 63 App. Div. 419, 71 N. Y. Supp. 552.

It seems to me that the words "known as the Bristol Apartment Hotel" after the word "building" were merely descriptive of the character of the hotel at the time of the making of the lease, and are not indicative of an agreement that no portion of the building may be devoted to purposes not inconsistent with the use of a building described as an apartment hotel. If the tenancy were conditional upon the exclusive use of the building to leased apartments, then, under the familiar rules of construction applicable to restrictive covenants, the intention so as to restrict should not be one of inference, but unmistakably expressed in the contract of leasing. Indeed, respondent in his brief evidently lays little stress upon the defense that there was a breach of contract, his arguments being mainly based on the defense of an eviction. He rests this defense upon an implied covenant of quiet enjoyment, an incident to every lease, and attempts to justify his abandonment of the premises because the act of the landlord in affording accommodation to transient guests rendered the premises unsuitable to the purposes to which they were applied at the time of the letting. There is not, however, the slightest proof in the case that the renting of rooms to transients in any degree interfered with defendant's beneficial enjoyment of the rooms rented to him. The only testimony in that regard was the following:

"And the fact that there were transients there—Well, it was the whole point with us; it wasn't anything else; * * * meeting strangers, and having the house continually upset. We went there to be in a private house, and not in a hotel at all. We didn't want to live in a hotel."

The undisputed facts are that the hotel building contained 86 apartments; that about 25 per cent. of the building was rented in apartments to parties under leases ranging from one to two years; that the agreement of leasing provided that the landlord furnish, "without extra

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charge, hall and chamber service, ice water, water for all the plumbing fixtures, steam heat to warm the halls and apartments during the cold season," and the descriptive book which the defendant testified was shown him by the plaintiff's agent before the hiring, and which he offered in evidence, refers to a restaurant on the first floor, with service a la carte and table d'hote. The building was therefore at the outset equipped with hotel accommodations. It does not appear that the restaurant service was open to the general public. But suppose the management entertained guests in the restaurant other than those living in the apartments, would this constitute a breach of the implied covenant of quiet enjoyment? The defendant has the undoubted right to a preference to living in a house exclusively devoted to apartments, and the propriety of such a preference is manifest; but it seems to me, if he intended to have his tenancy conditional upon such an exclusive occupancy of the building, he should not have executed the lease unless it contained a clause safeguarding his rights in that respect, and clearly expressing the agreement in that behalf between the parties.

In the absence of such an agreement and of any proof tending to show that defendant's enjoyment of the premises were in any manner interfered with by the landlord, excepting, perhaps, that a proper fastidiousness of the defendant was thereby affected, it cannot successfully be urged that the facts established constitute, within the contemplation of the parties, a constructive eviction, which justified the tenant in abandoning the premises, and defeating a recovery for rent for the unexpired term.

It is not pleaded nor alleged that the defendant was induced to make the lease through fraud, and it seems to me that no defense valid in law was established that the rulings of the court were erroneous, and the verdict of the jury in defendant's favor unfounded.

Judgment reversed, and new trial ordered, with costs to appellant to abide the event. All concur.

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## DELAMANARUS v. CHUCLOS et al.

(Supreme Court, Appellate Term. February 27, 1906.)

1. APPEAL—REVIEW OF ORDER IN ATTACHMENT.

Error of a justice of the Municipal Court in refusing to vacate a warrant of attachment was not ground for reversal of a judgment against the defendant subsequently rendered in the action.

2. SAME.

Neither the provisions for appeals from orders (Municipal Court Act, Laws 1902, pp. 1562, 1563, c. 580, §§ 253-257) nor from judgments (Id. p. 1578, § 310) cover orders in attachment proceedings.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 661-664.]

Appeal from Municipal Court, Borough of Manhattan, Second District.

Action by Nicholas Delamanarus against Heralambos, Traparis,

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and Constantine Chuclos. From a judgment for plaintiff, defendants appeal. Affirmed.

Argued before SCOTT, P. J., and GIEGERICH and GREENBAUM, JJ.

Maurice L. Rippe, for appellants.

GIEGERICH, J. In this case the defendants have appealed from the judgment for the sole purpose of bringing up for review an order denying a motion to vacate the attachment which the plaintiff had obtained from a justice of the Municipal Court against their property.

The precise question here presented arose in Rosenthal v. Grouse, 12 Daly, 529, and in Schnauffer v. Catterbury, 16 Daly, 358, 10 N. Y. Supp. 543, where it was held that a warrant of attachment was merely a provisional remedy, not involving the merits of the action, nor the validity of the process by which the defendant was brought into court, and that error of the justice in refusing to vacate it was not ground for reversal of a judgment against the defendant subsequently rendered in the action. The court in the case first cited points out that, if there was no error in the judgment in the court below, there can be no error in the judgment when it is brought into the appellate court for review. No provision of the Municipal Court act is cited, nor can I find any, which authorizes this court to review upon appeal an order of the character in question. Neither the provisions for appeals from orders (Municipal Court Act, Laws 1902, pp. 1562, 1563, c. 580, §§ 253-257) nor from judgments (Id. p. 1578, § 310) cover orders in attachment proceedings. The cases above cited are therefore decisive of the questions involved, and, as no error in the judgment is claimed, it must be affirmed.

The judgment must therefore be affirmed, with costs. All concur.

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## CARTIER v. PABST BREWING CO. et al.

(Supreme Court, Appellate Division, First Department. April 20, 1906.)

CHATTEL MORTGAGES—FORECLOSURE—PURCHASE BY MORTGAGEE—LIABILITY TO JUDGMENT CREDITORS.

Where, after default in payment of the debt secured by chattel mortgage, the mortgagee took possession of the property, sold it, and purchased at the sale for less than the value of the property, a judgment creditor of the mortgagor was not entitled to thereafter recover from the mortgagee the difference between the amount of the mortgage indebtedness and the value of the property.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Chattel Mortgages, § 576.]

O'Brien, P. J., dissenting

Appeal from Special Term, New York County.

Action by Elveina Cartier against the Pabst Brewing Company and others. From a judgment for plaintiff, defendant brewing company appeals. Reversed and remanded.

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Argued before O'BRIEN, P. J., and McLAUGHLIN, INGRAHAM, CLARKE, and HOUGHTON, JJ.

A. S. Gilbert, for appellant.
Julius H. Cohen, for respondent.

McLAUGHLIN, J. This action was in equity to set aside a sale made under a chattel mortgage and to redeem. There is little or no dispute between the parties as to the material facts involved, except as to the value of the property sold. On the 8th of November, 1899, John L. Cartier and Rosa Michaels purchased from one Durando the hotel business conducted upon lands situate at 154th street and McComb's dam, in the city of New York, including the furniture, fixtures, etc., and for that purpose borrowed from the Pabst Brewing Company $5,000 as collateral security, for the payment of which they delivered to it a chattel mortgage upon the furniture, fixtures, etc. The mortgage was in the usual form, and the condition of it was to pay the $5,000 on demand, with interest at the rate of 6 per cent., and all other sums which might thereafter be due or become due to the brewing company for merchandise sold by it to the mortgagors. Cartier and Michaels continued the business for some time, and then organized, or were instrumental in organizing, a corporation known as the "Standard Hotel Company," and after such organization they sold to it the property covered by the mortgage. On the 20th of January, 1903, the corporation took from the owner of the land on which the hotel stood a lease extending from that date until the 1st of May, 1910, at a specified rental, payable at stated times; the payment of the rent being guarantied by the brewing company, and for the purpose of securing it against any loss which it might sustain by reason of such guaranty, and as further security for the payments secured by the Cartier and Michaels mortgage, it assumed the indebtedness, and also executed another mortgage on the lease. Subsequently, the hotel company became insolvent, and on the 30th of November, 1903, notified the brewing company that it was about to abandon the place, and suggested it had better take possession under its mortgages, in order to protect its interest. Acting upon this suggestion, the brewing company, through its representatives, took possession, and on the following day the property was sold at its direction by the city marshal at public auction; one notice advertising the sale having been previously inserted in a daily newspaper published in the city of New York, which, according to the uncontradicted testimony of the marshal, was the usual way in which such property was sold. The brewing company purchased the property as an entirety for $500, being the only bidder. After the sale it remained in possession until about the 12th of December, when it sold to the defendant Luhring the "good will of the hotel, restaurant, and café business, * * * and the fixtures therein contained," and other property of considerable value, for $8,000; $3,000 of which was paid down, and payment of the balance secured by chattel mortgage on the property sold. The brewing company also gave her a lease of the premises from January 1, 1904, to May 1, 1910; she agreeing to pay the same rent as the brewing company had obligated itself

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to pay to the owner. On the 21st of December following, the brewing company obtained from the owner a lease of the premises on the same terms and conditions as those contained in the lease from the owner to the hotel company, except that it was from January 1, 1904, and the brewing company obligated itself to pay the rent, instead of guarantying payment. On the 27th of November, 1903, the plaintiff secured a judgment against the hotel company for the sum of $3,213.46, upon which execution was issued and returned wholly unsatisfied, and she thereafter brought this action to set aside the sale, cancel the mortgage upon the leasehold estate, and to redeem; alleging that she was ready and willing to pay whatever sum might be found due to the brewing company upon the mortgage of said leasehold on being accorded the right to redeem. The trial court found as a fact, and the finding is not challenged, that at the time the brewing company took possession there was due to it from the hotel company, for which the mortgages had been given as security, $8,325.66; that the sale was not conducted in a manner calculated to obtain the best possible price, in that sufficient publicity was not given; that the value of the property sold, including the lease, at the time of the sale was $10,000; that the brewing company should be charged with this amount, from which should be deducted the amount due it, leaving a balance of $1,852.53, for which judgment was directed against it; such judgment, however, to be in lieu of a resale and redemption by the plaintiff. Judgment was accordingly entered, and the brewing company appeals.

I am not familiar with any principle, either legal or equitable, which will permit a judgment obtained upon the foregoing facts to be sustained. It is, in effect, compelling a mortgagee of personal property, after default has accrued, to purchase the property at its full value. When default occurred in the payment of the amount secured by the chattel mortgages, that moment the title to the property covered by them became absolute in the brewing company, the mortgagee. Stoddard v. Denison, 38 How. Prac. 296; Ballou v. Cunningham, 60 Barb. 425. After default the brewing company held the legal title and was the owner of the property. Neither the mortgagor (the hotel company) nor any of its creditors could thereafter maintain an action at law against it. All that remained to them was a mere naked equity of redemption, which could only be enforced in an equitable action. Charter v. Stevens, 3 Denio, 33, 45 Am. Dec. 444; Bragelman v. Daue, 69 N. Y. 69. In order to avail themselves of the right to redeem, they were obliged to allege and prove that they were willing and able to pay such amount, or else facts had to be proved which warranted a judgment directing such payment as a condition of redemption (Casserly v. Witherbee, 119 N. Y. 522, 23 N. E. 1000), or that the mortgagee had by his own act so dealt with the property that it could not be restored; in which case a personal judgment might be directed against him for the difference between the amount due and its value.

Appropriate facts were alleged in the complaint entitling plaintiff to redeem, but the facts proved did not sustain the allegations of the complaint, nor do I think they justified a judgment entitling plaintiff to redeem, much less a personal judgment against the brewing com-

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pany. The hotel company, as we have already seen, was indebted to the brewing company in upwards of $6,300. In addition to this, the brewing company had become obligated to pay, in case the hotel company did not, rent aggregating upwards of $30,000. The hotel company abandoned the premises. The brewing company thereupon did the only thing which it could do—took possession and sold the property—and if it be assured that the sale was voidable, either by reason of the manner in which it was made, or the inadequacy of the consideration paid, it does not appear to have injured the plaintiff, because in that event the brewing company must be treated as a mortgagee in possession, and as such obligated to turn over to the hotel company or its creditors the property purchased, including the lease which it subsequently took, on being paid the amount due it from the hotel company at the time the sale was made, and, in addition, on being indemnified against the amount which it had obligated itself to pay under the lease. The fact that it has sold the property to the defendant Luhring is of no importance, because its indebtedness has been reduced by such sale $3,000, and it holds a mortgage for $5,000—the balance of the purchase price—which is largely in excess of the plaintiff's claim; in other words, it is in precisely the position it was at the time the hotel company abandoned the premises, except its claim has been reduced $3,000, and to secure the balance it holds a $5,000 mortgage upon the same property that was covered by the former mortgage for that amount, and holds the lease, instead of a mortgage upon it.

The plaintiff, therefore, if entitled to any relief, can only be given it by taking the place of the brewing company, and this can only be done by her paying the amount of its mortgage and indemnifying it against the liability which it has assumed under the lease.

If the foregoing views be correct, then it follows the judgment appealed from must be reversed, and a new trial ordered, with costs to appellant to abide event.

INGRAHAM, J., concurs. CLARKE and HOUGHTON, JJ., concur in result. O'BRIEN, P. J., dissents.

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## ANTES v. WATKINS et al.

(Supreme Court, Appellate Division, First Department. April 20, 1906.)

1. APPEAL—PRESERVING GROUNDS OF ERROR—EXCEPTIONS—MOTION TO DISMISS.

   Where no exception was taken to the action of the court in reserving decision upon a motion to dismiss until after verdict, an exception to the granting of the motion did not entitle the excepting party to contend on appeal that the court had no authority to grant the motion after the verdict.

2. MASTER AND SERVANT—DEFECTIVE SCAFFOLDING—SERVANTS OF INDEPENDENT CONTRACTOR.

   Under Labor Law, Laws 1897, p. 467, c. 415, § 18, declaring that a person employing another to perform labor in the erection of a house shall not furnish or erect scaffolding which is unsafe and not so constructed as to give proper protection to the employé, a person employing an independent contractor to erect a house is under no obligation to furnish

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**tools or appliances to servants of the contractor, and is not liable for injuries to such a servant through the erecting of a scaffold, which the servant himself constructed from materials furnished by the owner, and which he used after the owner had warned him that it was unsafe.**

**[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 1262.]**

Appeal from Trial Term, New York County.

Action by Margarete Antes, as administratrix, against William H. Watkins and others. From a judgment dismissing the complaint as against the defendant named and another, plaintiff appeals. Affirmed.

Argued before O'BRIEN, P. J., and PATTERSON, INGRAHAM, LAUGHLIN, and CLARKE, JJ.

Frederick S. Martyn, for appellant.

Frank V. Johnson, for respondents.

PATTERSON, J. The plaintiff appeals from a judgment entered upon the dismissal of the complaint as to the defendants William H. and Joseph Watkins. The action was brought against the defendants Watkins, owners of a lot of land in the borough of Manhattan, city of New York, on which they were constructing or causing to be constructed a house, and against the defendants Shohmenger & Rosenbaum, who were engaged as contractors in doing certain work as builders and framers upon such house. It is alleged in the complaint that the plaintiff's intestate was a carpenter in the employ of Shohmenger & Rosenbaum; that William H. Watkins, for himself and for the defendant Joseph Watkins, personally directed and controlled the building of the house, and took part in the construction thereof, "including the construction of a certain scaffold" built upon the outside of the house, upon which plaintiff's intestate in the course of his employment was required to work; that it was the duty of the defendants Watkins and of the defendants Shohmenger & Rosenbaum to furnish plaintiff's intestate with a reasonably safe place to work, and with reasonably safe tools and appliances with which to do his work, and to keep the same in reasonably safe repair, and that, unmindful of their duty in this respect, the defendants carelessly and illegally neglected and failed to give plaintiff's intestate a safe place to work, and provide him with reasonably safe and proper materials, and keep the same in reasonably safe repair, all of which was known to the defendants, and not known to the plaintiff's intestate, and that by reason of the carelessness and neglect of the defendants, as aforesaid, the said scaffold upon which the plaintiff's intestate was working on a certain date was precipitated to the ground, and he thereby sustained injuries which caused his death. The defendants Watkins answered the complaint, admitting their ownership of the premises, but denied the other substantial allegations thereof, and their answer contains the usual allegation of contributory negligence of the plaintiff's intestate. The defendants Shohmenger & Rosenbaum denied all the allegations of the complaint. On the trial of the cause the following facts were established without contradiction. The plaintiff's intestate was employed by Shohmenger & Rosenbaum, who contracted with the defendants Watkins to furnish the labor and do all the framing work connected with the construction

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of the house. The defendants Watkins were to furnish all the materials. Antes, the plaintiff's intestate, and one Eckert, carpenters employed by Shohmenger & Rosenbaum, worked upon a scaffold which was constructed from material upon the premises belonging to the defendants Watkins. Antes and Eckert selected the material, constructed the scaffold, and tested it. The scaffold was built of hemlock and spruce. It rested upon two horses inside the building, with two pins projecting outside, and was braced from the bottom and the ceiling inside the building. It was a movable structure, and was first put up and used by Antes and Eckert on a Saturday. It was moved from story to story, and on the following Monday it was at the fourth floor. Antes and Eckert were working upon it all Monday morning. About noon of that day it broke. One of the pins or spruce cross-pieces that went from one horse to another inside of the building broke two feet from the exterior end, and the men working upon it fell to the ground, and Antes was killed. Liability was imputed to all of the defendants, upon the claim of a violation of section 18 of the Labor Law, Laws 1897, c. 415, p. 467, which provides that:

"A person employing or directing another to perform labor of any kind in the erection, repairing, altering or painting of a house, building or structure shall not furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders or other mechanical contrivances which are unsafe, unsuitable or improper, and which are not so constructed, placed and operated as to give proper protection to the life and limb of a person so employed or engaged."

In submitting the cause to the jury, the trial judge instructed them that the duty rested upon the employers to use reasonable care to furnish their employés with a safe place in which to perform their labor, called their attention to the above-cited provision of the labor law, and directed them to pass upon the question of the scaffold being a safe structure upon which to work; and they were told that, if the scaffold was constructed by the decedent himself and his fellow workman, and there was carelessness on the part of the fellow workman in the construction, that carelessness is chargeable against the master; and, on the other hand, if the decedent himself saw defects in the scaffold, or if there were any defect discernible by the exercise of reasonable care on his part, he would be deemed to have assumed whatever risks were incident to such defects; and if the resulting collapse or breaking of the scaffold was produced by defects of which the decedent had knowledge, or which by the exercise of reasonable care he might have discovered, no one would be liable; and as to the defendants Watkins, liability would depend upon their having assumed to give directions with respect to the construction of the scaffold, in connection with the fact of the material used belonging to or having been furnished by them. The court also specifically instructed the jury that they could not find a verdict against the defendants Watkins unless there was a direction given by them, or one of them, concerning the construction of the scaffold; that a suggestion only relative to it was not of itself suffcient, and that they must be satisfied that there was a direction given. The jury found a verdict for the plaintiff against the defendants Watkins, but they also found in favor of the defendants Shohmenger & Rosen-

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baum. After the rendition of the verdict, a motion to dismiss the complaint as to the defendants Watkins, which had been made at a previous stage of the trial, but the decision of which was reserved until after the verdict, was granted, and from the judgment entered upon the dismissal of the complaint this appeal is taken.

It is argued by the appellant that the court had no authority after a general verdict to dismiss the complaint, and that for that reason the verdict must be reinstated. There are decisions to the effect that after a general verdict the court cannot dismiss a complaint upon the merits. (Hoey v. Met. St. Ry. Co., 70 App. Div. 60, 74 N. Y. Supp. 1113; Levy v. Grove Co., 80 App. Div. 384, 80 N. Y. Supp. 730), but in each of those cases the reservation of a decision upon the motion to dismiss was excepted to when the court announced its purpose. No exception was taken in the present case to the reservation. Counsel for the plaintiff, by neither objecting nor excepting, acquiesced in the ruling of the court. The only exception taken was to the disposition ultimately made of the motion, and not to the reservation, and in such circumstances an objection to the procedure is not now available to the appellant.

The only matter for consideration, then, is the propriety of the dismissal of the complaint as to the defendants Watkins. Their liability must repose altogether upon their acts or conduct with relation to the erection of the scaffold. They were not the employers of Antes: the relation of master and servant did not exist as to them; they were under no duty or obligation as employers to furnish him with tools, appliances, apparatus, or accessories of his work. If they remained aloof from the whole matter, they violated no duty to the decedent. There is nothing in the provision of the labor law which requires the owner of a building which is being constructed for him by an independent contractor to provide anything for the performance of that work by the contractor or his employés. The words of the statute are not to be extended or limited by construction. Schapp v. Bloomer, 181 N. Y. 125, 73 N. E. 563. There was not evidence sufficient to go to the jury that the defendants Watkins, the owners, undertook to direct Antes and his fellow servant in the construction and erection of this scaffold. The only proof upon the subject is that one of the defendants Watkins told these workmen that the scaffold they intended to erect was an insufficient one. They persisted in constructing it according to their own method, and with the material selected by them. It can scarcely be said that the defendants Watkins directed the erection of this particular scaffold when they merely gave a solemn warning against its construction and use, which was unheeded and totally ignored.

A nonsuit was right, and the judgment appealed from should be affirmed, with costs. All concur.

INGRAHAM, J. I concur with Mr. Justice PATTERSON. The action of the trial court in reserving its decision upon the defendants' motion for a dismissal of the complaint on behalf of the defendants Watkins until after the verdict of the jury was justified by section 1187 of the Code of Civil Procedure. That section provides:

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"When a motion is made to non-suit the plaintiff or for the direction of a verdict, the court may, pending the decision of such motion, submit any question of fact raised by the pleading to the jury or require the jury to assess the damage. After the jury shall have rendered a special verdict upon such submission or shall have assessed the damage, the court may then pass upon the motion to non-suit or direct such general verdict as either party may be entitled to."

The court reserved the motion for a nonsuit, and submitted to the jury the question as to whether the defendants, or either of them, were guilty of negligence. Whereupon the jury retired, and upon returning announced a verdict in favor of the plaintiff against the defendants Watkins, the owners of the property, in the sum of $5,000, whereupon the court granted the motion, the decision of which had been reserved, to dismiss the complaint against the defendants, the owners of the property. The questions of fact which were submitted to the jury were whether the defendants Watkins were guilty of negligence and whether the plaintiff's intestate was free from contributory negligence; and, under the general authority conferred upon the court by this section of the Code, the court had power to determine the question as to whether the evidence was sufficient to sustain the verdict against the respondents. But if the motion for a nonsuit had been denied, and the case submitted to the jury, who had found a general verdict for the plaintiff, if there was no evidence in plaintiff's favor which justified the verdict, the court was at liberty to dismiss the complaint, notwithstanding the previous submission of the case to the jury. Glennon v. Erie R. R. Co., 86 App. Div. 397, 83 N. Y. Supp. 875, affirmed on appeal 180 N. Y. 562, 73 N. E. 1124.

I also concur with Mr. Justice PATTERSON that there was no evidence to justify a verdict against the respondents.

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## GRIMM v. KRAHMER.

(Supreme Court, Appellate Division, First Department. April 20, 1906.)

INJUNCTION—PENDENTE LITE—CONFLICTING AFFIDAVITS.

The court is justified in refusing a temporary injunction against erection of a veterinary hospital, as in violation of a covenant against erecting on the premises a dangerous, noxious, or offensive establishment; the hearing being on conflicting affidavits.

Appeal from Special Term, New York County.

Action by Louis Grimm against Rachel I. Krahmer. From an order, plaintiff appeals. Affirmed.

Argued before INGRAHAM, McLAUGHLIN, LAUGHLIN, CLARKE, and HOUGHTON, JJ.

Samuel J. Siegel, for appellant.

George W. Wager, for respondent.

INGRAHAM, J. The defendant is the owner of certain property located on the northerly side of 148th street, between Brook and St. Ann avenues, in the borough of the Bronx, city of New York, and the plaintiff is the owner of a piece of property adjoining that of the de-

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fendants. The plaintiff alleges that she is erecting on her property 6 apartment houses, such to be occupied by 15 families; that the defendant is the owner of a tract of land adjoining the plaintiff's premises on the west; that the premises belonging to the plaintiff and to the defendant, together with other property, constitute the block of land bounded by Brook and St. Ann avenues and East 148th and East 149th streets; that this block was prior to the 22d day of February, 1864, owned in fee by one Lewis B. Brown; that on the 22d day of February, Brown conveyed the premises now owned by the defendants by a deed, which contained the following covenant:

"And the said party of the second part, for his heirs and assigns hereby and by the acceptance of these presents covenant, promise, and to and with the said parties of the first part, their heirs and assigns, neither he, the said party of the second part, nor his heirs or assigns, at any time hereafter erect, suffer, or permit on the premises hereby gra or any part thereof, any brewery, distillery, slaughterhouse, soap, ca starch, varnish, vitriol, glue, ink, or turpentine factory, or any factor tanning, dressing, or preparing skins, hides, or leather, or any other gerous, noxious, or offensive establishment whatsoever. And it is under and agreed between the parties as hereto that this covenant is attach and shall run with the land."

Thereafter the said premises were conveyed by various convey until it vested in the defendant. It is further alleged that Brown conveyed the property now owned by the plaintiff subject to a si covenant; that the defendant is about to erect upon a portion c premises owned by her a building having a frontage on East : street of 25 feet, and a depth of 70 feet, which is to be one sto height, and which the defendant proposes to use as a veterinary pital or stable for the treatment of sick and diseased animals; tha business which the defendant proposes to carry on upon the premis a nuisance, and is and will be dangerous, noxious, and offensive tc neighboring inhabitants, and particularly the plaintiff; that it gather together a number of horses and animals of a similar n: suffering from the ills attendant upon this species of animals; that it will pollute and deteriorate the atmosphere of the neighborhood, and the same will become offensive and objectionable to the residents of the neighborhood and to the plaintiff. There was an affiadvit of a physician submitted by plaintiff, who deposes that in his opinion the building and maintenance of a stable and veterinary hospital for the treatment of horses and other animals suffering from diseases akin to such animals must inevitably be a menace to the health of the persons living in its vicinity; that the contagious diseases of horses or other animals might be transmitted to human beings coming in contact with the air of the hospital, and that children might particularly become infected; that the stench and odor from such an establishment would most emphatically be noisome, noxious, and offensive, and distinctly unhealthful; that the noises attendant upon the treatment or putting to death of such animals would be disturbing to the peace and quiet of the people of the vicinity.

The defendant interposed an answer, admitting that she is constructing a brick and stone building on the premises owned by her, to be used as a veterinary hospital; that during the past five years there has

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been a building on the premises in question, which has during the whole of said period been used as a stable by the defendant in connection with the defendant's husband's business of veterinary surgeon; that the defendant is erecting in lieu of the old building a brick and stone structure of one story, which is to be highly sanitary in its construction, and in nowise a violation of any restriction that may exist upon the use of the said premises. There was other evidence of those living in the neighborhood that the business carried on by the defendant's husband is not at all noxious or offensive, and that the construction of the new building would be a great improvement upon the one already the premises. There is no evidence that the business carried on by : defendant's husband for the past five years has been noxious or of-ısive, so as to come within the restriction contained in the covenant. hether or not the proposed building will be a "dangerous, noxious, offensive establishment" can only be disclosed when it is erected and :d. The covenant is that the grantee shall not at any time erect, suf-, or permit on the premises any brewery, etc., or any other danger-ɜ, noxious, or offensive, establishment whatsoever. This covenant not one that restricts a business which would be injurious or offen-e to the neighboring inhabitants, but, after specifying several ecific uses to which the property is not to be put, couples with such tricted uses any other dangerous, noxious, or offensive establish-nt whatsoever; and, while the construction of this covenant would : be governed by the general laws as to nuisances, but by the force l effect of the covenant (Rowland v. Miller, 139 N. Y. 193, 34 N. E. ;, 22 L. R. A. 182), there must be evidence to justify the finding t the building or business to be conducted by the defendant is dan-ɔus, noxious, or offensive.

'he question as to the nature of the defendant's business, and as to ether or not it is within the covenant, can be determined upon the l at Special Term, when the nature of the defendant's business ı be inquired into, and the court upon such an investigation can then restrain any use of the building which would be a violation of the covenant. But upon these affidavits I think that the court below was justified in refusing to grant a temporary injunction, and leaving the question to be determined upon the trial.

The order appealed from should therefore be affirmed, with $10 costs and disbursements. All concur.

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## JOHNSTON v. SISTERS OF THE POOR OF ST. FRANCIS.

(Supreme Court, Appellate Division, First Department. April 20, 1906.)

1. WILLS—CONSTRUCTION—DESIGNATION OF LEGATEE.

A bequest to the trustees of St. Francis Hospital, where there is no corporation known as St. Francis Hospital, may properly be paid to the Sisters of the Poor of St. Francis, a corporation owning and controlling a hospital known as St. Francis Hospital.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 1110.]

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2. HOSPITALS—PURPOSES OF CORPORATION—CAPACITY TO TAKE AS LEGATEE.

**A bequest to a corporation owning and controlling a hospital, for the benefit and use of the "Blessed Virgin Mary Purgatorial Fund," where no such fund exists, the only object of a purgatorial fund being the saying of masses for the spiritual welfare of the souls of the dead in purgatory, and the sole purpose of the corporation being the care of the sick, aged, infirm, and poor, is invalid.**

**O'Brien, P. J., and Ingraham, J., dissenting.**

Appeal from Special Term, New York County.

Action by Edward W. S. Johnston, as executor of the estate of Joseph Hughes, deceased, against the Sisters of the Poor of St. Francis for construction of a will. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Argued before O'BRIEN, P. J., and PATTERSON, INGRAHAM, LAUGHLIN, and CLARKE, JJ.

John E. Donnelly and Amend & Amend (Alfred J. Amend, on the brief), for appellant.

Edward W. S. Johnston (Lewis Johnston, on the brief), for respondent Johnston.

John H. Rogan, for other respondents.

CLARKE, J. The last will and testament of Joseph Hughes, deceased, contained the following clause:

"Third. I give and devise to my executors hereinafter named, or such one of them as shall qualify, all my real estate situate, lying, and being in the state of New York, in trust, to sell and dispose of the same at public or private sale, and to divide the net proceeds of such sale as follows: Three equal fourth parts thereof to the trustees of St. Francis Hospital in the city of New York for the benefit and use of the Blessed Virgin Mary Purgatorial Fund of said hospital; one equal eighth part thereof to my sister Susan M. Riordan; one equal sixteenth part thereof to my niece, Mary C. Adams; and the remaining one equal sixteenth part thereof to my nephew, William Michael Hughes."

The learned court found as facts that there was no body corporate known as St. Francis Hospital; that the Sisters of the Poor of St. Francis is a domestic corporation, duly organized and existing under the provisions of chapter 201, p. 390, of the Laws of 1866, and the only objects of the said corporation specified in the act of its incorporation are the care of the sick, aged, infirm, and poor; that the object of the testator's bounty is not within the corporate purposes and powers, or any of them, of the defendant, the Sisters of the Poor of St. Francis; that the said corporation maintains a hospital in the city of New York popularly known as St. Francis Hospital; that "there never was, and is not now a Blessed Virgin Mary Purgatorial Fund maintained by the defendant, the Sisters of the Poor of St. Francis, or by said Hospital"; that "the only possible object of a purgatorial fund is the saying of masses for the spiritual welfare of the souls of the dead in purgatory"; and, as conclusions of law, that the devise of bequests to the trustees of St. Francis Hospital for the benefit and use of the Blessed Virgin Mary Purgatorial Fund of said hospital is invalid and void. The appellant duly excepted to such finding, and alone appeals from the judgment entered in accordance with the decision.

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Although the will describes the legatee as "the trustees of St. Francis Hospital in the city of New York," and there is no corporate entity known as St. Francis Hospital, and hence no trustees thereof exist, there is no difficulty in identifying the intended object of the testator's bounty, in that it appears that there is a St. Francis Hospital in the city of New York, and that it is maintained by the Sisters of the Poor of St. Francis, a domestic corporation. It being clear that it was the intention of the testator that the managers of the hospital should take the bequest, we can hold the corporation to be the intended legatee. This view is strengthened by the fact that the charter of the corporation provides that "no misnomer of said corporation shall defeat any gift, grant, or devise, provided the intent shall sufficiently appear that any estate or interest was made to be vested in said corporation."

The question remains, was it a valid gift? Was it for an object within one of the corporate purposes? Judge Rapallo, in Holland v. Alcock, 108 N. Y. at page 337, 16 N. E., at page 317, 2 Am. St. Rep. 420, stated the question to be, "whether the grantor or devisor of a fund designed for charity is competent to give, and whether the organized body is endowed by law with capacity to receive and hold and administer the gift." The appellant's charter provides: "The objects of said corporation are the gratuitous care of the sick, aged, infirm, and poor." The gift was "for the benefit and use of the Blessed Virgin Mary Purgatorial Fund of said hospital." It is conceded and established that the only possible object of a purgatorial fund is the saying of masses for the spiritual welfare of the souls of the dead in purgatory. There is no such fund existing. I do not understand that the gift can be held good under the contention that the testator intended to create such a fund; but that it must rest upon the proposition that the bequest would go to the appellant absolutely as a general gift, if the same was donated for an object within any one of its corporate purposes. A corporation's purposes are fixed by its charter and the laws under which it is organized. This corporation is not a religious corporation, and is not organized under the religious corporation law. To constitute such, it must be either, first, an incorporated church, created to enable its members to meet for divine worship or other religious observances; or, second, an incorporated congregation, society, or other assemblage, accustomed to meet for the same purpose. If it were such, a fund of the character intimated might be properly within the objects of the corporation; for certainly to a considerable portion of the community the saying of masses for the poor souls is a most deeply religious observance. But this corporation has for its object the care of the bodies of the living, and not the welfare of the souls of the dead.

In Chamberlain v. Chamberlain, 43 N. Y. 424, cited by appellant, the testator sought to dispose of his residuary estate to the Centenary Fund Society, a Pennsylvania corporation, and the court said:

"The validity of the provisions in favor of this society depends upon its power to take and hold in the manner and for the purpose indicated by the testator."

The court then points out that the society had power to take and hold property for such purpose, within certain limitations as to amount.

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So, in Matter of Strickland (Sup.) 17 N. Y. Supp. 304, the testator gave to the trustees of each of four incorporated religious societies a sum of money in trust, to be invested, and the interest to be applied to the support of the pastor in charge. The General Term said:

"The gift in each case was for one or more of the purposes of the incorporation of the institution to which it was made. In the case of each of the four churches it was for the support of the pastor—a recognized and undoubted purpose for which the church was organized—and therefore the gift was not only to the incorporation, but was directly for its benefit."

In Fosdick v. Town of Hempstead, 125 N. Y. 581, 26 N. E. 801, 11 L. R. A. 715, Judge Peckham said:

"The gift, to take effect as an absolute one, must be for some one or all of the purposes for which the corporation was created"; and points out that "the cases of Wetmore v. Barker, 52 N. Y. 459, Le Couteulx v. City of Buffalo, 33 N. Y. 335, Vail v. L. I. R. Co., 106 N. Y. 283, 12 N. E. 607, 60 Am. Rep. 449, were all instances of a gift to a corporation having power to take for the purposes that the gift was intended; and hence a direction accompanying the gift, that it was to be used only for a corporate purpose, or that the income only was to be used, did not create a trust."

In Bird v. Merklee, 144 N. Y., at page 550, 39 N. E., at page 646, 27 L. R. A. 423, Judge Bartlett said:

"If it were necessary in order to sustain the bequest, these words of designation by the testator might be treated as merely precatory; but we think it was entirely competent for him to apply his bounty to the whole or any one of the various purposes for which the corporations are authorized to hold property."

As it seems clear that the object of this gift was not within any of the purposes of this corporation, I find myself, under the authorities cited, in agreement with the learned judge who decided this case at the Special Term, when he said:

"I have searched in vain to try and find some ground upon which I could be justified in upholding this bequest, trying to bring the unquestioned intention of the testator within legal bounds, so that effect may be given to what his undoubted desire was; but I cannot do it."

So far as the suggestion is made by the executor on this appeal as to the proper disposition of this void legacy, it is sufficient to say that, there having been no appeal by any of the parties interested, that question is not before us.

The judgment appealed from should be affirmed.

PATTERSON and LAUGHLIN, JJ., concur.

INGRAHAM, J. The question presented in this case depends upon the construction to be given to the last will and testament of Joseph Hughes, of the city of New York. The testator, after devising certain lands in the state of Pennsylvania, provides:

"I give and devise to my executors hereinafter named, or such one of them as shall qualify, all my real estate situate, lying, and being in the state of New York, in trust, to sell and dispose of the same at public or private sale, and to divide the net proceeds of such sale as follows: Three equal fourth parts thereof to the trustees of St. Francis Hospital in the city of New York for the benefit and use of the Blessed Virgin Mary Purgatorial Fund of said hospital."

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—With a bequest of the remaining fourth part to his sister, a nephew and niece. It appeared that there was no St. Francis Hospital in the city of New York, but that there was a corporation incorporated by a special act of the Legislature passed in 1886 under the name of "Sisters of the Poor of St. Francis." The object of the corporation was for the gratuitous care of the sick, aged, infirm, and poor, and for that purpose the corporation maintained a hospital in the city of New York known as St. Francis Hospital, which was a charitable institution for the relief of the suffering poor.

Upon the trial it was admitted that at the time of the death of the testator there was not, is not now, and never was, any body corporate, person or persons, or legal entity known as St. Francis Hospital, but that St. Francis Hospital is a public institution under the charge of and maintained by the defendant, the Sisters of the Poor of St. Francis, a corporation organized and existing under the provisions of chapter 201, p. 390, of the Laws of 1866, and that said corporation maintains a hospital in the city of New York known as St. Francis Hospital, and is the only one of that name. Upon that concession it is quite clear that the testator intended this bequest to the corporation known as the Sisters of the Poor of St. Francis, as they are the ones who maintained the hospital, and they fairly come within the description of the will as the trustees of the hospital; but the court found as a fact that the object of the testator's bounty in the third paragraph of his will was not within the corporate purposes and powers, or any of them, of the defendant, the Sisters of the Poor of St. Francis, and there never was, and is not now, a "Blessed Virgin Mary Purgatorial Fund" maintained by the defendant, the Sisters of the Poor of St. Francis, or by said hospital; that the only possible object of a purgatorial fund is the saying of masses for the spiritual welfare of the souls of the dead in purgatory; and, as a conclusion of law, that the devise or bequest in the third paragraph of the will of three equal fourths of the net proceeds of the sale of all the testator's real estate situate, lying, and being in the state of New York, being the lands and premises described in the fourteenth finding of fact to the trustees of St. Francis Hospital in the city of New York for the benefit and use of the Blessed Virgin Mary Purgatorial Fund of said hospital, is invalid and void; and upon the judgment entered upon this decision the Sisters of the Poor of St. Francis Hospital appeal.

There was under the provisions of this will an equitable conversion of the real property of the testator. The bequest to this hospital was three-fourths of the proceeds upon the sale of this property, which the executors were directed to make, and in determining the question of the validity of this disposition of the testator's property, it should be treated as a bequest of personalty. The testator, therefore, has bequeathed a portion of his estate to trustees of a hospital maintained in the city of New York as a charitable institution for the benefit of the poor, coupled with the provision that this bequest is for the benefit and use of the Blessed Virgin Mary Purgatorial Fund, no such fund being in existence. It is conceded that the testator intended to benefit this corporation, who organized and maintained the hospital, and his direction that the bequest should go to the trustees of the hospital



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would be complied with by paying it to the corporation organized for the gratuitous care of the sick, aged, infirm, and poor, who had, to carry out that object of its incorporation, established a hospital known as the Hospital of St. Francis. The learned trial judge, however, was of the opinion that because there was coupled with this gift, which was absolute in form and valid upon its face, the provision that it was for the benefit and use of the Blessed Virgin Mary Purgatorial Fund of said hospital, the gift was invalidated. We must not forget that in considering a will we are to give force to the intention of the testator, and if that intention can be ascertained from the instrument itself effect should be given to it, unless it violates some legal rule. Crozier v. Bray, 120 N. Y. 366, 24 N. E. 712. It is quite clear that it was the primary intention of this testator to give to the trustees or persons maintaining this hospital a portion of his estate, and the question that is presented is whether this intention is to be defeated because he has added to the gift a proviso that the provision was for the benefit of a particular fund, which he apparently supposed was maintained by those who maintained the hospital. It appeared by the testimony of the secretary of the corporation that it conducted a hospital known as St. Francis Hospital; that there was a chapel connected with said hospital, in which there were devotions several times a day; that there was a morning mass; that the sisters say the office at various times of the day, and there are always public devotions in which prayers are said for the poor souls in purgatory. There was thus maintained a chapel in which there was daily religious services, conducted in accordance with the beliefs of the church of which these sisters were affiliated, for the souls of the dead, maintained by the sisters as a part of the hospital that they organized and maintained to carry out the purposes for which they were incorporated—the gratuitous care of the sick, aged, infirm, and poor. Considering the belief of the church with which these sisters were affiliated, I do not think we can say that the organization and maintenance of a chapel for the benefit of the souls of those who come under their care was not within the object for which the corporation was incorporated. The gratuitous care of the sick, aged, infirm, and poor might well involve religious services for their benefit, either before or after death, and where a body of religious persons, with a belief in the efficacy of religious ceremonies and observances for the amelioration of the condition of the poor and helpless, maintain a chapel in which is conducted religious services for the benefit of those in their charge, such services may well come within the definition of the gratuitous care for the sick, aged, infirm, and poor. That this corporation was incorporated for purely charitable purposes is conceded, and that the lives of those connected with it are devoted to that purpose was apparently known to the testator, and he wished to aid, so far as in his power, the members of this corporation in the work to which they had devoted their lives. He evidently believed in the efficacy of those religious observances as a benefit to those for whom they were celebrated, and it was his intention that this portion of his property should be devoted to that purpose. To sustain this as a bequest to this corporation will accomplish this object, and I think it would

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be extremely unfortunate if the court should be compelled to frustrate this intention because of the form used in the bequest.

It is a well-settled principle that where there is a bequest or devise to an individual sufficient to vest the bequest in the legatee, a subsequent provision will not cut down that bequest or devise, unless such an intention is clearly expressed. Clarke v. Leupp, 88 N. Y. 228. In the will before the court in that case there was a bequest to the testator's wife of all his property, real and personal, and his wife was appointed sole executrix "to take charge of my property after my death, and retain or dispose of the same for the benefit of herself and children above named"; and it was held that the entire estate vested in his wife upon the testator's death; the court saying:

"It is well settled by a long succession of well-considered cases that when the words of the will in the first instance clearly indicate a disposition in the testator to give the entire interest, use, and benefit of the estate absolutely to the donee, it will not be restricted or cut down to any less estate by subsequent or ambiguous words, inferential in their intent."

In Clay v. Wood, 153 N. Y. 134, 47 N. E. 274, it is said:

"Where there is an absolute gift of real or personal property, in order to qualify it or to cut it down the latter part of the will should show an equally clear intention to do so, by the use of words definite in their meaning, and by expressions which must be regarded as imperative. * * * Whether the precatory words in a will shall be accorded such force as to deprive the donee of the absolute right of disposal, and thereby qualify the beneficial interest in the gift, must be determined in connection with what may be gathered from the rest of the will as an intention which would be reconcilable with the idea of a trust imposed upon the legal estate. Where to impose such a trust would be to nullify previous expressions in the will, and to create a repugnancy between its different parts, then the rules of construction forbid the attempt."

In Chamberlain v. Chamberlain, 43 N. Y. 429, it was held that a bequest, although in terms to the trustee of a corporation, is in legal effect a gift to the corporation, vesting the legacy in the corporate body. In that case the bequest was to the trustees of Chamberlain Institute, to be by such trustees permanently invested in bond and mortgage, the principal to be kept permanently invested, and the interest and income thereof to be used in the payment of teachers and the purchase of books for a library institution; but the court held that this bequest was for the benefit of this institution, and was, in legal effect, a gift to the corporation, vesting the legacy in the corporate body; and this same rule was applied by the General Term in the Fifth Department. In re Strickland's Estate (Sup.) 17 N. Y. Supp. 304. It has been definitely settled in this state that there is nothing illegal in a testator making provision for masses to be said for the repose of the soul after death (Gilman v. McArdle, 99 N. Y. 451, 2 N. E. 464, 52 Am. Rep. 41); and a bequest being to a corporation competent to take, there being a defined beneficiary, there is nothing in this will, as I view it, which creates a trust, or which limits the power of the beneficiary in the use of the money after it is received. In Holland v. Alcock, 108 N. Y. 312, 16 N. E. 305, 2 Am. St. Rep. 420, where it was held that the absence of a defined beneficiary was a fatal objection to an attempt to create a trust for the purposes of prayer offered in a Roman Catholic Church for the repose of the testator's soul and the

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souls of his family, and the souls of all others who may be in purgatory, it seems to have been recognized that such a bequest would be valid if to an incorporated church, so as to entitle it to claim the fund.

My view is, therefore, that there was here a bequest of personal property to a defined beneficiary, to be used for the purposes for which it was incorporated, and, as there was nothing in the will sufficient to cut down or limit the bequest, it is valid, and the judgment appealed from should be reversed, and the decree entered upholding the bequest, and directing that it be paid to the defendant, the Sisters of the Poor of St. Francis; with costs to the plaintiff and to the appellant to be paid out of the estate.

O'BRIEN, P. J., concurs.

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## JONES v. ARKENBURGH et al.

(Supreme Court, Appellate Division, First Department. April 20, 1906.)

EXECUTION—SUPPLEMENTARY PROCEEDINGS—RECEIVER—RIGHT TO PROPERTY HELD BY EXECUTOR.

Under Code Civ. Proc. § 2464, authorizing the judge at any time after the making of an order requiring the judgment debtor to attend in proceedings supplementary to execution to appoint a receiver of the property of the judgment debtor, and section 2468, providing that the property of the judgment debtor is vested in a receiver, property held by executors in their representative capacity does not vest in a receiver appointed in proceedings supplementary to an execution issued under a judgment against the executors.

Appeal from Special Term, New York County.

Action by John W. Jones, as receiver of the property of Eliza J. Arkenburgh as executrix, and another against Eliza J. Arkenburgh as executrix and another. From a judgment overruling a demurrer to the complaint, defendants appeal. Reversed, with directions to dismiss the complaint.

Argued before O'BRIEN, P. J., and PATTERSON, INGRAHAM, LAUGHLIN, and CLARKE, JJ.

Charles Souther, for appellants.

Robert Little, for respondent.

INGRAHAM, J. The complaint alleges that on May 4, 1899, and March 7, 1900, Thomas J. Dunn, as sheriff of the county of New York, recovered judgments against the defendants as executors of Robert H. Arkenburgh, deceased; that such judgments were duly filed and docketed in the office of the clerk of the county of New York, where said judgment debtors then resided and still reside; that the action in which said judgments were recovered was an action in aid of an attachment, pursuant to sections 655 and 677 of the Code of Civil Procedure; that leave to issue executions upon said judgments against the property of the executors was duly granted by an order of the surrogate of Rockland county, where letters had been issued to said executors, and executions against the property of said executors were thereupon

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issued to the coroners of the city of New York; that on March 9, 1905, upon the application of the judgment creditor in proceedings supplemental to execution, and by an order on that day duly made by a justice of the Supreme Court, the plaintiff was duly appointed receiver of the property of the executors; that said order was on that day duly filed with the clerk of the county of New York; that on March 9, 1905, the plaintiff gave the bond required by said order, which was duly approved by a justice of the Supreme Court, and said bond was duly filed prior to the commencement of this action; that said judgment and executions were on March 9, 1905, and now are, wholly unpaid; that on March 9, 1905, the Farmers' Loan & Trust Company, a domestic corporation, was indebted to the defendants, as executors of Robert H. Arkenburgh, deceased, in a sum of over $55,000, being the balance due upon an account for money had and received by the said defendant and on deposit for said executors; that thereafter the plaintiff commenced an action against the Farmers' Loan & Trust Company for the recovery of money in which it was indebted to said executors, and by an order of the Supreme Court these defendants, as executors of the last will and testament of Robert H. Arkenburgh, deceased, were substituted as defendants in this action in the place and stead of the Farmers' Loan & Trust Company; and that the Farmers' Loan & Trust Company was discharged from liability, either to the plaintiff or to said executors, by paying into court the amount in which it was indebted to the said executors, and by paying the same to the Trust Company of America as depositary of this court, subject to the further order or judgment of this court. Wherefore, the plaintiff asks judgment directing the said trust company to pay to the plaintiff the moneys held by it to the credit of this action. The defendants demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action.

The plaintiff, as receiver in supplemental proceedings in this action, seeks to obtain possession of the property of an estate under his appointment as receiver in proceedings supplemental to execution based upon a judgment against the executors of the estate, upon the ground that when such a receiver is appointed he thus becomes vested with the property of the estate. The appointment of a receiver in proceeding supplemental to execution is provided for by section 2464 of the Code of Civil Procedure. That section authorizes the judge, at any time after making an order requiring the judgment debtor or any other person to attend and be examined, to appoint a receiver "of the property of the judgment debtor"; and section 2468 provides that the property of the judgment debtor is vested in a receiver, who has duly qualified from the time of filing the order appointing him or extending his receivership, as the case may be. It is quite evident that this provision does not apply to property held by a defendant in a representative capacity as executor, trustee, receiver, or assignee. It is the property of the judgment debtor that is vested in the receiver. The judgment debtors in this action were the executors of the estate of a decedent, and, whether sued personally or in their representative capacity, the property of the estate held by them was not the property of the judgment debtor. There is no provision in the sections of the

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Code relating to proceedings supplemental to execution which authorizes the court in such a proceeding to vest in a receiver the property of the estate against which a claim is made. As was said by the Court of Appeals in Ward v. Petrie, 157 N. Y. 301, 51 N. E. 1002, 68 Am. St. Rep. 790, "This action is an excursion by a receiver into a new field." Control of the distribution of estates of decedents is vested in the surrogate, and ample power is given to the surrogate to direct payment of the claims against an estate to the legal creditors of the decedent; and if by virtue of an attachment the sheriff became entitled to receive from the executors of the estate the amount of this claim, the surrogate had authority, under section 2722 of the Code, to direct its payment. That section provides:

"In either of the following cases a petition may be presented to the Surrogate's Court, praying for a decree, directing an executor or administrator to pay the petitioner's claim, and that he be cited to show cause why such a decree should not be made: 1. By a creditor, for the payment of a debt, or of its just proportional part, at any time after six months have expired since letters were granted."

By section 2743 the surrogate has power, upon the judicial settlement of the accounts of executors of an estate, to direct the payment and distribution of any part of the estate which remains and is ready to be distributed to the creditors, legatees, next of kin, husband, or wife of the decedent, or their assigns, according to their respective rights.

If the sheriff had obtained a right to enforce a claim against the estate, he became a creditor of the estate, and could enforce his rights as creditor under these provisions. There is no allegation in the complaint as to whether the executors had accounted before the surrogate; but whatever rights the sheriff would have to enforce a claim that had vested in him by virtue of the attachment, whether by a proceeding in the Surrogate's Court or an application to a court of equity, it is apparent that the appointment of a receiver in supplemental proceedings in an action against the executors of the estate does not vest in such receiver the property of the estate, so as to distribute the estate in a proceeding supplemental to execution, instead of through the Surrogate's Court, as provided for by the Code. It is not strange that there is no authority on this point, so far as appears, as no one has ever before supposed that the court in summary proceedings could take out of the hands of executors the estate of a decedent, and divert it from the orderly administration of a decedent's estate to the payment of a claim of a judgment creditor. The sheriff was either a creditor of the estate, or he was not. If he was not a creditor, he was not entitled to have the funds of the estate applied to the payment of his claim. If he was a creditor, he was entitled to proceed as a creditor, and have his claim paid in the ordinary course of procedure by which a distribution of the estate of a decedent is provided for.

It follows that the judgment appealed from must be reversed, with costs, and the demurrer sustained, with costs; and, as it is entirely clear that no amendment can be of any advantage to the plaintiff, final judgment is directed dismissing the complaint, with costs. All concur.

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## KELSEY, Comptroller, v. CHURCH, Surrogate.

(Supreme Court, Appellate Division, Second Department. April 20, 1906.)

1. TAXATION—TRANSFER TAX—APPOINTMENT OF APPRAISERS—DUTY OF SURROGATE.

Laws 1896, p. 874, c. 908, § 230, declaring that the surrogate, either upon his own motion or on the application of any interested party, including the Comptroller of the state, shall by order direct the county treasurer in a county in which the office of appraiser is not salaried and in any other county an appraiser to fix the fair market value of property of persons whose estates shall be subject to the payment of a transfer tax, is mandatory.

2. SAME—APPLICATION FOR APPOINTMENT—SUFFICIENCY.

Under Laws 1896, p. 874, c. 908, § 230, declaring that the surrogate, upon the application of any interested party, including the Comptroller of the state, shall require certain persons to fix the fair market value of property of persons whose estates shall be subject to the payment of a transfer tax, an application by the Comptroller, made upon a verified petition, setting forth all the necessary facts upon information and belief, is sufficient.

3. MANDAMUS—COMPELLING ACTION BY SURROGATE—TRANSFER TAX PROCEEDING.

Under Laws 1896, p. 874, c. 908, § 230, declaring that the surrogate, either upon his own motion or upon the application of any interested party, including the Comptroller of the state, shall direct the county treasurer or an appraiser to fix the value of property of persons whose estates are subject to the payment of the transfer tax, etc., mandamus is the proper remedy to require the surrogate to act, even though he has erroneously determined that he has no jurisdiction.

Appeal from Special Term.

Application by Otto Kelsey, as Comptroller of the state of New York, against James C. Church, as surrogate of Kings county, for a writ of mandamus to compel respondent to appoint an appraiser in a transfer tax proceeding. From an order denying the application, applicant appeals. Reversed.

Argued before HIRSCHBERG, P. J., and WOODWARD, JENKS, HOOKER, and MILLER, JJ.

Jabish Holmes, Jr., for appellant.

William P. Pickett, for respondent.

MILLER, J. The State Comptroller appeals from an order of the Special Term denying an application for a peremptory writ of mandamus, requiring the surrogate of Kings county to make an order appointing an appraiser in a transfer tax proceeding attempted to be instituted by the appellant in said county. The statute pursuant to which the learned surrogate was requested to act (Laws 1896, p. 874, c. 908, § 230, as amended) provides:

"The surrogate, either upon his own motion, or upon the application of any interested party, including the Comptroller of the state of New York, shall by order direct the county treasurer in a county in which the office of appraiser is not salaried, and in any other county the person or one of such persons so designated as appraisers to fix the fair market value of property of persons whose estates shall be subject to the payment of any tax imposed by this article."

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At the threshold of this inquiry, it is important to determine whether this provision is mandatory. It is well settled that, where a statute clothes a public officer with power to do an act which concerns the public interests, the execution of the power may be insisted upon as a duty, even though the language of the statute be permissive only. People ex rel. The Otsego County Bank v. Supervisors, 51 N. Y. 401; People ex rel. Reynolds v. Common Council, 140 N. Y. 300, 35 N. E. 485, 37 Am. St. Rep. 563. The language of the statute under consideration is imperative. The portion of the statute quoted supra was taken from section 11, c. 399, p. 818, Laws 1892, but with a significant omission. As the statute originally was, it provided:

"The surrogate, upon the application of any interested party, * * * shall, as often and whenever occasion may require, appoint a competent person as appraiser * * *."

The Court of Appeals said, in Matter of Westurn's Estate, 152 N. Y. 93, 46 N. E. 315, that this statute left it to the sound discretion of the surrogate to determine when the power should be exercised; and the present case furnishes a concrete illustration of the reason, founded upon experience, that doubtless moved the Legislature to eliminate the words affording ground for this construction. This statute provides the machinery for the assessment and collection of the tax, and makes the surrogate of each county a part of it. He is required, in the first instance, to appoint an appraiser. Upon the report of the appraiser, and any other proof which may be before him, he is required forthwith, as of course, to determine the value of the estate and the amount of tax to which it is liable. See section 232, c. 908, p. 875, Laws 1896. It is plain that up to this point he acts as an assessing officer merely, of course judicially, the same as every assessor acts. From the initial order imposing the tax, an appeal lies, in the first instance, to the surrogate, who thereupon is required to review his own acts as such assessing officer. See section 232. The initial step in the proceeding is the appointment of an appraiser, and the surrogate is required to make such appointment, either on his own motion, or upon the application of any interested party, including the State Comptroller. He must act upon his own motion when he learns of facts affording reason to believe that such proceeding ought to be instituted; upon the application of an interested party when a proper application is made. The reason for making the surrogate the assessing officer, and requiring him to act upon his own motion, is plain. No other officer in the state has the same opportunity to learn when a transfer tax ought to be imposed, as all resident estates, and nonresident estates in which it is necessary to apply for ancillary letters, become of record in his office; and although it was said in Matter of O'Donohue, 44 App. Div. 186, 59 N. Y. Supp. 1087, 60 N. Y. Supp. 690, that "the jurisdiction of the surrogate to appoint an appraiser is one that may be exercised with or without a petition and of his own motion, whenever in the sound exercise of his discretion he deems it proper to do so" (the "exercise of discretion" evidently referring to action upon his own motion), I think the duty to act in either case is imperative. Of course, before acting on his own motion, he must determine whether

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the facts within his official knowledge are such as to require action, and before acting upon the application of an interested party he must determine whether a proper application has been made; but his duty to act is just as imperative in either case as is the duty of local assessors to obey the command of the statute respecting the performance of their duty, and there is no more reason for saying that he has a discretion in the matter than there is for saying that any officer charged with the performance of a public duty has a discretion whether he will discharge such duty.

Was a proper application made? The application was made upon a verified petition, which sets forth every fact upon which the jurisdiction of the surrogate to act depended. To be sure the allegations are upon information and belief, but this is good pleading, and is expressly authorized by the Code of Civil Procedure, whether in an action or in a proceeding in Surrogate's Court; and surely more cannot be required respecting the petition for the institution of this proceeding than is required to institute proceedings in the Surrogate's Court. The petitions made by the officer charged by law with the duty of collecting this tax. He cannot know of his own knowledge as to the taxability of these estates, and the very purpose of these proceedings, as the law plainly contemplates, is to ascertain the fact. From the affidavit of the learned surrogate submitted upon this motion, it appears that he is of opinion that oppression to estates may result unless the State Comptroller is required to establish in advance the facts to ascertain which the proceeding is required to be instituted. The fact that some other officer may not understand his duty furnishes no reason for disregarding the statute. But the proceeding need involve no expense to the estate. The appraiser merely ascertains the facts, and reports them with the evidence to the surrogate, and the statute guards against the unlawful imposition of a tax, and gives the estate full and complete protection. Those who desire to evade paying what the law imposes in return for the protection of their persons and property afforded by the state may call that oppression. The danger is not the one feared by the learned surrogate, but that estates legally taxable will escape taxation; respecting resident estates, that, owing to delay, the estate may be wasted or distributed without application to the surrogate, or that it may become difficult to ascertain the facts and enforce payment of the tax; respecting nonresident estates, that property subject to tax may be removed from the state without the payment of the tax, except as the transfer of securities of decedents without the payment of the tax may be prevented by another provision of the statute. This danger can only be minimized by extreme vigilance on the part of officers charged with the duty of collecting the tax, and by a faithful observance of duty on the part of officers charged with its assessment. The law contemplates the institution of the proceeding upon the application of the Comptroller. Manifestly, it is impracticable, if not impossible, for him to do more than was done in this case, and, if the petition presented by him was not sufficient, the institution of the proceeding must be left to the volition of representatives of estates. This will be a kindness only to those who desire to escape

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taxation, because experience has shown that in counties where the institution of transfer tax proceedings has been delayed by the surrogate, persons ignorant of the provisions of the law have been subjected to penalties, which no one can remit, often larger than the tax. The exact form of petition used in this case was held good on direct attack in the Matter of O'Donohue, supra, and there can be no doubt that a proper application was made to the surrogate, requiring him to obey the command of the statute.

Is mandamus the proper remedy? No appeal lies from an ex parte order, because no effectual judgment or order could be made on the determination of the appeal, except in the nature of mandamus. Matter of Johnson, 27 Hun, 538; People v. Common Council, 30 Hun, 636; Matter of Notingham, 88 Hun, 443, 34 N. Y. Supp. 404; Hayes v. Consolidated Gas Co., 143 N. Y. 641, 37 N. E. 648. The function of mandamus is to compel action, and not to review action taken. It can control the performance of a ministerial duty. It can require, but cannot control, the exercise of judgment or discretion. These propositions are elemental. The learned court at Special Term was of the opinion that mandamus would not lie because the surrogate had a judicial discretion in the matter of granting these orders. This proposition, if I am correct, is untenable. He has no discretion, but of course is required to exercise judgment in determining whether a case is presented requiring him to act. If his refusal to act, upon the erroneous determination that he had not jurisdiction, cannot be corrected by mandamus, then I conceive that there can be few cases in which a judicial officer can be compelled to act, because he can usually say that he had to exercise judgment in determining whether a case was presented requiring action, and that he had exercised such judgment in determining that no action was required. In this case the refusal of the surrogate to act presents nothing for review. The petitioner seeks to compel him to act, not to control his action. An officer cannot refuse to discharge his duty, and then defeat mandamus by saying that he determined that no case was presented calling upon him for the discharge of such duty. What the petitioner seeks is a determination of this matter upon the merits. Of course, if, after the institution of the proper proceedings, the surrogate in determining the matter upon the merits should conclude that he had not jurisdiction to assess a tax, that conclusion could be reviewed only in the manner pointed out by the statute, to wit, by an appeal to the surrogate, and from his order on such appeal to the Appellate Division. No case has been called to our attention in which mandamus has been refused where the officer has refused to act upon the erroneous assertion of want of jurisdiction; on the contrary, there is plenty of authority to the effect that the erroneous determination of want of jurisdiction preliminary to acting at all does not defeat a mandamus to compel a judicial officer to act. That mandamus in such case was the proper remedy was plainly stated by the Court of Appeals in Hayes v. Consolidated Gas Co., supra, and by Judge Martin, speaking for the General Term of the Fourth department, in the Matter of Nottingham, supra. To be sure these expressions were obitor, but there is controlling authority in this

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state on the proposition. See People ex rel. Allen v. Murray (Super. N. Y.) 23 N. Y. Supp. 160, affirmed (Super Ct.) 21 N. Y. Supp. 797; 138 N. Y. 635, 33 N. E. 1084. The distinction between the erroneous determination of a question of jurisdiction preliminary to hearing the case at all and such erroneous determination after a hearing upon the merits is made plain by a comparison of the case last cited and the case of Matter of McBride, 72 Hun, 394, 25 N. Y. Supp. 431. In the latter case the sole remedy is by appeal; in the former, mandamus will lie to compel action. See, also, Queen v. Brown, 7 Ellis & Black. 757; Regina v. Mayor, 5 L. R. Ct. of Q. B. 256.

As there are no facts in dispute, a peremptory writ should issue. The order appealed from should be reversed, without costs, and the application for a peremptory writ of mandamus granted, without costs. All concur.

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## WEISS v. BLEIER et al.

**(Supreme Court, Appellate Division, First Department. April 20, 1906.)**

**BROKERS—ACTION FOR COMPENSATION—EVIDENCE.**

**In an action by brokers for a commission for the sale of property, evidence *held* to show that the defendant was not the owner of the property, that the brokers knew this fact, and that the brokers had released their claim for commission as against the sellers because of the receipt of commission from the buyers.**

Appeal from Trial Term, New York County.

Action by Morris Weiss against Josephine Bleier and another. From a judgment in favor of plaintiff, and from an order denying a new trial, defendant Bleier appeals. Reversed.

Argued before O'BRIEN, P. J., and PATTERSON, INGRAHAM, LAUGHLIN, and CLARKE, JJ.

Henry Brill, for appellant.

Julius Hilbern Cohn, for respondent.

INGRAHAM, J. The plaintiff, Morris Weiss, and the defendant Adolph Weiss were copartners as real estate brokers. The firm acted as brokers in negotiating an exchange of real property for the defendant Bleier. Subsequently the copartnership was dissolved. The plaintiff then requested his partner to join with him in commencing an action against the defendant Bleier for the commissions claimed to have been earned upon such exchange of property. That request having been declined, the plaintiff brought this action, making his former partner a defendant. The complaint alleges that the defendant Josephine Bleier was the owner of property in the city of Yonkers; that she engaged the services of the plaintiff and the defendant Adolph Weiss, who were then copartners, to negotiate a sale or exchange of the property described, and agreed to pay the said firm the sum of $1,500 for their services as such brokers; the performance of this contract by the firm; the execution of a written contract between the defendant and a purchaser of the property, and the execution and delivery by the defendant Bleier of a deed of the premises in pursuance of that contract; that

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thereafter the copartnership was dissolved; that the claim for commission was not disposed of as between such partners, but the same was the property of the plaintiff and the defendant Adolph Weiss as such copartners; and the complaint demands judgment for the sum of $1,500, the amount of the brokerage. The defendant denies all the allegations of the complaint, except the allegation that no part of this sum of $1,500 was paid by the defendant, and as a defense to the action she alleges that, while this property stood in her name, she had no actual or beneficial interest in the property, but that she was the agent or title holder merely for Stein, Cohen & Roth, a corporation organized and existing under the laws of the state of New York, which said corporation was the actual owner of said premises, all of which facts were at the time known to the plaintiff; that all the services rendered were rendered for the benefit of the said corporation, and not for defendant; and, as a further defense, that the plaintiff and the defendant Adolph Weiss were the brokers employed by the purchaser of the property, and received as brokerage from the purchaser a large sum of money, to wit, the sum of $1,500, and that it was agreed between the plaintiff and his copartner, the defendant Adolph Weiss, with Stein, Cohen & Roth, the corporation aforesaid, that no brokerage or commission was to be paid for the transfer of the Yonkers property; and that this defendant was not the actual purchaser of the Seventh avenue property, and never had any actual or beneficial interest therein—all of which was well known to this plaintiff.

Upon the trial Bernhard Mayer, the purchaser of the property, which stood in the name of the defendant, was called as a witness. He testified that he employed the copartnership of which the plaintiff was a member to represent him in the transaction; that after the deal was consummated the purchaser paid to the plaintiff's firm the sum of $1,500 as their commissions; that the defendant Adolph Weiss was the party with whom the exchange of property was negotiated, although he had some interviews with the plaintiff. The defendant Adolph Weiss testified that he was the senior partner of the firm of Weiss Bros., of which the plaintiff was the junior partner; that the corporation of Stein, Cohen & Roth employed the firm to sell this Yonkers property; that the witness offered this property to Bernhard Mayer in exchange for some property on Seventh avenue and Twenty-Second street; that before the arrangement was finally consummated, the witness released any commissions for the sale of the Yonkers property to be paid by Stein, Cohen & Roth; that Mayer, the purchaser of the Yonkers property, agreed to pay him a commission of $1,500; and in order to carry through the deal he released the commissions for the sale of the Yonkers property. The fact that this agreement was made was also testified to by Cohen and Stein, who were connected with the corporation that in fact owned the property. The evidence is clear that the principal member of the plaintiff's firm that had to do with this transaction was the defendant Adolph Weiss. No special agreement was made with the plaintiff by which the firm was to receive any commissions for this exchange. There was no agreement by which this defendant was to pay commissions, and the evidence was undisputed that the property really belonged to the corporation. The

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defendant conveyed the property at the request of the corporation, who, so far as appeared, received the consideration. It having been proved by undisputed evidence that before the transaction went through Weiss Bros. agreed that they should not be entitled to commissions on the sale of the Yonkers property, the verdict of the jury was clearly against the weight of evidence. The agreement was not at all improbable. This firm of brokers was to receive $1,500 from the other party to this transaction, and if this firm was willing to accept the $1,500 as their compensation for the transaction there is no reason why they should not do it; but on this evidence a verdict holding the defendant liable for commissions on this exchange of property cannot stand.

The judgment and order appealed from should be reversed, and a new trial ordered, with costs to the appellant to abide the event. All concur.

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## JACOBS et al. v. MEXICAN SUGAR REFINING CO., Limited, et al.

(Supreme Court, Appellate Division, First Department. April 20, 1906.)

1. DISCOVERY—EXAMINATION BEFORE TRIAL—WRITINGS—DEMAND FOR PRODUCTION.

**Where in an action against a corporation it was necessary to plaintiff's case to prove certain agreements and proceedings of defendant, a demand on the corporation for a copy of the records and papers was not a condition precedent to plaintiff's right to an examination of defendant before trial.**

2. SAME—SCOPE OF EXAMINATION.

**In an action by stockholders in a corporation against it and another to annul an agreement by which a lease made by the latter to the former had been canceled, an order for the examination of the former before trial was too broad, in so far as it authorized an examination into the operations of a plantation by the latter after the cancellation of the lease, since if the lease was unlawfully canceled there might be an interlocutory judgment requiring an accounting.**

Appeal from Special Term, New York County.

Action by Solomon R. Jacobs and another against the Mexican Sugar Refining Company, Limited, and another. From so much as vacates an order for the examination of the defendant Mexican Sugar Refining Company, through its president, plaintiffs appeal. Modified.

See 93 N. Y. Supp. 776.

Argued before O'BRIEN, P. J., and PATTERSON, INGRAHAM, LAUGHLIN, and CLARKE, JJ.

G. H. Engelhard, for appellants.

William P. S. Melvin, for respondents.

LAUGHLIN, J. The plaintiffs bring the action as stockholders of the Mexican Sugar Company, a New Jersey corporation, and demand judgment that an agreement by which a lease made by the Mexican Sugar Refining Company, a Louisiana corporation, to the Mexican Sugar Company has been canceled be declared null and void. The order for the examination of the corporation appears to have been vacated upon the theory that the plaintiffs should have applied to the company for the information before applying to the court for the ex-

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amination. It appears that the plaintiffs are quite familiar with the facts, but in the main the material facts could not be proved by their testimony. It is essential to the plaintiffs' cause of action to prove certain correspondence, negotiations, agreements, and proceedings of the corporation of which they are stockholders by, with, or concerning the other corporation defendant. It is manifest that the only competent evidence of such matters are the records, correspondence, and contracts. There is no rule by which, as a condition precedent to the right to such examination, the plaintiffs are required to request the corporation for a copy of the records and papers desired; nor would the plaintiffs be bound by such copies. They are entitled to the original evidence, and this appears to be a proper case for an examination before trial. The records are now in this state, and they might not be at the time of the trial. Moreover, an examination in advance of the trial will quite likely shorten the trial, and the court should not be delayed by an investigation through records upon a trial, where the investigation may be had in advance, and the material evidence selected for presentation upon the trial.

The order for the examination, however, is too broad. It authorizes an examination into the operation of the plantation by the Mexican Sugar Refining Company after the cancellation of the lease under which it is claimed that the Mexican Sugar Company should have operated the plantation. The suit is in equity, and the issue to be tried preliminarily is as to whether the lease was lawfully canceled. If not, then there may be an interlocutory judgment requiring the Mexican Sugar Refining Company to account, and on that accounting its operation of the plantation may be investigated. But that is not essential in the first instance.

It follows, therefore, that the order appealed from should be reversed, with $10 costs and disbursements, and the motion denied, without costs, except that the original order for the examination should be modified by eliminating the subdivision thereof numbered 27, which relates to the operation of the plantation by the Mexican Sugar Refining Company after the cancellation of the lease. All concur.

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## JACOBS et al. v. MEXICAN SUGAR REFINING CO., Limited, et al.

(Supreme Court, Appellate Division, First Department. April 20, 1906.)

DISCOVERY—EXAMINATION BEFORE TRIAL—PERSONS WHO MAY BE EXAMINED—CORPORATE OFFICERS.

Where an order was made for the examination of a corporate defendant through an officer of the corporation before trial, pursuant to Code Civ. Proc. §§ 871–873, it was error, on vacating the order so far as it required an examination of the corporation, to continue it as to the officer, though it appeared that he was about to leave the state; it not being claimed that the officer individually, apart from his connection with the corporation and ability to testify from its records, possessed any information material to plaintiff's cause of action.

Appeal from Special Term, New York County.

Action by Solomon R. Jacobs and another against the Mexican Sugar Refining Company, Limited, and another. From so much of an order

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as authorized an examination of James B. Craven, one of the officers of defendant the Mexican Sugar Refining Company, defendants appeal. Affirmed.

See 93 N. Y. Supp. 776.

Argued before O'BRIEN, P. J., and PATTERSON, INGRAHAM, LAUGHLIN, and CLARKE, JJ.

William P. S. Melvin, for appellants.

G. H. Engelhard, for respondents.

LAUGHLIN, J. On ex parte application of the plaintiffs, a justice of this court ordered the examination of both defendants through their officers, after issue joined and before trial, pursuant to the provisions of sections 871, 872, and 873 of the Code of Civil Procedure. The defendants moved on notice to vacate this order, and the order, in so far as it required an examination of the corporations through their officers, was vacated. But it was assumed by the learned justice presiding at the Special Term that the order authorized the examination of James B. Craven either individually or as secretary and treasurer of the Mexican Sugar Refining Company, as distinguished from an examination of the corporation as a party, and in that respect the order was continued. In this the learned justice was in error. There is no authority to examine an officer of a corporation as such apart from the examination of the corporation. The provisions of the Code of Civil Procedure authorize the examination of a party, including a corporation, and prescribe that where the party is a corporation the examination shall be had by examining one or more of its officers. The proper practice in such a case is to authorize the examination of the party, and then, the party being a corporation, the order should provide that the information is to be elicited by an examination of certain of its officers. The order, in so far as it authorized the examination of Craven, appears to have been granted upon the theory that he was about to depart from the state, and would not return thereto. Of course, the plaintiffs could perpetuate the testimony of Craven individually upon this ground; but the application was not made upon this theory, and it is not claimed that Craven individually, apart from his connection with the corporation and ability to testify from its records, possesses any information material to the plaintiffs' cause of action. It is evident, therefore, that if the learned Special Term was right in holding that the moving papers did not show a right to the examination of the party, the order should have been vacated in toto, instead of modified, as was done. Having reached the conclusion, however, on an appeal by the plaintiffs from so much of the order as deprived them of the right to examine the corporations, that the examination was authorized, we cannot reverse that part of the order which is appealed from by the defendants.

It follows that the order so far as appealed from should be affirmed, but without costs. All concur.

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## ZAHLER v. ARKIN.

(Supreme Court, Appellate Division, Second Department. April 27, 1906.)

MASTER AND SERVANT—CONTRACT OF EMPLOYMENT—EXECUTION—EVIDENCE.

In an action for alleged breach of a contract of employment, evidence *held* insufficient to sustain a finding that a contract of employment for a specified period or longer than from week to week had been made.

Appeal from Municipal Court of New York.

Action by Joseph Zahler against Morris Arkin. From a Municipal Court judgment in favor of plaintiff, defendant appeals. Reversed.

Argued before WOODWARD, JENKS, HOOKER, RICH, and GAYNOR, JJ.

Maurice J. Katz, for appellant.

Clyde E. Black, for respondent.

WOODWARD, J. The plaintiff brings this action for an alleged breach of contract of employment, and the only question involved upon this appeal which calls for consideration is whether the contract alleged by the plaintiff was actually made. The plaintiff answered an advertisement appearing in the New York World for a cutter, and it is not disputed that he was put at work by the defendant, that he was employed the greater part of two weeks, and that he was paid at the rate of $18 per week for one week, and at the rate of $20 per week for the next week, when he was discharged by the defendant. The plaintiff alleges that after he had worked two days he had a talk with the defendant, in which the question of wages was considered and agreed upon, and that it was agreed that the plaintiff should have $18 per week for the first week, after that he should have $20 per week, and that the employment should continue from the date of the employment, April 6, 1905, to the 1st of July of that year, upon the terms named. The defendant admits the employment and the rate of wages agreed upon, but denies that there was any definite term, except by the week. He was permitted to testify, without objection, that he never employed any one except by the piece or by the week, and defendant's wife, who appears to have had charge of the work that was being done by the plaintiff (that of cutting lawn shirt waists), testifies that the contract was by the week, and a disinterested witness testifies that she heard the original conversation between the plaintiff and the defendant in reference to wages, but that she heard nothing in reference to the employment extending to the 1st of July. A contract contemplates always that the minds of the parties must have met—that there must have been a mutual agreement—and it seems to me that the plaintiff has failed to show by a fair preponderance of the evidence that defendant ever entered into a contract of employment for the time between the 6th day of April and the 1st day of July, 1905. The evidence is undisputed that there was a considerable dull season intervening, and the defendant is supported in his denial of the plaintiff's version of the contract by two persons who were present, or who were in a position to hear what was said, and when this is taken into consideration, in connection with the customary method of employment, as testified to by the defendant with-

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out objection and without contradiction, it seems clear that the plaintiff has failed to establish his case by the weight of evidence. The week is the unit of compensation agreed upon. It appears to have been the term of employment prevalent in that establishment when the work was not done by the piece. The business appears to have been dependent upon seasons to a considerable extent, and to rely upon orders which might or might not materialize, and it is hardly probable that the defendant, who had conducted his business generally upon the basis of weekly employment, would have entered into a contract of several months duration with a stranger after two days trial. It may be that the plaintiff did say to the defendant that he was a married man, and that he must have steady employment, and the defendant may have acquiesced in the general proposition; but that does not constitute a contract unless the defendant agreed that he would afford such steady employment for some definite time. The latter says that he made no such contract, and in this he is corroborated by his wife and another witness, though it must be admitted that the testimony of the operative was somewhat weakened by her admission that she did not hear all of the conversation. But, taking all of the probabilities into consideration, in connection with the positive testimony of the defendant and his wife, I am convinced that the weight of evidence is against the plaintiff, and that the judgment should be reversed. The defendant ought not to be called upon to pay for services which he has never had, unless it clearly appears that he made the contract which the plaintiff alleges. The defendant's version is entirely reasonable. It appears to be in harmony with the system of doing business in the establishment, and the burden of proving the contract, in violation of the established custom, is fairly upon the plaintiff, who stands uncorroborated either by direct or circumstantial evidence. The defendant had the plaintiff's services, and paid him in harmony with the terms of the contract as he alleges it to have been, and the plaintiff's theory is not supported by sufficient evidence to warrant this court in upholding the judgment.

The judgment appealed from should be reversed, and a new trial ordered; costs to abide the event. All concur.

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## SCHLESINGER v. KLINGER.

(Supreme Court, Appellate Division, First Department. April 20, 1906.)

1. DIVORCE—DECREE—VALIDITY—COLLUSION—PUBLIC POLICY.

A wife brought suit for a limited divorce for alleged cruel and inhuman treatment. The parties consented to a separation, but the husband insisted that the decree should be entered on the ground of nonsupport. A stipulation was presented to the court, executed by the husband and wife, by which the former acknowledged that the wife had a good cause of action on the ground of nonsupport, and that he consented in open court to the entry of judgment for separation on that ground, requiring him to pay $40 a week alimony, counsel fees, etc., to be secured by bond with surety, on consideration of which the wife agreed to execute a release of dower. The court, before acting, personally and searchingly interrogated the wife as to the nature of her action against her husband, and her knowledge of the stipulation and its effect, and, satisfactory answers being obtained, entered the decree. *Held*, that such decree was neither fraudulent, collusive, nor contrary to public policy.



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2. DOWER—RELEASE—VALIDITY.

**Real Property Law 1896, § 186, Laws 1896, p. 587, c. 547, declares that a woman who is divorced from her husband may release to him, by an instrument in writing sufficient to pass title to real estate, her inchoate right of dower in any specific real property, either then owned or that might subsequently be acquired by him. *Held* that, where a wife, pursuant to a valid divorce decree, executed for a sufficient consideration a valid release of her dower in all her husband's land that he then owned or that he might thereafter acquire, she was estopped thereafter to claim any dower interest in his land, so that a deed to land by the husband accompanied by such release vested the full title to the property conveyed in the grantee.**

Submission of controversy on agreed statement of facts between Adolf Schlesinger and Louis Klinger. Judgment for plaintiff.

Argued before O'BRIEN, P. J., and PATTERSON, INGRAHAM, LAUGHLIN, and CLARKE, JJ.

M. Harold Hochdorf, for plaintiff.

Elias B. Goodman, for defendant.

PATTERSON, J. By the agreed statement of facts upon which the controversy between the parties to this record was submitted, it appears that the plaintiff contracted to sell and the defendant to buy a parcel of real estate situate in the borough of Manhattan, in the city of New York, and at the time named in the agreement for the completion of the transaction the plaintiff tendered a deed executed by himself alone, and a release of dower made to him by his wife. The defendant refused to take title, claiming that, notwithstanding the release, the premises were still incumbered by an inchoate right of dower. The release tendered was executed by Celia Schlesinger, the plaintiff's wife, on May 18, 1905, and by its terms she—

"Remised, granted, released, and forever quitclaimed * * * unto the said Adolph Schlesinger [the plaintiff], his heirs and assigns forever, all the dower and thirds, right and title of dower and thirds, and all and every right, title, interest, property, claim, and demand whatsoever, in law or equity, of me, the said Celia Schlesinger, of, in, and to all and every messuages, lands, tenements, and real estate and real property whereof the said Adolph Schlesinger is now seized or possessed, or may hereafter be seized or possessed or acquire, so that I, said Celia Schlesinger, my heirs, executors, administrators, or assigns, nor any other person or persons for me, them, or any of them, have, claim, challenge, or remand any dower or thirds, or any other right, title, claim, or demand in and to every and all real property which the said Adolph Schlesinger ever had, now has, or may hereafter have, acquire, or possess."

This release was under seal. Celia Schlesinger on the 16th day of May, 1905, in an action theretofore brought by her against her husband for a limited divorce, procured a decree of separation in the Supreme Court of the state of New York. Two days after the entry of the decree she executed the release above mentioned. The property which the plaintiff agreed to sell to the defendant was acquired by him after the entry of the decree and the execution and delivery to him of the release of dower.

It is provided by section 186 of the real property law of 1896 (Laws 1896, p. 587, c. 547), that:

"A woman who is divorced from her husband, whether such divorce be absolute or limited or granted in his or her favor by any court of competent

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**jurisdiction, may release to him by an instrument in writing sufficient to pass title to real estate her inchoate right of dower in any specific real property theretofore owned by him or generally in all such property and such as he shall thereafter acquire."**

The terms of this statute being so clear and unambiguous, there can be no doubt that the tender of a deed to the defendant, with a release of his wife's inchoate right of dower, reciting the facts authorizing her to give such a release, would have been sufficient to pass the whole title to the property, the subject of the contract, to the defendant.

It is urged, however, that other facts and circumstances appearing in the agreed statement upon which this cause was submitted, impeach the validity of the release. They are contained in an extract from the record of the trial of the action for a limited divorce between the plaintiff and his wife. The pleadings in the case are not before us, nor does it distinctly appear that the whole record of the trial has been presented to us. It is shown, however, that, when the cause was called for trial, it was stated that the ground upon which the separation was demanded by Mrs. Schlesinger was cruel and inhuman treatment, and that the parties had consented to a decree of separation; but the husband insisted that such a decree should be entered on the ground of nonsupport, not wishing to consent to a charge of cruelty. A stipulation was presented to the court, executed by the husband and wife, by which the former acknowledged that his wife had a good and meritorious, and substantial cause of action upon the ground of nonsupport, and he would consent in open court to the entry of a judgment of separation pursuant to law upon the ground of nonsupport, and to a provision directing and requiring him to pay $40 a week alimony, certain debts of the wife, and an amount to her counsel as compensation for his services, and that the alimony should be secured by the husband's bond, with a sufficient surety; and in the stipulation the wife agreed that upon the granting of the decree to her she would execute a release of dower. When this stipulation was presented to the learned justice sitting at Special Term, he declared that he would have to satisfy himself that the wife understood the nature of the agreement, and thereupon he proceeded to interrogate her by a series of direct and searching questions relating to the nature of the action she brought against her husband, her demand for a separation, the consequences of such separation, her knowledge of the contents of the stipulation, and her understanding thereof in all its details, and the effect thereof, and particularly as to the import and effect of that part of the stipulation which related to her release of dower, and it was upon her satisfactory answers to all the questions put to her by the court of its own motion that the decree was entered; the terms of the stipulation being embodied therein.

There is nothing whatever to show nor to give rise to a suspicion that the suit for separation was collusive. The defendant therein admitted in open court the plaintiff's right to a decree of limited divorce, but desired to save himself from the odium attaching to a charge of cruelty. The release the wife stipulated to give was not without consideration. The consent to the entry of a decree was not fraudulent, and it was not collusive. It was made in open court, subjected to rigid judicial

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scrutiny, and cannot be said to be against public policy. The wife being entitled to her decree, and having after its procurement executed the release, that instrument cannot be invalidated simply because of its having been executed in accordance with the previous stipulation embodied in the decree as one of its terms. By that decree the wife secured the fruits of her litigation. She had provided for her an income which was secured to her by a bond with a surety, and upon which she could realize by compulsory process if her husband neglected to pay her. We think there can be no question that Mrs. Schlesinger would be estopped from denying the validity of this release, and that it with the deed from the plaintiff would be sufficient to vest full title in the defendant.

The specific questions propounded are answered in the affirmative, and judgment for the plaintiff must be entered as prayed for by him, without costs to either party as against the other. All concur.

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## REES v. NEW YORK HERALD CO.

(Supreme Court, Appellate Division, First Department. April 20, 1906.)

1. LIBEL—NEWSPAPER PUBLICATIONS—LIBELOUS PER SE.

A newspaper published what purported to be a special dispatch from San Francisco, reciting that plaintiff's brother had arrived from New York, and announced in "Judge Morgan's Court that he was prepared to see that his brother returned to New York. The judge thereupon ordered [plaintiff] released." *Held*, that such publication was not libelous per se, as impliedly stating that plaintiff was under arrest for some offense in San Francisco.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Libel and Slander. § 22.]

2. PLEADING—COMPLAINT—DEMURRER—LEAVE TO AMEND.

Where a demurrer was sustained to a complaint for libel because it did not plead a publication which was libelous per se, plaintiff should have been granted leave to serve an amended complaint.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, §§ 575–582.]

3. APPEAL—RULINGS APPEALABLE—DECISIONS SUSTAINING DEMURRER.

A decision sustaining a demurrer to a complaint, as distinguished from the interlocutory judgment entered thereon, is not appealable.

Laughlin, J., dissenting.

Appeal from Special Term, New York County.

Action by Richard L. Rees against the New York Herald Company. From an interlocutory judgment sustaining a demurrer to the complaint, plaintiff appeals. Modified and affirmed.

Argued before O'BRIEN, P. J., and PATTERSON, INGRAHAM, LAUGHLIN, and CLARKE, JJ.

Robert Goeller, for appellant.

Robert W. Candler, for respondent.

INGRAHAM, J. The action is for libel. The demurrer to the complaint was sustained upon the ground that the publication was not libelous per se. The article complained of was what purported to be a special despatch to the New York Herald, headed "R. L. Rees is released," dated "San Francisco, Cal., Thursday," as follows:

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**"Howard Caradoc Reese, brother of R. Llewelyn Reese, arrived from New York to-day, and announced in Judge Morgan's court that he was prepared to see that his brother returned to New York. The judge thereupon ordered Reese released."**

The complaint, by way of innuendo, attempted to extend this libel to a charge that the plaintiff had been imprisoned for a crime, or was insane, but it was conceded that these innuendoes were much beyond anything that could properly be inferred from the words used, and it is claimed by the plaintiff that they should be disregarded and the complaint held good, upon the ground that the publication was libelous per se.

Considering this publication, without an innuendo, it seems to me quite clear that it was not libelous. There is no charge, but only an inference, that the plaintiff was under any restraint. The statement that the plaintiff's brother had arrived from New York, and had announced in a court that he was prepared to see that his brother returned to New York, and that thereupon the judge ordered the plaintiff released, was quite inconsistent with the fact that he was in custody charged with the commission of a crime; for a person charged with a crime is not released because it is stated that he intends to return to New York. Just why it was necessary that the judge should order his release is not stated, nor was there anything said from which an inference could be drawn that the plaintiff had been guilty of any crime or other disgraceful or dishonest act.

No leave was awarded to the plaintiff to withdraw the demurrer and serve an amended complaint, but I think he should have that right. The judgment appealed from should therefore be modified by sustaining the demurrer, with costs in the court below, and allowing the plaintiff to serve an amended complaint within 20 days after the service of a copy of this order, upon the payment of such costs, and the judgment, as so modified, affirmed, without costs of this appeal.

The plaintiff in his notice of appeal also appeals from the decision of the court sustaining the demurrer. As no such appeal is allowed by the Code of Civil Procedure, the appeal from the decision should be dismissed, with costs. Spies v. Munroe, 35 App. Div. 527, 54 N. Y. S. 916.

O'BRIEN, P. J., and PATTERSON and CLARKE, JJ., concur.

LAUGHLIN, J. I dissent, on the ground that the article is libelous per se.

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## SAUL v. SWARTZ et al.

**(Supreme Court, Appellate Division, First Department. April 20, 1906.)**

WILLS—CONSTRUCTION—AMOUNT OF BEQUEST—SHARES OF LEGATEES.

**Testator gave to each of his children $5,000, "in addition to other provisions for their benefit." He then created a trust for the life of his wife, subject to the provisions made for the benefit of his children, and directed that on the wife's death the trust estate should be divided equally among the children; the daughters' shares to be in trust for their lives,**

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**with remainder to their children, and declared that a daughter marrying with her mother's consent should receive a marriage portion of $15,000, "being part of her said share in my estate," subject to deduction of the sum which the testator "may have charged against my said daughter on account thereof." A daughter, during the lifetime of the testator, married with his and her mother's consent. Testator had given her $12,500. *Held*, that she was entitled to receive the further sum of $2,500; equality among the daughters requiring the payment to her of such sum, the other daughters having received $15,000.**

**[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 1142.]**

Appeal from Special Term, New York County.

Action by Lester J. Saul, executor of the will of Solomon M. Swartz, deceased, against Henrietta Swartz and others. From a portion of a judgment entered on the report of a referee appointed to hear and determine the action for an accounting of executors and trustees under the will of deceased, plaintiff and defendant Howard Eisenbach and others appeal. Modified.

Argued before O'BRIEN, P. J., and PATTERSON, INGRAHAM, LAUGHLIN, and CLARKE, JJ.

Donald McLean, for plaintiff.

J. Harry Hull, guardian ad litem, for appellant Robert Lyon.

Herbert Parsons, guardian ad litem, for appellants Howard, Marion, and Alfred Eisenbach, Jr.

Edgar J. Nathan, and Cardozo & Nathan, for respondent Gerald Lyon.

Felix H. Levy, for respondent Lester J. Saul.

CLARKE, J. This is an appeal from part of a judgment entered upon the report of a referee. The case involves the construction of the will of Solomon M. Swartz, deceased, and the accounting by his executors and trustees. The estate is still held in trust, and there has been and is no distribution among individual beneficiaries. The evidence is not returned in the printed case on appeal, and the appeal is here on exceptions to two conclusions of law. On April 17, 1889, Solomon M. Swartz made his will. He died on April 6, 1890. The will provided for certain bequests, then to his grandson $2,500, to be paid on his reaching the age of 25, "to each of my children living at my death the sum of five thousand dollars, in addition to other provisions for their benefit," and to his wife the use of his house and the property therein contained for life.

"Sixthly. All the rest, residue, and remainder of my estate, real and personal, wherever and whatever, of which I may die seised, possessed, or entitled to, I give, devise, and bequeath to my executors hereinafter named who shall qualify and to the survivor upon the following trusts: (1) To receive the rents, income, and profits thereof, and apply the same to the use of my wife, Henrietta, so long as she shall remain my widow, subject, however, to the provisions hereinafter made for the benefit of my children. (2) Upon the death of my wife, I give and devise my estate to and among my children, equally, share and share alike, the parts or shares set apart to my daughters, respectively, to be held by my executors upon the further trust to receive the rents, income, and profits thereof during the life of such daughter, and apply the same to the use of such daughter so long as she shall live, and upon her death the trust to cease as to such share, which shall thereupon go and belongs to the heirs at law of such daughter absolutely, per stirpes. * * *

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(3) Upon the marriage with her mother's consent of any daughter, provided, however, that said daughter has not already received from me the said sum, I direct my executors to pay to said daughter, the sum of fifteen thousand dollars, being part of her said share in my estate, and I direct my executors to deduct from said fifteen thousand dollars any sum which I may have charged against my said daughter on account thereof. Upon my son attaining the age of twenty-five years, I authorize my executors in their discretion to advance to him out of his share the sum of twenty thousand dollars. Should any daughter attain the age of twenty-one years in her mother's lifetime, I direct my executors to pay to such daughter, from and after her attaining the age of twenty-one years, and until her marriage or the final division of my estate, as prescribed in this article, the annual income yielded by the sum of fifteen thousand dollars."

The learned referee found as matter of fact:

"That said defendant Henrietta Swartz and Gerald Lyon, on or about the 6th day of January, 1891, paid to the defendant Annie Lyon the sum of twenty-five hundred dollars, termed an 'additional gift by decedent'; that prior to the death of said Solomon M. Swartz and the making of his will, Annie Lyon had married with the consent of her father and mother, and at the time of her marriage the decedent had given her the sum of $12,500."

And as a conclusion of law:

"That the sum of $2,500 paid to Annie Lyon as an additional gift from the decedent was properly paid by the executor in fulfillment of the provision of the will in regard to the $15,000 legacies to the daughters."

To this finding exception was duly taken.

The scheme of this will is clear and the intention thereof not difficult to discover. Testator exhibited to the natural objects of his bounty justice and equality, slightly varied by just consideration. His children stood equally in his affections. He first gave to each a bequest of $5,000, expressly said to be "in addition to other provisions for their benefit." He then created a trust for the life of his wife, "subject, however, to the provisions hereinafter made for the benefit of my children." Upon her death the trust estate was to be divided equally among the children; the daughters' shares, for their protection, however, to be in trust for their lives, with remainder over to their children. The daughters, marrying with their mother's consent, were to receive a marriage portion of $15,000, "being part of her said share in my estate"; but from it was to be deducted any sum which testator "may have charged against my said daughter on account thereof."

Appellants contend that the will is to be construed, if not from the date of the death of the testator, at least from the date of its execution, and that as at that time Annie was already married. The provision as to the daughters marrying with their mother's consent referred solely to the then unmarried daughters, had the element of futurity attached to it, and could in no event have been intended to include Annie. Wills are to be construed according to the intention of the testator, when it is possible to discover such intention from the language used by him. The keynote of this will is fairness and equality to his children. He treated them alike. They were equally dear to him. He had no favorites. Annie had married, not only with her mother's consent, but with his own. Her husband he had made one of his executors and trustees. Her son, the infant, Robert, he had made a legatee by name. He had given her $12,500, and his will provided that his executors should de-

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duct from the $15,000 "any sum which I may have charged against my said daughter on account thereof." Equality among the sisters requires the allowance of this $2,500 to Annie, as we assume, in the absence of the evidence and the accounts, that the other daughters have each received $15,000.

Nor is our view of the proper construction of this will unsupported by authority, if authority be needed for the proposition that a will should be construed in accordance with the clear intention of the testator. In Eisner v. Koehler, 1 Dem. Sur. 277, Mr. Surrogate Rollins had occasion to examine what he called "enabling conditions" in a will. He said:

"The decided cases to which I have referred clearly establish that, in the interpretation of such a condition as the one under review, it is proper to inquire what purpose the testator had in imposing it, and that, in the absence of any language indicating a contrary intention, such condition should be deemed fulfilled whether it has been satisfied after the testator's death, or before that event and subsequently to the execution of the will, or even before such execution. * * * Where, for example, a testator has made a bequest to one of his daughters upon her marrying with the approval of his widow or executor, or some other specified person or persons, it has often been held that the marriage of the daughter in the lifetime of her father, and with his approbation, it must be deemed a substantial compliance with the conditions created by the will (Clarke v. Burkley, 2 Vern. 720; Parnell v. Lyon, 1 Ves. & Bea. 479; Wheeler v. Warner, 1 Sim. & Stu. 304; Smith v. Cowdrey, 2, Sim. & Stu. 358); and this in recognition of a principle thus stated by Roper (Legacies, p. 819): 'The proper marriage of the legatee being the essence of the condition, the purpose is answered by the marriage under the eye and with the consent of the testator.' The condition, it is true, is not performed according to the letter, but it is so in substance."

In Van Vechten v. Van Veghten, 8 Paige, 104, the testator made certain specific bequests, and conveyed the rest of his property to his son and daughters under specified trusts. He also bequeathed an outfit to each of his three daughters who should marry. Two of the daughters married during the lifetime of their father, and it was held that they were entitled to receive such outfit as a legacy. This payment was therefore justified, and the portion of the judgment appealed from in that regard should be affirmed.

Lawrence Swartz, the son of the testator, has died, and a construction of the will was asked in respect to the determination of the proper disposition of his interests under his father's will, and the learned referee has made certain conclusions in relation thereto which have been excepted to, and especially by the infant appellants. The trust estate has not yet determined; the time for distribution has not arrived. There is no present necessity for any decision upon this question, and by the time that the question has to be determined there may be in existence other parties who will be interested therein and entitled to be heard thereon, and who would not be controlled by any unnecessary determination made by the court at the present time. Under such circumstances, decision of an academic question will not be undertaken by this court.

The judgment should be modified by striking therefrom the three paragraphs construing the will as to the disposition of the right, title, and interest of Lawrence Swartz, and, as so modified, affirmed, with costs to all parties payable out of the estate. All concur.

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## STEVENS v. McADOO et al.

(Supreme Court, Appellate Division, First Department. April 20, 1906.)

1. INJUNCTION—ENFORCEMENT OF CRIMINAL LAW—EQUITABLE RELIEF.

A court of equity has no jurisdiction to restrain police officers from stationing themselves in front of premises where plaintiff is conducting his business, which the police officers are of the opinion consists in operating a poolroom in violation of Pen. Code, § 351, and from warning persons entering the place that it is being unlawfully conducted, and that persons found therein will be liable to arrest.

2. SAME—REMEDY AT LAW.

Plaintiff's remedy, if any, was by invoking Pen. Code, § 556, providing that a public officer doing any act whereby another person is injured in his person, property, or rights commits oppression, and is guilty of a misdemeanor, or by suit against the officers for damages.

O'Brien, P. J., dissenting.

Appeal from Special Term, Kings County.

Suit by Lawrence Stevens against William McAdoo and others. From an order granting an injunction pendente lite, defendants appeal. Reversed.

Argued before O'BRIEN, P. J., and PATTERSON, INGRAHAM, LAUGHLIN, and CLARKE, JJ.

Terence Farley, for appellants.

Albert Tameling, for respondent.

INGRAHAM, J. The action was brought against the defendants, William McAdoo, police commissioner, William J. Eggers, an acting police captain, and James F. Nally, a police captain, in the police department of the city of New York, to restrain these officers from keeping, stationing, and maintaining upon or in front of the plaintiff's business any officers under their command, or from unlawfully entering the premises of the plaintiff, or from otherwise continuing to oppress the plaintiff, and trespassing upon the premises occupied by him, and to recover the sum of $5,000. The action was originally brought in Kings county, and upon the complaint and affidavits a temporary injunction was granted by a justice of the Supreme Court, with an order to show cause why that injunction should not be continued until the trial of the action. In answer to the motion to continue the injunction, there were submitted the affidavits of the captains and other police officers, stating that they were of the opinion that the premises of the plaintiff and the telephones therein were being used for the purpose of operating and conducting a poolroom, in violation of section 351 of the Penal Code, and stating the facts upon which their conviction was founded. Upon the hearing of this motion, the Special Term continued the injunction, restraining the defendants and each of them and the officers under their command from maintaining policemen or police officers in front of or adjacent to the plaintiff's premises; from keeping, stationing, and maintaining in front or adjacent to the plaintiff's premises, or in the halls or at the doorway leading thereto, any of the officers under the command of the defendant, or either of them, against the will of the plaintiff; or from unlawfully interfering with the customers and patrons of the plaintiff's said business, or persons desiring

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to do business with the plaintiff upon said premises; and further, from "unlawfully interfering with the possession or control of said premises by plaintiff herein, or from unlawfully trespassing upon said premises, or from removing or destroying any of the plaintiff's chattels or property in said room occupied by plaintiff without due warrant or process of law." Subsequently, upon motion of the defendants, the place of trial of the action was changed to the county of New York, whereupon the defendants appealed from this order continuing the injunction.

The defendants are police officers, whose duties it is to arrest persons violating the criminal law of this state. They are responsible for any unauthorized or illegal use of this power, conferred upon them by law for the protection of the people and for the punishment of criminals, and a court of equity has no jurisdiction to determine whether a person has or has not been guilty of a crime, or whether a person is about to commit a crime for which he should be arrested. The foundation of the plaintiff's complaint is that the police have charged him with being engaged in a business whch the law has made criminal; that he is innocent of the charge; that the business in which he is engaged is not criminal; and he therefore asks a court of equity to determine that he is not committing a crime; that his business is not criminal, and to enjoin the officers from interfering with his business, or with those wishing to do business with him; and the court has entertained this application, and restrained the police officers from interfering with the plaintiff's business, which they claim is unlawful and criminal. I supposed it had been definitely settled in this state that a court of equity has no jurisdiction in such an action. That persons engaged in a business which is claimed by the police to be criminal have from time to time attempted to have the question as to whether it is or is not criminal determined by a court of equity upon affidavit is quite familiar to those who have been engaged in the administration of justice in New York. Prize fights, horse racing, poolrooms, liquor selling without a license, and other occupations prohibited by law, have been carried on for years under the protection of injunctions issued by courts of equity restraining the police from interfering with the persons engaged in these various occupations; but where the questions have been presented to the appellate courts it has almost uniformly been held that a court of equity has no jurisdiction to determine such questions, and that a person cannot, under the guise of an allegation that the police in the performance of their duty of suppressing crime and arresting criminals are interfering with his business, obtain an injunction restraining the police from interfering with such business, or arresting those who engage in the business which the police claim is criminal. Davis v. American Society for the Prevention of Cruelty to Animals, 75 N. Y. 362; Kramer v. Police Department of New York, 53 N. Y. Super. Ct. 492. In Delaney v. Flood, 183 N. Y. 323, 76 N. E. 209, the Court of Appeals, on an appeal from an order enjoining the defendant, who was a captain of police, from stopping any person who should desire to enter the premises of the plaintiff, answered in the negative the question whether equity would interfere to restrain the police authorities from stationing policemen outside of a place which has a liquor tax license, and which they

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suspect of being a disorderly house, and notifying customers that the place is a disorderly house; and in deciding that case the court say:

"If the plaintiff did in fact maintain a disorderly place, it was the defendant's right, if it was not his duty, to warn persons about to enter against becoming participators in plaintiff's violation of the law. The whole question, whether the acts of the defendant and his inferior officers were legal or not, depends entirely upon the character of the so-called hotel. This basic question should not be determined in a court of equity upon affidavits, but in a court of law, and by evidence that is tested and scrutinized according to the settled rules."

And then, after citing Davis v. American Society for the Prevention of Cruelty to Animals, supra, and quoting largely from the opinion in that case, the court continued:

"If equity will not intervene in behalf of a concededly lawful business of a fixed and unchanging character, to prevent the criminal prosecution of some alleged unlawful act in its conduct, how can such intervention be justified in a case where the business itself, when lawfully conducted, exists by mere sufferance of law, or where it is of such a character that it may be lawful or unlawful, at the will of him who conducts it? Such a situation as is presented in the case at bar is one which, in its very nature, cannot be adequately dealt with by a court of equity. What might be a trespass at one instant of time may be a perfectly justifiable and necessary act at another. Here lies the fundamental distinction between the case at bar and that class of cases in which equity assumes jurisdiction to restrain trespasses that are continuous or permanent in their nature, and where such relief is necessary to obviate multiplicity of actions at law, and to prevent continuity of wrong. * * * The whole subject may be briefly summed up in the statement that we see nothing in the case at bar to take it out of the ordinary rule that equity will not interfere to prevent the enforcement of the criminal law. If the plaintiff has been oppressed and injured by any unlawful act of the defendant, he may invoke the Penal Code (section 556), or he may have an action at law for his damages."

This case, it seems to me, must set at rest any question as to the right of the police to interfere with a business which is claimed to be carried on in violation of law, where the effect of an injunction would be to prevent the police from enforcing the criminal law. The cases cited by the plaintiff decided in the Second Department must be deemed overruled by Delaney v. Flood, supra.

It follows that the order appealed from should be reversed, with $10 costs and disbursements, and the motion to continue the injunction denied, with $10 costs, and the temporary injunction vacated.

CLARKE, J., concurs. LAUGHLIN, J., concurs in result.

PATTERSON, J. I concur, on the ground that the facts of this case show that it comes within the doctrine announced in Delaney v. Flood, 183 N. Y. 323, 76 N. E. 209.

O'BRIEN, P. J. (dissenting). The case of Delaney v. Flood, 183 N. Y. 323, 76 N. E. 209, is cited by Mr. Justice INGRAHAM as authority for the proposition that equity will never interfere to restrain a trespass or prevent police officers from doing unlawful acts. If that case so decided it would be our duty to follow it. I do not think, however, it is an authority for the proposition so broadly stated by Mr. Justice INGRAHAM. It was therein said:

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"The question, in substance, is whether equity will intervene to restrain the police authorities from stationing officers outside of a place having a liquor tax certificate, when such authorities suspect that place of being conducted as a disorderly house, which is likely to be raided at any moment. * * * The pivotal point around which this question revolves is, that the plaintiff is engaged in the sale of intoxicating liquors."

And in concluding the court says:

"The whole subject may be briefly summed up in the statement that we see nothing in the case at bar to take it out of the ordinary rule that equity will not interfere to prevent the enforcement of the criminal law."

It will be noticed, therefore, that the purpose sought by the injunction was to restrain the police from enforcing the criminal law, which they were attempting to do by exercising the right of inspection expressly given by statute. The Delaney and other cases referred to were all instances wherein injunctions have been refused because, first, the plaintiff was conducting a business requiring an excise or other license, or coming within section 315 of the charter; or, second, where the acts threatened affected no property rights, of which Davis v. American Society for the Prevention of Cruelty to Animals, 75 N. Y. 362, also referred to by Mr. Justice INGRAHAM, and cited in Delaney v. Flood, supra, is an illustration. Here the purpose sought by the injunction was to restrain the police officers from doing acts which were clearly acts of trespass with respect to private individuals, doing what was presumably a private business, and prevent them from forcibly invading the plaintiff's premises without warrant or process of law. There is no claim that the business which the plaintiff claimed to be conducting was one that required a license, or that it was within section 315 of the charter. Laws 1901, p. 136, c. 466. The plaintiff was a private citizen, conducting what he asserted was a legal business, and the complaint is that the police without warrant had forcibly entered his premises and destroyed property, and, upon his stating that he intended (because he had a right to pursue that business) to re-establish it, the police replied that they would, in that event, return, and again forcibly enter the premises, and injure the property which he was using in that business; in other words, they proposed to repeat the trespass and destroy property without warrant of law as often as plaintiff attempted to do business. I do not think that Delaney v. Flood, supra, or any other case, has gone to the extent of holding that the police have the right to invade houses and places of business without warrant where such a business is not done under a license, or is not one where, under the right which the police have of inspection, their entrance for that purpose would not be a trespass. A private citizen whose business or property is thus invaded without warrant has no adequate remedy where it is threatened to repeat the acts of trespass except to enjoin the unlawful acts; and, as I do not read the case of Delaney v. Flood, supra, as holding that equity should not interfere by injunction in any case, I dissent from the conclusion reached by the majority of the court.

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## PEOPLE ex rel. JEROME, Dist. Atty., v. COURT OF GENERAL SESSIONS OF THE PEACE et al.

(Supreme Court, Appellate Division, First Department. April 20, 1906.)

1. CRIMINAL LAW—NEW TRIAL—MOTION AFTER JUDGMENT—POWER OF COURT.
Code Cr. Proc. § 462, declares that a new trial is a re-examination of the issue in the same court before another jury after a verdict has been given. Section 463 provides that a new trial can be granted by the court in which the former trial was had only in the cases provided in section 465. Section 465 provides that: "The court in which a trial has been had upon an issue of fact has power to grant a new trial, where a verdict has been rendered against the defendant, by which substantial rights have been prejudiced, upon his application in the following cases: * * * (6) Where the verdict is contrary to law or clearly against evidence. (7) Where it is made to appear, by affidavit, that upon another trial the defendant can produce evidence such as, if before received, would probably have changed the verdict * * *." Section 466 provides that the application for a new trial must be made before judgment, except an application made under subdivision 7 of section 465, which may be made at any time within one year, and except in case of a sentence of death, when the application may be made at any time before execution. *Held*, that the Court of General Sessions has no power after judgment to grant a new trial in a criminal case except on the ground of newly discovered evidence.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 2349–2355.]

2. PROHIBITION—SUPREME COURT—POWERS.
Under the express provisions of Code Civ. Proc. § 2092, the special term of the Supreme Court has power to issue an alternative writ of prohibition to the Court of General Sessions.

3. SAME—WHEN GRANTED—REMEDIES.
A writ of prohibition is the appropriate remedy when a court is about to exercise a power it does not possess.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Prohibition, §§ 37–39.]

4. SAME.
As under Code Cr. Proc. § 518, the people have no right of appeal from an order granting a new trial in a criminal case, the writ of prohibition was properly asked where the court in a criminal case improperly granted a motion for a new trial made after judgment.

Appeal from Special Term, New York County.

Application by the people, on the relation of William Traverse Jerome, District Attorney, for a writ of prohibition against the Court of General Sessions of the Peace, etc., and others. From a judgment vacating an alternative writ of prohibition, and denying an application for an absolute writ (98 N. Y. Supp. 66), the relator appeals. Reversed, and motion for issuance of an absolute writ granted.

Argued before O'BRIEN, P. J., and PATTERSON, INGRAHAM, LAUGHLIN, and CLARKE, JJ.

Robert C. Taylor, for appellant.

James W. Osborne (Osborne, Hess & Churchill, of counsel), for respondent.

CLARKE, J. One John Blake was convicted in part I of the General Sessions before the learned recorder on November 29, 1905, upon

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an indictment found May 25, 1904, for selling an article under a false label. Motions for a new trial, in arrest of judgment, and for a certificate of reasonable doubt were on said November 29th made, denied, and exceptions taken, and the defendant was thereupon sentenced to three months in the penitentiary, and thereafter said part I was adjourned sine die. Subsequently motion papers were served upon the district attorney for a new trial and an arrest of judgment, and for an order vacating and setting aside the verdict and the judgment of conviction entered thereon, upon the ground, inter alia, that it affirmatively appeared upon the face of the indictment and also by the testimony upon the trial that the offense upon which the defendant was convicted was charged to have been committed on May 12, 1902, and that it appeared by the record of the court that the indictment was not found or filed until May 25, 1904; a period of more than two years after the commission of the alleged offense, and after the statute of limitations had run and attached against the said offense. Notwithstanding the objections of the district attorney that after judgment the court had no power to entertain the motion for a new trial, the learned recorder proceeded to hear argument and take the matter under consideration. Before a decision had been handed down, the district attorney obtained from the Special Term of the Supreme Court an alternative writ of prohibition, addressed to the Court of General Sessions, the recorder, and the defendant, restraining them from further proceedings upon said motion for a new trial, and directing the respondents to show cause upon a day certain why an absolute writ should not issue. Upon the return of said alternative writ, the Special Term made an order vacating said writ, and denying the absolute writ of prohibition, from which order the district attorney appeals to this court.

The subject of writs of prohibition has been so fully discussed in Quimbo Appo v. People, 20 N. Y. 531, and in the recent case of People ex rel. Hummel v. Davy, 105 App. Div. 598, 94 N. Y. Supp. 1037, affirmed 184 N. Y. 30, 76 N. E. 732, that it seems unnecessary to consider further the origin, history, or limitations generally of said writ.

The important question involved in this appeal—important not only to the people and the defendant in the case under consideration, but of far-reaching importance in the administration of criminal law—is, has the Court of General Sessions power after judgment to grant a new trial in a criminal case except upon the ground of newly discovered evidence? The leading case of Quimbo Appo v. People, supra, is confidently cited by counsel for appellant and respondent alike. That case was decided by the Court of Appeals in 1860. Quimbo Appo had been convicted of murder in the first degree at a term of the court of oyer and terminer held in the county of New York in April, 1859, and the court had adjourned sine die on the 16th of June, 1859. In the following October, at a succeeding term held before another judge, Appo made a motion for a new trial upon the ground of newly discovered evidence. The district attorney denied the power of the court to entertain or grant such a motion, and declined to answer it on the merits. The court affirmed its power, and announced its intention to grant the motion. The district attorney sued out an alternative writ of prohibition,

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which the General Term subsequently made absolute. Judge Selden in the Court of Appeals, affirming the writ, said:

"It becomes necessary, therefore, to pass upon the question whether courts of oyer and terminer in this state have authority to grant a new trial upon the merits in a capital case."

After a review of the cases in England and in this state, the learned judge proceeded:

"It is not controlled by any statute, and hence what we are called upon to decide is whether, by the common law, courts of oyer and terminer have the power to grant new trials upon the merits after conviction in a capital case. * * * The subject, taken as a whole, can only be adequately dealt with by the Legislature, to which it appropriately belongs, and I am entirely opposed to so obvious a stretch of judicial power as would be involved in holding that the courts of oyer and terminer, without the aid of any statute, possess a control over convictions for crime which it is conceded was never possessed by the highest common-law courts in England."

Judge Clarke, concurring, said:

"I place my opinion, therefore, on the ground, not merely that a court of oyer and terminer has no power to grant a new trial when the verdict has been rendered at a previous oyer and terminer, but that no court has power in cases of felony to grant a new trial on the merits under any circumstances."

Therefore, what was decided was that in the absence of a statute the court in cases of felony had no power to grant a new trial, and that the issuance of a writ of prohibition was proper to prevent the exercise of such power. The court also pointed out that the subject could be adequately dealt with by the Legislature. Since that decision the subject has been so dealt with by the Legislature in sections 462–466 of the Code of Criminal Procedure.

In People v. Hovey, 92 N. Y. 554, Chief Judge Ruger said:

"The general object and design of the Code of Criminal Procedure was to collect the various statutes relating to the subject, and to furnish a uniform, harmonious, and comprehensive system of criminal practice, to apply to and govern all criminal proceedings thereafter instituted in any of the courts of the state."

In People v. Bissert, 71 App. Div. 118, 75 N. Y. Supp. 630, affirmed 172 N. Y. 643, 65 N. E. 1120, Mr. Justice McLaughlin, after citing the Hovey Case and People v. Jaehne, 103 N. Y. 182, 8 N. E. 374, said:

"And independent of the construction put upon the Code by the Court of Appeals, the slightest consideration of the various sections of it is sufficient to indicate that it was intended by the Legislature that this Code was to take the place of, and be substituted for, all of the statutes of the state bearing upon the subject; to which end provisions were made for every necessary step to be taken in every criminal case, commencing with the formation of a grand jury, leading up to a trial, conviction, sentence, and discharge of a defendant."

In People v. Glen, 173 N. Y. 395, 66 N. E. 112, Judge Werner, in discussing section 313 of the Code of Criminal Procedure, regulating motions to set aside indictments, referred to the fact that from time immemorial common-law courts had quashed indictments on motion for defects in form and other irregularities, but added:

"Such matters are now regulated by the provisions of the Code of Criminal Procedure, and, however inconvenient or even oppressive they may appear

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to be in specific cases, the courts must apply them as best they can, for they embody the command of the law-making power in matters wherein its fiat is supreme and final."

We have, then, the authority of the Court of Appeals that prior to the statute there existed no power in the court to grant a new trial on the merits after conviction of a felony for any reason, and that now the statute is imperative and controlling on all matters of criminal procedure.

We now examine the statute. Section 462 of the Code of Criminal Procedure provides that:

"A new trial is a re-examination of the issue in the same court before another jury, after a verdict has been given."

Section 463 provides that a new trial can be granted by the court in which the former trial was had only in the cases provided in section 465. Section 465 provides that:

"The court in which a trial has been had upon an issue of fact has power to grant a new trial, where a verdict has been rendered against the defendant, by which substantial rights have been prejudiced, upon his application in the following cases: * * * (6) Where the verdict is contrary to law or clearly against evidence. (7) Where it is made to appear, by affidavit, that upon another trial the defendant can produce evidence such as, if before received, would probably have changed the verdict. * * *"

Section 466 provides that:

"The application for a new trial must be made before judgment, except an application made under subdivision 7 of section 465, which may be made at any time within one year, and except in case of a sentence of death, when the application may be made at any time before execution. * * *"

In the case at bar the application was not under subdivision 7 upon the ground of newly discovered evidence, and was made after judgment and not before. The learned judge at Special Term in his opinion herein said: "Not always is the word 'must' to be construed as mandatory." That is quite true, but considering the history of these provisions, the prior state of the law, and that new trials in criminal cases are permissible by statute only, it seems to me that the words are too plain and imperative to permit of such construction. It is like a statute of limitations. If the motion for a new trial "may" be made after judgment, "may" a motion upon the ground of newly discovered evidence other than capital be made after a year? If not, why not? When the statute was first passed the provision for the motion upon the ground of newly discovered evidence was also required to be made before judgment; the extension for one year having been inserted by chapter 534, p. 665, of the Laws of 1887, to take effect on June 6th of that year. Before said amendment, Judge Andrews said, in People v. Bradner, 107 N. Y. 1, 13 N. E. 87:

"The defendant, after judgment, applied to the trial court to vacate the judgment, to enable him to move for a new trial on the ground of newly discovered evidence. The court denied the motion, on the ground that it had no power to grant the same. The power of a trial court to grant a new trial, given by section 463 of the Code of Criminal Procedure, is qualified by section 466, which declares that the application for a new trial must be made before judgment. The affidavits upon which the motion was made did not make a case upon which, within the established rule, a new trial could be granted."

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We are therefore of the opinion that the statute means what it says, and that there is no room for construction. If it were decided otherwise, a new opportunity would be afforded to invite the law's delay. In the case at bar the question of the statute of limitations can be raised and disposed of upon the appeal from the judgment, and it appears from the record that a certificate of reasonable doubt has already been issued and the defendant admitted to bail, so that no great hardship to the defendant clamors for a relaxation of the law for the benefit of an individual, and against the public interest. The Special Term of the Supreme Court had power to issue the writ of prohibition to the General Sessions. Section 2092, Code Civ. Proc. It is the appropriate remedy when a court is about to exercise a power it does not possess. The General Sessions had no power to grant the motion for a new trial made after judgment. The writ was properly asked for because the people have no right of appeal from an order granting a new trial in a criminal case. Section 518, Code Cr. Proc.

If I am right in my view of the law, it follows that the order appealed from should be reversed, and the motion for the issuance of an absolute writ granted. All concur.

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## ORIENTAL BANK v. GALLO.

(Supreme Court, Appellate Division, Second Department. April 27, 1906.)

1. BILLS AND NOTES—PRIOR INDORSEMENT OF CHECKS—FORGERY—EVIDENCE.
   Evidence in an action by a bank for money paid on a check indorsed to it by defendant examined, and *held* to support a finding that the prior indorsement was a forgery, entitling the bank to recover.

2. SAME—SUBSEQUENT INDORSER—LIABILITY.
   A person's indorsement of a check is a warranty of the genuineness of a prior indorsement, and on discovery of the forgery thereof he is liable to make good the amount he has received on the check.
   [Ed. Note.—For cases in point, see vol. 7, Cent. Dig. Bills and Notes, §§ 669, 672.]

3. SAME.
   A holder of a check under a forged indorsement indorsed it to a bank, and received the money thereon. The bank was paid the amount thereof by the drawee, who on discovering the forgery sued the bank to recover the amount paid. *Held*, that it had authority to compromise the suit, and recover from the holder on proving the forgery.

Appeal from Trial Term, Kings County.

Action by the Oriental Bank against Saverio Gallo. From a judgment for plaintiff, and from an order denying a motion for a new trial made on the minutes, defendant appeals. Affirmed.

Argued before HIRSCHBERG, P. J., and WOODWARD, JENKS, HOOKER, and GAYNOR, JJ.

J. Stewart Ross, for appellant.
De Witt Bailey, for respondent.

HIRSCHBERG, P. J. This action is brought by the Oriental Bank to recover from the defendant, its depositor, the amount of a check deposited by the latter in the bank, upon the ground that the indorse-



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ment immediately prior to that of the defendant is a forgery. The check is the check of the Brooklyn Savings Bank, drawn upon the Nassau National Bank, certified by the latter, and indorsed to the order of Antonio Cona, purporting to be indorsed by Antonio Cona, and then indorsed by the defendant. On the deposit of the check by the defendant with the Oriental Bank, the plaintiff, the amount of the check was credited to the defendant's account, and in due course the check was paid to the plaintiff through the clearing house by the Nassau National Bank; the indorsements being guarantied, in accordance with custom. The Brooklyn Savings Bank afterwards discovered that the indorsement of Antonio Cona on the check was forged. The Nassau National Bank thereupon on demand repaid the amount of the check to the Brooklyn Savings Bank, and thereafter sued the plaintiff to recover such amount on its guaranty of the indorsements made at the time of the payment through the clearing house. The plaintiff paid the Nassau Bank the amount of the check, with the costs and attorney's fees, in settlement of the action, and thereupon demanded from the defendant repayment of the money, and duly offered to return the check to him.

The only disputed question in the case, and which was properly submitted to the jury, and I think correctly decided by them, was whether or not the signature of Antonio Cona in the indorsement on the check was a forgery. While this question was submitted as a disputed one, the evidence all points to the conclusion that the indorsement was forged. It appears that in the month of January, 1903, Antonio Cona, a resident of No. 273 Tillary street, in Brooklyn, in company with another who owned the money, made a deposit of $600 in the Brooklyn Savings Bank. The money was deposited in the name of Antonio Cona, but the passbook was taken by the owner of the money. In some manner not explained the passbook subsequently came into the possession of another person named Alphonse Cona, but sometimes called Antonio Cona or Tony Cona, by whom the book was presented to the savings bank in November, 1903, and a demand made for the money. The officers of the savings bank could not recognize this individual as the depositor, and, having some doubt as to his identity, concluded on consultation to deliver to him a check payable to the order of Antonio Cona for the amount of the deposit, with interest, in return for the delivery of the passbook. This was accordingly done, and the person to whom the check was so given applied shortly afterward to the defendant, a private banker, and asked him to cash it. The defendant required an identification of the individual, as he was personally unknown to him, and, on being assured by a neighbor that he was Antonio Cona, did cash it on the indorsement by this individual of the name of Antonio Cona, and then deposited it with the plaintiff, as already stated.

The depositor, Antonio Cona, was a witness on the trial. It was proved beyond dispute that he was not the person to whom the check was given by the savings bank, and that he was not the person who indorsed the check to the defendant and received the money on it from him. The defendant, who testified in his own behalf, made no claim as a witness that the depositor whom he saw as a witness for the plain-

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tiff was the one from whom he received the check. I do not see how the jury, under the circumstances, could have reached any other conclusion than that the check was procured by a fraud perpetrated by the individual who presented the passbook to the savings bank, and that the indorsement by which the defendant was induced to cash the check was a forgery. The right of the plaintiff to recover under the circumstances is undoubted. The defendant's indorsement was a warranty that the prior indorsement was genuine, and upon discovery of the forgery he became immediately liable to make good the amount he had received. Story on Prom. Notes, § 135; Turnbull v. Bowyer, 40 N. Y. 456, 100 Am. Dec. 523; Bank of Brit. No. Am. v. Mer. Natl. Bank of N. Y., 91 N. Y. 106; Lennon v. Grauer, 159 N. Y. 433, 54 N. E. 11; Packard v. Windholz, 88 App. Div. 365, 84 N. Y. Supp. 666, affirmed 180 N. Y. 549, 73 N. E. 1129.

The plaintiff was not obliged to allow the suit brought against it by the Nassau National Bank to proceed to judgment before making the payment which it did. In making such payment, it did only what it could have been compelled to do, assuming that the disputed signature was a forgery. The signature proving to be a forgery, such payment is not to be regarded as voluntary in any sense which would operate to relieve the defendant from his liability to restore the money which he received from the plaintiff upon his implied guaranty of the genuiness of the forged indorsement.

The judgment and order must be affirmed.

**Judgment and order affirmed, with costs. All concur; GAYNOR, J., in result.**

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## UNTERMYER v. CITY OF YONKERS.

**(Supreme Court, Appellate Division, Second Department. April 27, 1906.)**

1. MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—SPECIAL ASSESSMENTS—AUTHORITY OF MUNICIPALITY.

   A municipal corporation, acting as the agent of the owners of property benefited by a public improvement, is restricted in its agency to the terms of the statute under which the work was undertaken, and there is an implied limitation that the property benefited shall not be called on to pay more than the legitimate cost of the improvement.

2. SAME—RIGHT OF PROPERTY OWNER TO COMPLAIN.

   Where a property owner stood by and saw a public improvement being made without raising any objection, he must, on appealing to equity to set aside the assessment made on his property for the payment of the improvement, establish affirmatively the fact that he has been wronged by the assessment, as a condition of relief.

3. SAME—EFFECT OF INVALIDITY OF CONTRACT.

   Contracts for the construction of sewers at the cost of the property benefited bound the contractors to abide by Laws 1899, p. 1172, c. 567, providing for the employment of laborers for 8 hours per day, and at the payment of the prevailing rate of wages in the locality. The contractors did not take the provision into consideration in making the estimates on which their bids were made. The contracts were let to the lowest bidders. None of the bidding contractors would have made lower bids if the provision had not been in the contracts. The contracts were not performed subject to the limitation. Experts claimed that contracts performed with such restriction increased the labor cost from 15 to 25 per

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cent. *Held*, that the assessments for the benefits were not increased by reason of the provision required by the statute, which is invalid, and an owner was not entitled to have the assessments set aside on the ground that the contracts contained the restriction.

4. SAME—BENEFITS TO PROPERTY.

A sewer constructed in R. and P. avenues was done under one proceeding. The sewer was in the form of a "T," the stem thereof being in P. avenue while the top thereof extended east and west along R. avenue. There was no evidence of any fraud on the part of the municipality in fixing the assessment district. The assessors, in apportioning the cost of the improvement according to the benefits, procured the contractor to furnish an itemized estimate of the cost of constructing the portion of the sewer which passed on R. avenue. The assessments of benefits were made on the portion which might be presumed to be of benefit to property abutting on R. avenue. *Held*, that the assessment on property abutting on R. avenue would not be set aside on the ground that the land was not benefited by the construction of the entire sewer.

5. SAME.

The city procured from a railroad company conveyances of rights of way to construct a sewer under the tracks of the company. The city then constructed the sewer through the premises described in the conveyance. *Held*, that there was no defect in the proceeding vitiating the assessment for benefits on the ground that the city had a mere license to construct the sewer under the railroad tracks; it being presumed that a beneficial grant is accepted.

6. SAME.

Mere formal defects, in no wise working an injury to one who has stood by and has seen a public improvement constructed, are not proper grounds for setting aside an assessment for the cost thereof.

Miller, J., dissenting.

Appeal from Special Term, Westchester County.

Proceedings by Samuel Untermyer against the city of Yonkers to set aside assessments for the payment of public improvement. From a judgment setting aside the assessments, defendant appeals. Reversed.

Argued before HIRSCHBERG, P. J., and WOODWARD, RICH, MILLER, and GAYNOR, JJ.

Francis A. Winslow (William J. Wallin, on the brief), for appellant.

Ralph E. Prime and Louis Marshall, for respondent.

WOODWARD, J. The defendant, acting under the provisions of its charter, has constructed certain sewers in the streets, highways, and public places of the city of Yonkers, and has levied assessments upon the property supposed to be benefited by such improvements. The plaintiff has property adjacent to some of these sewers, which were evidently constructed to conform to a general system for the locality, and he brings this action to set aside the assessments made upon his property for the payment of his portion of the cost of such sewers, and the learned court at Special Term has found in his favor. The defendant appeals from the judgment entered upon the decision of the court.

The principal objection urged to the assessments as a whole is the fact that the various contracts under which the three separate sewers were constructed contain provisions by which the contractors agree to abide by the provisions of chapter 567, p. 1172, of the Laws of 1899, which provides for the employment of laborers for only eight hours

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per day and the payment of the prevailing rate of wages in the locality. It is conceded that these provisions of the statute are unconstitutional and of no force and effect, and it is the contention of the plaintiff, supported by the judgment, that the presence of this provision in the various contracts has had the effect of increasing the cost of these sewers, and thus to take the property of the plaintiff without due process of law, by compelling him to pay more than the legitimate cost of the public improvement. It is not to be doubted that a municipal corporation, acting as the agent of the owners of property benefited by a public improvement, is restricted in its agency to the terms of the statute under which the work is undertaken, and that there is an implied limitation that the abutting or benefited property shall not be called upon to pay more than the legitimate cost of such public improvement within reasonable bounds; but where the plaintiff has stood by and watched the improvement being made without raising any objections, he is bound, in appealing to a court of equity, to establish affirmatively the fact that he has been wronged by the assessment as a condition of relief. The evidence in this case, it seems to us, fails to meet this equitable requirement. It is true that there was some testimony by witnesses called as experts to the effect that a contract performed under the letter of these various agreements would increase the labor cost 15 to 25 per cent., but there is no evidence that the contracts were performed under such limitations, and the presumption is that the contractors knew the law, and that they disregarded these provisions in the making of their bids. In speaking of these provisions in the case of People ex rel. North v. Featherstonhaugh, 172 N. Y. 112, 126, 64 N. E. 802, 806, 60 L. R. A. 768, the Court of Appeals say:

"The provisions of that statute incorporated into the specifications are extraneous matters, which have no material effect upon the main provisions of the contract, and cannot affect those provisions, unless it may tend to increase the cost of the work. The contractors must be presumed to have known the law, and consequently to have known that the provision with reference to the rate of wages was unconstitutional. They are deemed, therefore, to have made their bid with this understanding, even independent of the notice which was given to them by the commissioners."

In the case now under consideration the various contractors, or persons representing such contractors, testify that the provisions of the statute in reference to labor were not taken into consideration in making the estimates on which their several bids were made, and this seems entirely probable when we consider the comparatively small contracts which were being considered. The largest contract was for $31,750, which included all work and materials, and the other two were for $19,800 and $17,666, respectively; and when it is recollected that a very large portion of the cost of such improvements is in the materials, in the investment in plant for doing the work, etc., it may very well be that a contractor would not figure very minutely upon the question of the exact hours of labor and the rate of wages. To justify him in doing the work his contract must necessarily take into consideration a large number of incidental questions, such as accidents, delays due to weather conditions, etc., and if we assume, what the law presumes, that these contractors knew that the provisions of the labor law here under con-

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sideration were unconstitutional, there is no foundation for the conclusion that the cost of this improvement was increased by reason of this provision in the contracts. It might be that the cost of doing the work would be increased to the contractor if he in fact complied with the provisions of the statute, but that is not the question involved here; the question is whether the cost of the improvement to the plaintiff and others similarly situated was increased by reason of the provision in the various contracts, and the evidence does not show that it was. There were several bids on each proposition. The contracts were let to the lowest bidders, and there is not a suggestion on the part of any one, so far as the evidence discloses, that any of the competing contractors would have made lower bids if these provisions had not been in the conditions of the contracts, or that the successful bidders would have been willing to have put in lower bids without these limitations. On the contrary, the successful bidders say that they did not take these provisions of the statute into consideration in making their estimates. there is no evidence that the contracts were performed subject to such limitations, and it seems to us that there is an entire failure to establish the fact that the cost of the improvement to the benefited property owners has been enhanced a single dollar by reason of these unconstitutional provisions in the several contracts. See Knowles v. City of New York, 176 N. Y. 430, 440, 68 N. E. 860.

It is also urged by the plaintiff, and supported by the judgment, that the assessment resulting from the North Broadway sewer proceeding and from the Robert avenue and Palisade avenue proceeding are void because the plaintiff's land is not benefited thereby; several sewers having been in each instance united in one proceeding, and the property benefited by one of such sewers being in no sense benefited by the other. It appears from the evidence in this case that the sewers constructed in Robert avenue and Palisade avenue were done under one proceeding. The sewer is in the form of a "T," the stem of the "T" being in Palisade avenue, while the top of the "T" extends east and west along Robert avenue. The plaintiff's property lies north of Robert avenue, on the slope of the southerly hill, forming the valley where the north and south branches of the sewer connect with the Palisade avenue stem. The work was all embraced in a single contract, there is no evidence of any fraud or bad faith on the part of the common council in fixing the assessment district, and the assessors in apportioning the cost of the improvement according to the benefits to the property within the assessment district procured the contractor to furnish an itemized estimate of the cost of constructing the portion of the sewer which passed near the plaintiff's premises, and the assessment of benefits appears to have been made, not upon the cost of the entire "T" sewer, but upon that portion which may be presumed to be of benefit to the plaintiff's premises. This was likewise true of another of the sewers in a general way, and we are of opinion that it does not show grounds for equitable relief. So far as the evidence discloses, there was an effort to follow the statute very closely on the part of the public officials, and the assessment does not appear to have worked any hardship upon this plaintiff for which he is not fully compensated by the benefits which may be expected to flow from the inauguration of a public improvement es-

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sential to the health of the community in general, and to those occupying the premises which this sewer is designed to drain. These objections, as well as various others urged by the plaintiff, are, to quote the language of the court in Gilmore v. City of Utica, 131 N. Y. 26, 34, 29 N. E. 841, 843, "of the purest technicality, and under these circumstances courts should not be astute to find some means of setting aside what, so far as the evidence shows, is a meritorious assessment, levied for the payment of the cost of a public improvement."

The suggestion that the defendant had failed to accept certain conveyances of rights of way, or that there was a defect in the proceedings vitiating the assessment because of the fact that at the time of the commencement of this action the defendant had a mere license to construct the sewer under the tracks of the New York Central & Hudson River Railroad, is hardly worthy of serious consideration. It is always presumed that a beneficial grant is accepted, and the fact that the defendant procured these grants, and then constructed the sewer through the premises described in such grants, is conclusive that the right vested in the defendant. In the matter of crossing the railroad, it appears that the matter has since been entirely cleared up by a grant from the railroad company, and there is no ground for equitable relief in this technical defect.

We have examined all of the matters urged by the plaintiff, but we are unable to agree with the conclusion reached by the learned court at Special Term. The proceedings of a jurisdictional character appear to have been complied with in a manner which is not open to criticism, and the details appear to have been worked out with more than usual regard for the rights of those who are to pay for the improvement. Mere formal defects, in no wise working an injury to one who has stood by and seen a public improvement constructed, are not proper grounds for setting aside an assessment, which must result in throwing the burden either upon the contractor or upon the community at large; and we are of opinion that the evidence in this case does not warrant the disposition made at Special Term.

The judgment appealed from should be reversed, with costs to abide the final award of costs.

All concur, except MILLER, J., who dissents on the ground that the finding that the illegal provisions of the estimates and contracts increased the cost of the work is abundantly supported by the evidence. The successful bidder admitted that it entered into his estimates.

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## PALMER et al. v. LARCHMONT HORSE RY. CO. et al.

(Supreme Court, Appellate Division, Second Department. April 27, 1906.)

STREET RAILROADS—DRIVING ON TRACKS—FAILURE TO LOOK AND LISTEN—QUESTION FOR JUDY.

While deceased was driving along the street on a dark night he discovered red lights hanging on telegraph poles, which encroached upon the highway to within about nine feet of the street car tracks. In order to avoid the apparent danger, he turned in and drove along with two wheels ewer the first rail. A few seconds later he was struck by a car coming

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**up from behind and killed. *Held*, that he was not guilty of contributory negligence as a matter of law because he failed to look and listen before driving upon the tracks.**

**GAYNOR and Miller, JJ., dissenting.**

Appeal from Trial Term, Westchester County.

Action by Bryant S. Palmer and another, as administrators of Floyd T. James, against the Larchmont Horse Railway Company and another. From a judgment for plaintiffs, and an order denying a motion for a new trial, defendants appeal. Judgment and order affirmed, with costs.

Argued before HIRSCHBERG, P. J., and WOODWARD, RICH, MILLER, and GAYNOR, JJ.

Isaac N. Mills, for appellants.

Arthur C. Palmer, for respondents.

WOODWARD, J. Counsel have argued this case at great length in their briefs, but the case does not appear to be different in principle from negligence cases generally, and it is practically conceded upon this appeal that the motorman operating the car which produced the injuries complained of was negligent in the management of the same.

The only other question upon the merits is whether the plaintiffs have offered evidence from which the jury were justified in finding that the plaintiffs' intestate was free from contributory negligence. The two railroad companies were jointly interested in the operation of the cars over the line, and we are of opinion that there is no question of the joint liability, if there is, in fact, any liability at all; and upon this proposition the jury has found in favor of the plaintiffs. The defendants appeal.

Floyd T. James was killed in a collision between the car jointly operated by the defendants and a light wagon which he was driving on the highway in the town of Mamaroneck, between the villages of Mamaroneck and Larchmont, on the 28th day of November, 1900, at about 11:30 p. m., and his administrators bring this action to recover damages for his death, alleging negligence on the part of the defendants. On the night of the accident, James, in company with one Chatterton, started on a drive from White Plains, following the highway and the tracks of the trolley line of one of the defendants. When in Palmer avenue, in the town of Mamaroneck, the plaintiffs' intestate, who had been driving along the side of the track, discovered red lights hanging on certain telegraph poles, which encroached upon the highway to such an extent that the driveway was only about 9 feet between the tracks of the defendants and the poles, back of which was a retaining wall. He was driving at the rate of about 8 miles an hour, and his attention was called to the lights by his companion just as they were within about 25 feet of the first pole containing such lights. The night was starlight but dark, and, being thus warned of danger, James turned his horse in the direction of the tracks of the defendants, and, crossing over the first rail with two wheels of his light wagon, he was driving along in the same general direction, without slackening his speed, when his wagon was hit in the rear by the defendants' car, and he was thrown out and under the wheels of the car, which appears to have run some

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200 feet before coming to a stop, when the deceased was found under the car mangled and dead. The evidence shows that the deceased was not upon the track for a distance of more than 40 feet, involving only a few seconds of time at the rate his horse was traveling, and the defendants urge upon this appeal that he was guilty of contributory negligence, or, at least, that the plaintiffs have failed to show a lack of contributory negligence, because it is not shown that the deceased looked or listened before driving upon the tracks of the defendants; and a long line of cases in which the courts have held that a plaintiff cannot recover where he has entered upon the tracks without listening or looking, and has driven upon the same, are cited in behalf of this contention. It seems to us that none of these cases have any bearing upon the situation as it was revealed by the evidence, and as the jury were justified in finding. The defendants were occupying a public highway. They were charged with the duty of knowing the situation at the point where this accident occurred, and the fact that the deceased, driving briskly along a public highway, to avoid an apparent danger, turns his horse upon the defendants' tracks, and proceeds along the line for the obvious purpose of passing the danger signals, is not inconsistent with the exercise of that reasonable degree of care which he was called upon to exercise. He was in a position of apparent danger. The entire time between the moment his attention was called to the red lights and the collision was but a few seconds, and the acts of a man in an emergency, even though not the most prudent which might have been adopted, do not constitute negligence. It seems to us that the jury might very properly draw the inference that the deceased was exercising due care in driving along this highway; this was the duty he owed, not to the defendants, but to himself. He had a right to be there; he had a right to traverse any part of that highway, subject to the paramount right of the defendants to operate their cars in a reasonably careful manner; and when the deceased saw these red lights, and drove away from the apparent danger, he was exercising some degree of care, and the fact that, in exercising this care, he ran into a new danger, and one which he had had no reasonable opportunity to observe, does not deprive his representatives of the right to recover for the negligence of the defendants. He was not driving heedlessly; he was exercising care. He was trying to avoid danger, and in the brief interval that elapsed between the first effort to avoid the danger indicated by the red lights, the extent of which in the darkness he could not readily determine, and the happening of the accident, was not sufficient to justify the conclusion that he was upon the tracks in a negligent manner. He had a right to get past the red lights, to get past the danger which they indicated; and while he could not recklessly disregard the fact that the defendants were operating cars over that line, he was not, as a matter of law, bound to look or listen before making an effort to get out of the danger which seemed both obvious and imminent. At least, we think the situation was one which was properly submitted to the jury, and that its verdict, in the absence of legal error, ought not to be disturbed.

We have examined the matters alleged to constitute error in the trial of this case, but we do not find that the rights of the defendant have

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been prejudiced, and we reach the conclusion that the judgment and order appealed from should be affirmed.

Judgment and order affirmed, with costs.

HIRSCHBERG, P. J., and RICH, J., concur.

GAYNOR, J. (dissenting). The motion to dismiss should have been granted. The facts of this case are simple, once you get through the drudgery of picking them out of the mass of useless matter which counsel on both sides seemed bent on accumulating on the trial. The deceased was driving about midnight in a light one seat wagon along a suburban country road on which there was an electric street railway. Another man was seated with him. They saw two or three red lanterns ahead of them suspended in the road, indicating that some work was going on there, and that that part of the street was obstructed. The deceased turned his horse upon the railway track to go by the place where the lanterns were, and his wagon was forthwith run into by a car that came up behind him and he was killed. It all happened in a few seconds. The car was fully lighted by electricity. Neither the deceased nor his companion, as appears from the testimony of the latter, who was sworn by the plaintiff, looked back, or listened, or did anything to find out if a car was coming before turning into the track. They were talking about wagons. They were in no place of danger when they turned; they simply saw some warning lights ahead and turned. Their negligence was gross, and that it contributed to the accident is beyond doubt. The case is of a class familiar to us all. If the deceased had been driving along on the track before he was hit, which is by no means as strong a case for the defendant, it seems there could be no recovery. Belford v. B. H. R. Co., 86 App. Div. 388, 83 N. Y. Supp. 836. He turned into the track where he knew cars ran at high speed, and was bound to look before doing so. Even one afoot would not be excused for omitting to do so. Reed v. Metropolitan R. Co., 180 N. Y. 315, 73 N. E. 41. Reasonable prudence is to look when you can.

The judgment should be reversed.

MILLER, J., concurs.

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## COAN v. PATRIDGE.

(Supreme Court, Trial Term. Onondaga County. March, 1906.)

GUARANTY—CONSTRUCTION.

A guaranty of the payment of all moneys to become due from a merchant for merchandise did not extend to the liability of a firm composed of the merchant and one whom he subsequently took into partnership with him.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Guaranty, § 30.]

Action by Helen M. Coan, individually and as executor of Amos S. Coan, deceased, against Grover Patridge. Complaint dismissed.

Eugene M. White, for plaintiff.

Willis C. Ellis, for defendant.

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ROGERS, J. Trial by the court without a jury. This action was brought upon the following guaranty:

"For a good and valuable consideration to me in hand paid, I, the undersigned, guaranty the payment to Amos S. Coan & Co. of all money now due or hereafter to become due and owing by Harriet D. Patridge. The consideration herein referred to is the extension of credit, and the further sale of merchandise on credit; also the sum of one dollar to me in hand paid.

"Dated October 10, 1899.

"[Signed] Grover Patridge."

At the time of the making of the guaranty, Harriet D. Patridge, the principal, was engaged in the retail grocery business at Clifton Springs, N. Y. She was an invalid, confined to her room. The guarantor, Grover Patridge, was her husband, and was actively engaged in conducting the business. What amount was due the plaintiff at the time of the making of said guaranty, or what indebtedness, if any, accrued between that time and April 1, 1902, when she took her son, D. Wells Patridge, in copartnership with her, does not appear. There is no claim, however, that such indebtedness, if any, has not been paid. Between August 13, 1903, and March 12, 1904, the plaintiff sold and delivered to the firm of H. D. Patridge & Son goods to the value of $525.67, on which was credited, October 9, 1903, for goods returned, $7.80, leaving a balance of $517.87. On the 11th of April, 1904, said Harriet D. Patridge and D. Wells Patridge, copartners, were adjudged bankrupts. A trustee was appointed, who administered the estate in bankruptcy, and the plaintiff received dividends amounting to $59.14, leaving a balance unpaid of $458.73. The plaintiff now seeks to recover this sum from the defendant, upon the theory that the members of a firm are individually liable for the debts of the copartnership, and cites Judd Linseed Oil Co. v. Hubbell, 76 N. Y. 543, 546, and Amsterdam v. Rayher, 43 App. Div. 602, 60 N. Y. Supp. 330. As I understand, the claim is that Harriet D. Patridge, being individually liable, she, as a member of the firm, is still covered by the guaranty of payment "of all money now due or hereafter to become due and owing by Harriet D. Patridge," though contracted by H. D. Patridge & Son. The plaintiff's counsel in his brief says:

"This action is not brought for goods sold to the firm, but is brought to recover a debt for money due and owing to plaintiff from one of the individual members of the copartnership"—

And therefore he urges his right to recover.

The complaint, nevertheless, alleges that:

"Between August 13, 1903, and March 12, 1904, * * * this plaintiff * * * sold and delivered to the firm of H. D. Patridge & Son goods, wares, and merchandise, consisting of wholesale groceries, to the amount and the agreed price and value of $525.67."

It is to recover for a debt contracted in the purchase of goods by the said firm.

It is evident that an action brought against Harriet D. Patridge & Son would, necessarily, be for goods sold and delivered, and that no action could be maintained against her alone for the sale of the goods; it would have to be brought against the members of the firm. She could not be sued alone. Mason v. Wells, 2 Hun, 518; Speyers v. Fisk, 3

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Hun, 706. How does a creditor obtain a greater right against his debtor's guarantor than he has against the debtor himself? What can he do against the one which he cannot do against the other? The surety is not to be held beyond the precise stipulations of his agreement. Gates v. McKee, 13 N. Y. 232, 237, 64 Am. Dec. 540. It is to be strictly construed, and it does not matter whether a departure from the contract guarantied is or is not injurious to him. Page v. Krekey, 137 N. Y. 307, 33 N. E. 317, 21 L. R. A. 409, 33 Am. St. Rep. 731. It seems to me that a guaranty of an individual cannot be extended so as to cover the liability of a firm of which the individual subsequently becomes a member. Barns v. Barrow, 61 N. Y. 39, 42, 19 Am. Rep. 247; Burch v. De Rivera, 53 Hun, 367, 6 N. Y. Supp. 206; Bennett v. Draper, 139 N. Y. 266, 34 N. E. 791; Mayer v. Cook (Sup.) 57 N. Y. Supp. 94; Peabody v. Boutwell, 69 Hun, 361, 23 N. Y. Supp. 625; Davis S. M. Co. v. Lawrence, 3 Thomp. & C. 386.

Reasons might be suggested whereby a person could safely stand as surety for one, when he would be quite unwilling to guaranty for that individual and another whom he might associate with himself as copartner. One is patent. The business ability and integrity of the incoming partner might make a material difference in his estimate of the risk; and if he were compelled to stand for two, or for one who has given power to another to bind the two by the contract of the newcomer, it would place upon him an obligation other and perhaps quite beyond what was originally contemplated.

My conclusion, therefore, is that the guaranty in question does not extend so far as to make the defendant responsible for direct or indirect liability of Harriet D. Patridge to the plaintiff as a member of the firm of H. D. Patridge & Son.

The complaint will be dismissed, with costs.

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## ST. REGIS PAPER CO. v. SANTA CLARA LUMBER CO.

(Supreme Court, Appellate Division, Third Department. March 7, 1906.)

1. PLEADING—BILL OF PARTICULARS—MOTION—SUPPORTING AFFIDAVITS.

A motion for a bill of particulars, though made by a corporation, must be founded on the affidavit of the party; the affidavit of the attorney alone being insufficient, unless some well-stated reason exists why the affidavit of the party cannot be secured.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 978.]

2. SAME—ABSENCE OF OFFICERS.

The fact that no officer of defendant corporation was within the county when the motion was made by defendant for a bill of particulars was not a sufficient reason why the supporting affidavit was not verified by one of such officers instead of the attorney.

3. SAME—KNOWLEDGE OF AFFIANT.

Where the attorney for defendant corporation in making an affidavit for a bill of particulars did not assume to have personal knowledge of the essential facts, but averred that he had conferred with the officers of defendant, and had been informed by them and each of them that they never took or converted any such "other machinery," as was alleged in the complaint, and had no knowledge as to what such allegation referred to, and had been unable to ascertain the same, such affidavit was insufficient.

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Appeal from Special Term, Franklin County.

Action by the St. Regis Paper Company against the Santa Clara Lumber Company. From an order requiring plaintiff to serve a bill of particulars, plaintiff appeals. Reversed.

Argued before PARKER, P. J., and SMITH, CHESTER, and COCHRANE, JJ.

Elon R. Brown, for appellant.

Andrew J. Nellis, for respondent.

CHESTER, J. In the complaint it is alleged that "the defendant wrongfully and unlawfully took and carried away and converted to its own use property of the plaintiff of the value of ten thousand dollars, consisting of a large gang, planer, pulleys, shafting, and other machinery." The order appealed from requires the plaintiff to serve upon the defendant's attorney a bill of particulars of the property mentioned in the complaint, which shall state in detail what the "other machinery" mentioned in the complaint consisted of, and that the exact item and value thereof be given. The order was granted solely upon the affidavit of one of the defendant's attorneys, in that he states that he "has conferred with the officers of the defendant, and has been informed by them, and each of them, that they never took or converted any such 'other machinery,' as is alleged in the complaint; that they have no knowledge as to what said allegations refer to, and have been unable to ascertain the same." The only reason given why the affidavit is not verified by one of the officers of the defendant is "that no officer of the defendant is at the date hereof within the county of Franklin." In Toomey v. Whitney, 81 App. Div. 441, 80 N. Y. Supp. 826, the court says, with reference to an application for a bill of particulars:

"The rule of practice is well settled that motions of this kind must be founded upon the affidavit of the party, and the affidavit of the attorney alone is insufficient, unless some well-stated reason exists for a departure from this rule"—citing authorities.

The fact that the defendant is a corporation does not change the rule. Dueber Watch Case Mfg. Co. v. Keystone Watch Case Co. (Sup.) 21 N. Y. Supp. 342.

While there may be circumstances which will justify the court in granting an application for a bill of particulars upon the affidavit of the attorney of a party, yet no sufficient reason appears in the moving affidavit here for a departure from the rule stated. The reason assigned in the affidavit, that no officer of the defendant was at the date of the verification of the affidavit within the county of Franklin, was insufficient under the authorities. Cohn v. Baldwin, 74 Hun, 346, 26 N. Y. Supp. 457; Dueber Watch Case Mfg. Co. v. Keystone Watch Case Mfg. Co., supra; Wolff v. Kaufman, 65 App. Div. 29, 72 N. Y. Supp. 500.

The attorney does not make it appear that he had personal knowledge of the essential facts. Nor does he assume to have. If the officers of the defendant had no knowledge of what the term "other machinery" referred to, that fact should be shown other than by the unsworn statements of such officers to the attorney. Under such circumstances,

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the affidavit of the attorney is insufficient. Mungall v. Bursley, 51 App. Div. 380, 64 N. Y. Supp. 674.

The order should be reversed, with $10 costs and disbursements, and the motion denied, with $10 costs, but with leave to the defendant to renew its application upon new or additional papers. All concur.

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## SUTHERLAND v. AMMANN.

(Supreme Court, Appellate Division, Second Department. April 27, 1906.)

1. APPEAL—NONSUIT—REQUESTED AMENDMENT.

The appeal from a nonsuit in an action, the complaint in which is drawn on the theory of defendant's liability because of a violation of the labor law, and which does not allege facts necessary to bring the case within the employers' liability act, cannot, by reason of plaintiff's request after the nonsuit to amend the complaint, be aided on the ground that the case is within the latter act.

2. MASTER AND SERVANT—INJURY TO EMPLOYÉ—DEFECTIVE SCAFFOLDING.

A scaffolding for the erection of a temporary partition in a store, to protect goods therein from dust while alterations of the building were being made, from which one employed only for work on such partition was injured, is not within Labor Law, Laws 1897, p. 467, c. 415, § 18, declaring a person employing another to perform labor in the "erection, repairing, altering, or painting of a house" shall not furnish for the performance of such labor scaffolding unsuitable to give proper protection to the life and limb of a person so employed.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 207.]

Jenks, J., dissenting.

Appeal from Trial Term.

Action by Daniel W. Sutherland against Frank Ammann. From a judgment dismissing the complaint at the close of plaintiff's evidence, plaintiff appeals. Affirmed.

Argued before WOODWARD, JENKS, HOOKER, RICH, and GAYNOR, JJ.

Ira Leo Bamberger, for appellant.

Francis I. Osborne, for respondent.

WOODWARD, J. The plaintiff brings this action to recover damages for personal injuries alleged to have been sustained through the negligence of the defendant, and, having been nonsuited, is entitled to have the questions reviewed from the standpoint that all of the facts and inferences are such as the jury might properly have found from his evidence. The complaint in the action is drawn upon the theory that the defendant is liable to the plaintiff because of a violation of the provisions of section 18, c. 415, p. 467, Laws 1897, known as the "Labor Law," but the appeal is sought to be maintained upon the further ground that the case comes within the provisions of the employers' liability act; and it is urged that this question is in the case because of the fact that the plaintiff alleges that he gave the notice required by such act within 120 days of the happening of the accident. The case as pleaded, and as the pleadings stood when the motion to dismiss the

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complaint was granted, did not allege the facts necessary to bring the case within any of the provisions of the employers' liability act, and the rule is well settled that where the action depends upon a statute, the plaintiff must, by pleading and proof, bring the action within the terms and conditions of the statute. Lewis v. Howe, 174 N. Y. 340, 343, 66 N. E. 975, 1101, and authorities there cited. We may, therefore, pass over this contention of the plaintiff without further comment, for obviously the request of the plaintiff to amend his complaint after the motion had been granted could give no rights on this appeal.

The plaintiff was a carpenter, employed with others by the defendant in erecting a temporary dust partition in the store occupied by James McCreery & Co., on West Twenty-Third street, in the borough of Manhattan. This partition was made necessary by the fact that the owners of the premises contemplated making additions or alterations in the building, but it does not appear that the defendant had anything to do with making such alterations or additions; he was simply employed to erect this dust partition, to protect the goods of McCreery & Co. while the other work was being done, and the accident to the plaintiff resulted from the faulty construction of a scaffolding which was brought into use in the construction of this temporary partition.

The question presented by this appeal is whether this scaffolding, erected by the plaintiff and others, under the supervision of the defendant's foreman, comes within the legislative intention, and makes the defendant liable because it fell and produced the plaintiff's injuries. It seems that this partition was constructed by nailing boards upon timbers standing on end, and about 18 feet long, extending from the floor to the ceiling. When the carpenters had placed the boards as high as they could reach from the floor, the plaintiff, under the direction of defendant's foreman, assisted in constructing certain brackets, which were fastened to the partition for the purpose of placing boards upon them for a platform. Instead of using six brackets, only five were employed, the ends of some of the boards being placed upon the round of a ladder, which was stood up against a partition running at right angles with the one on which the work was being done. The plaintiff and defendant's foreman mounted this scaffolding and engaged in work. When the foreman came to get down from the platform, the ladder slipped in some way, and the scaffolding was saved from collapse only by these men holding onto some projection at hand. The foreman then went down to the floor, and the plaintiff says that the foreman said that the ladder was unsafe, and that he would fix it, and that, relying upon this assurance, the plaintiff continued his work, when suddenly the ladder slipped along the wall, and the platform fell, with the result that the plaintiff was injured. It is not suggested that there was any defect in the ladder as a ladder, or that there was any lack of suitable material for constructing a safe scaffolding. Indeed, it appears that six brackets were made, but that the ladder was used by the direction of the foreman, with the full knowledge of the plaintiff, and with subsequent notice that it was not safe, and yet he seeks to recover of the defendant for injuries from the falling of this scaffolding, due to a cause equally as obvious to him as it was to the foreman or to any other man of experience. But this goes, perhaps, to the ques-

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tion of contributory negligence, and we prefer to determine this appeal upon the broader question of the liability of the defendant under the circumstances of the construction of this scaffolding in the construction of a mere temporary partition, constituting no part of the work of erecting, repairing, altering, or painting of a house, building, or structure, within the fair contemplation of the statute under which this action is brought. In a dissenting opinion in Welk v. Jackson Architectural Works, 98 App. Div. 247, 253, 90 N. Y. Supp. 541, which has since received the approval of the Court of Appeals, I took occasion to say:

"It seems to me that section 18 of the labor law is given its legitimate effect when the employé is given a cause of action for the neglect of the master in furnishing a safe scaffold, where it is the duty of the master to furnish such scaffold. If this so-called 'scaffold' had been erected by the master, and the plaintiff had been called upon to perform some service which required his presence upon the beam, and the beam had turned over and produced the fall, there would be reason for holding the master liable; but when we find the plaintiff engaged in a general employment, necessitating the placing of this beam for the primary purpose of supporting the iron girders, and the latter is injured by a failure on the part of fellow servants to securely fasten the beam, it is hard to conceive of any duty which the master owed the plaintiff and which he has failed to discharge. If the law has reached a point of development where the master must personally attend each detail of construction, and must personally test each step of the laborer in order to determine that the latter may perform the work in safety, it is well that the fact be known, that employers may protect themselves, either by adding to the contract price sufficient to pay for this added burden, or by such other means as may be pointed out."

I am unable to distinguish this case in principle from the one at bar. The plaintiff not having pleaded the employers' liability act, or the facts necessary to constitute a cause of action under such act, the fact that the person who had charge of this work was a foreman, and exercised the powers of a superintendent, has nothing to do with the case. He was a fellow servant of the plaintiff, and they were engaged in the details of the work. It may be conceded that a scaffolding became necessary in the course of the work, though it does not appear from the evidence that the work might not have been done equally as well by the use of ladders, or some other means of carrying the boards into position; but this was a mere detail of the work. It was not the duty of the master to stand around and wait for the work to be done up to a certain point, and then to construct a scaffolding that the work might be completed. He had done his duty when he had furnished the materials and competent fellow servants for performing the work in hand, and the construction of this scaffolding was as much a detail of the work as would be the placing of the boards and nailing them in position. But, as suggested in Schapp v. Bloomer, 181 N. Y. 125, 128, 73 N. E. 563, 564, the statute could hardly have been intended to cover such a case as is presented by the evidence in this record. "What the Legislature evidently had in mind," say the court, "was scaffolding on buildings or structures where its use was obviously dangerous to life and limb of an employé thereon in case of a fall. If ordinary staging, put up in a room from four to six feet above the floor, to facilitate the placing of fixtures, was intended to be included

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as among the specified cases, we should find it difficult to suggest a scaffold that would not fall within the limitation of the statute. To so hold would practically extend it to all cases in which scaffolds are used. This would be an unauthorized departure from the rule of construction to which we have called attention." The scaffolding here under consideration was a few feet higher than that suggested by the court, but there is no difference in the principle, and we are persuaded that the plaintiff is not within the spirit of the act, and that the nonsuit was properly granted.

The judgment appealed from should be affirmed, with costs. All concur, except JENKS, J., who dissents.

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## MARTIN v. FLAHIVE et al.

(Supreme Court, Appellate Division, Second Department. April 27, 1906.)

1. MECHANIC'S LIEN—MATERIALMAN'S LIEN—LIABILITY OF PRINCIPAL CONTRACTOR.

Where a principal contractor on a default of a subcontractor undertook with the consent of the owner and a materialman, who had furnished materials to the subcontractor, to complete the work, the right of the materialman to claim a lien on the money coming due under the contract from the principal contractor to the subcontractor continued as if the subcontractor had completed his contract.

2. SAME.

A principal contractor on the default of a subcontractor undertook, with the consent of the owner and a materialman who had furnished materials to the subcontractor, to complete the work. The principal contractor failed to complete the work, and the owner did so. *Held*, that the lien of the materialman for materials furnished was not affected.

3. SAME—NOTICE OF LIEN—SUFFICIENCY.

A materialman furnished materials to a subcontractor, who failed to complete his contract. It was agreed that the principal contractor should complete it, and on his failure to do so the owner completed it. The notice of the lien filed by the materialman was in terms under the subcontractor's contract, and against him as subcontractor, and did not allege that the principal contractor undertook to complete the contract, or that on his default the owner completed it. *Held*, that the notice was sufficient; it being immaterial who completed the contract.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Mechanics' Liens, § 241.]

4. SAME—ACTION TO ENFORCE MECHANIC'S LIEN—COMPLAINT—SUFFICIENCY.

A complaint in an action to enforce the lien of a materialman furnishing materials to a subcontractor, who defaulted, alleged the default of the subcontractor, and that the principal contractor agreed to and did complete the contract, and did not allege that the principal contractor also defaulted, and that the owner completed the work. *Held*, that the complaint was sufficient; the essential fact to be alleged being that the work was completed.

5. PLEADING—AMENDMENT—AUTHORITY OF COURT.

The trial judge has power to amend a complaint at the end of the trial to conform to the evidence.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig Pleading, §§ 664–669.]



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6. MECHANIC'S LIEN—DEFAULT OF SUBCONTRACTOR—LIABILITY OF PRINCIPAL CONTRACTOR—COMPLETING THE CONTRACT.

A materialman furnished materials to a subcontractor, who defaulted. Thereupon the principal contractor agreed to complete the work. *Held*, that the principal contractor did not thereby make himself personally liable for the claim for the materials; the only effect of his undertaking being to preserve the right of the materialman to claim a lien to the extent of any overplus remaining of the subcontractor's contract price after deducting the cost of completion.

7. CONTRACTS—CONSIDERATION.

A materialman furnished materials to a subcontractor, who defaulted. The principal contractor thereupon undertook to perform the contract. The principal contractor assured the materialman that he would get his pay. *Held*, not to show a contract on the part of the principal contractor to pay, but only a promise made without consideration.

8. MECHANIC'S LIEN—BURDEN OF PROOF.

Where a materialman, who furnished materials to a subcontractor making a default in his contract, sought to enforce his lien against the principal contractor, who undertook to complete the contract, and the owner, who was obliged to complete it on default made by the principal contractor, the materialman has the burden of showing the actual cost of completing the contract.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Mechanics' Liens, § 556.]

Appeal from Special Term, Orange County.

Action to foreclose a lien by James G. Martin against Patrick J. Flahive and others. From a judgment for plaintiff, and from an order to conform the complaint to the proof, defendants Patrick J. Flahive and Edgar E. Krowl appeal. Conditionally reversed.

The appellants contracted with the state commission in lunacy to do building work at the State Hospital at Middletown for $14,190.

Lovely subcontracted with the appellants to furnish part of the materials and do part of the work called for by their contract for $4,200. He entered upon the execution of his contract and purchased material therefor of the plaintiff of the value of $1,893.45, and it was all delivered at the work. He defaulted on his contract. He had then used about one half of the material furnished by the plaintiff and the other half lay at the work.

Thereupon the state architect in charge, the appellants, the plaintiff, and Ketcham, whom Lovely also owed $374 for material, met, and it was figured up by the architect that after deducting the indebtedness of Lovely for material, and the amount he had been paid on his contract, there yet remained an unexpended balance thereunder of $500. The appellants were then asked by the architect if they would complete the said contract. They said they would and proceeded with the work. It was stated at such meeting that they were to use the material of Lovely on the ground, including that of the plaintiff, and they did so. The arrangement was assented to all round.

The appellants afterwards defaulted on their contract, and the said commission completed it, there being at the end a balance in their favor of $4,428.59, now in the hands of the treasurer of the said hospital, who is a defendant here as stakeholder. Lovely is also a defendant, but these appellants alone answered, except another defendant who did not litigate.

The appellants filed a lien for their claim after the work was all completed by the commission, and this suit is to foreclose such lien.

Other facts are in the opinion.

Argued before HIRSCHBERG, P. J., and WOODWARD, GAYNOR, RICH, and MILLER, JJ.

Michael Danaher, for appellants.

Geo. H. Decker, for respondent.

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GAYNOR, J. The appellants by undertaking with the consent of all concerned to complete Lovely's defaulted contract with them on his account, continued the right of lien which the plaintiff had on the money to come due under such contract the same as if Lovely had continued and completed it. They thereby kept their contract price with Lovely a separate fund and subject to the plaintiff's lien against it, to the extent of any unexpended balance of it remaining after the work to be done by Lovely had been completed by them. The legal effect was the same as if there were a clause in the contract giving them a right to complete, and they acted under it. Their position was the same as that of an assignee of Lovely's contract, or if his bondsman for the performance of his contract if he had stepped in to complete it. Harley v. Mapes Reeves Construction Co., 33 Misc. Rep. 626, 68 N. Y. Supp. 191; Smith v. Lange, 81 App. Div. 192, 80 N. Y. Supp. 1078; Wheeler v. Scofield, 67 N. Y. 311; Van Clief v. Van Vechten, 130 N. Y. 571, 29 N. E. 1017. The fact that they afterwards defaulted on their contract with the state commission in lunacy does not change the case, for the latter under a provision in the said contract also elected to and did complete such contract on their (the appellants') account, including the work they left undone on Lovely's contract, and has in its hands an overplus for the appellants or any intervening lienor who is entitled to it of $4,428.52.

The notice of lien is in terms under the Lovely contract, and against him as subcontractor. It does not allege that he defaulted and that the appellants undertook to complete his contract on his account, or that they defaulted and the commission in lunacy completed their contract on their account. Nevertheless it suffices. If it had been filed before Lovely defaulted and the appellants had undertaken to complete his defaulted contract on his account it would have been good as against any and all successors to Lovely, and I do not see how the filing of it after the work had all been completed by the appellants and the commission makes a different case. It is good evidence against Lovely's successors; they stand in his shoes. It is in terms under Lovely's contract with the appellants, and it does not matter who carried that contract out.

The amended complaint alleges the default of Lovely, and that the appellants agreed to and did complete his contract. It does not allege that they also defaulted and that the commission completed on their account, but that was not necessary. It matters not whether he or his immediate or remote successor completed it; the essential fact to be alleged was that it was completed.

The appeal from the order amending the complaint at the end of the trial to conform to the evidence by making it allege the agreement by which the appellants completed Lovely's defaulted contract is without foundation. The trial judge had power to do it, and if he had not done it, it could have been done here, if necessary to uphold the judgment, as is too well known among us to call for the citation of authority.

There is a trouble with this judgment, however. It is for the plaintiff's full claim of $1,893.45. This is based on a finding of fact that the appellants agreed to pay to the plaintiff the amount due to him from

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Lovely, and a conclusion of law that that sum is due from the appellants to the plaintiff. There is no evidence to support such finding. By stepping in and completing Lovely's defaulted contract on his account the appellants did not make themselves liable personally for the claims against him for material or work; the only effect in law was to preserve the right of lienors in respect of such claims to the extent of any overplus remaining of Lovely's contract price after deducting the cost of completion. If in agreeing to complete such contract they had told the plaintiff, as is claimed, that they would pay his claim, that would not have been a binding promise, for there was no consideration for it. The only evidence on that head is by the plaintiff and Lovely at the very end, as if by afterthought. That of Lovely is that after the appellants had agreed to complete his contract, at the interview of all of them with the state architect where that arrangement was made, one of the appellants said to the plaintiff: "You may not feel uneasy because we will pay you in full"; and the plaintiff says the statement was that "I could rest assured I would get my money, and that he would pay me." This was no contract to pay, but only a naked promise, if it was made at all. The three disinterested witnesses present make no mention of it.

The judgment can therefore be justified only if after the completion of Lovely's contract by the appellants there was an unexpended balance of the contract price of $4,200 sufficient to pay the plaintiff in full. But there is no finding of the actual cost of completion, or of any such balance.

When the appellants, and after them the commission, undertook to complete, they became the trustees therein of all concerned, and had to render an account of all expenditures under their trust on demand, which account would bind all unless excepted to and impeached. The burden of proof was on the plaintiff to show the actual cost of completion. Beecher v. Schuback, 1 App. Div. 359, 37 N. Y. Supp. 325. The plaintiff gave no evidence of such cost. The appellants rendered no account, but proved by two witnesses that they paid $1,699.30 for labor, $324.87 for material, $111.78 for board for workmen, and that the commission paid $131.03 for work. If these items be added to the sum of $1,874.45, paid by the appellants to Lovely before he defaulted, we have a total of $4,141.43, and if this be taken from the contract price of $4,200, there remains a balance of only $58.57. The plaintiff in no way impeached these items. Lovely testified that in his judgment the contract could have been completed for $500, but this evidence was not permissible and is of no probative force. It was not a question for opinion evidence, but of the actual amounts necessarily expended by the trustees to complete the contract. Lovely had already sworn that when he defaulted "about three-fourths of my work was not done." The finding of fact that his contract was nearly completed when he defaulted rests on no evidence whatever.

Unless the plaintiff consents to reduce the amount of his judgment to $58.57, the judgment will have to be reversed and the case sent back. If it go back it is by no means meant that the parties are obliged to rub all of the evidence out and take it over again, and pay a stenographer

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for it, and also for the printing of it, a second time. On the contrary, only additional evidence is needed, if there be any, to show what the actual cost of completion was, and the parties may consent to that course.

The judgment is reversed and a new trial granted, unless the plaintiff consents to reduce it to $58.57; the order is affirmed.

**Judgment reversed and new trial granted, costs to abide the final award of costs, unless the plaintiff stipulate within 20 days to reduce the recovery to $58.57, in which event the judgment is affirmed as so reduced, without costs. Order affirmed without costs. All concur.**

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## MACDONALD v. MACDONALD.

**(Supreme Court, Appellate Division, Second Department. April 27, 1906.)**

**APPEAL—REVIEW—FAILURE TO PRESENT QUESTION BELOW—INSTRUCTIONS.**

**Code Civ. Proc. § 1726, provides that, where a verdict awards a chattel to plaintiff, it must fix the value of the chattel at the time of the trial. The court instructed that defendant should return a certain chattel, or the value thereof, which amounted to a certain sum, and the judgment directed defendant to restore the chattel, or pay to plaintiff the sum mentioned by the court. *Held*, that the judgment was not open to an attack on appeal, on the ground that there was no evidence to show the value of the chattel at the time of trial; it not appearing that defendant took any exception to the court's instruction, or made any request that the present value be submitted to the jury.**

Appeal from Trial Term.

Action by J. A. Macdonald against Benjamin J. Macdonald. From a judgment in favor of plaintiff, and from an order denying a motion to set aside the verdict and for a new trial, defendant appeals. Judgment and order affirmed.

Argued before HIRSCHBERG, P. J., and WOODWARD, JENKS, HOOKER, and MILLER, JJ.

John M. Perry (Robert J. Fox, on the brief), for appellant.

Jonathan Deyo, for respondent.

WOODWARD, J. In April, 1900, the plaintiff purchased 87 shares of a local corporation in Newburg. At the same time the defendant purchased 88 shares of the same stock, separate certificates being issued to each of them. They were at the time engaged in business as copartners, but this stock transaction appears to have been independent of such partnership, and the purchases to have been individual transactions. The plaintiff's version, which has been accepted by the jury, is that the defendant asked the plaintiff for his certificate for the purpose of placing internal revenue stamps upon the same, and that the defendant has since retained the certificate, although the plaintiff has demanded its return. On the trial of the action there was some evidence of the cost price of this stock, and of its value some considerable time before the trial of the action, and it is urged upon this appeal that, there being no evidence to show the value of the chattel at the time of the trial, as provided by section 1726 of the Code of Civil Procedure,

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the judgment which directs the defendant to restore the stock or pay to the plaintiff the sum of $1,740 is contrary to law, and cannot be supported.

Whatever we might think upon this point if the determination of the question were necessary, we are of opinion that the defendant is not in a position to question the judgment. The learned court charged that, if the jury found the facts in favor of Joseph, the defendant should "give him back the 87 shares, or the value thereof, which, on the evidence, I charge you is $1,740." There was no exception to this portion of the charge, and the question of the present value was not submitted to the jury, nor was there any request that it should be submitted. The rule is well settled that, where the trial court in its instructions assumes the existence of certain facts, it will be presumed on appeal that such facts were admitted or conclusively proved. 11 Ency. of Pl. & Pr. 136; O'Laughlin v. Hammond & Co., 21 N. Y. St. Rep. 645, 647, 4 N. Y. Supp. 582; Govers v. Hofstatter, 41 App. Div. 384, 385, 58 N. Y. Supp. 550, and authorities there cited. The charge of the court was that the value of the shares at the time of the trial (for the charge spoke of the present) was $1,740, and "the only remedy is an exception to a refusal to supply the omission or to correct the false assumption, at the request of the party aggrieved, at the time the error is committed." Govers v. Hofstatter, supra.

It is conceded that there was a conflict of evidence upon the other issues involved in this case, and, the jury having found in favor of the plaintiff, we are of opinion that there is no warrant for disturbing the judgment.

The judgment and order appealed from should be affirmed, with costs. All concur.

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## HILDRETH v. MERCANTILE TRUST CO. et al.

(Supreme Court, Appellate Division, Second Department. April 27, 1906.)

PLEADING—MOTIONS TO STRIKE—FRIVOLOUS DEMURRER.

Where a demurrer is not so plainly bad as to require no argument to show it so, and a bare inspection does not indicate that it was made in bad faith, it cannot be disposed of as frivolous.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 1101.]

Appeal from Special Term, Suffolk County.

Action by Joseph D. Hildreth against the Mercantile Trust Company and others. From an order disposing of a demurrer as frivolous, defendants appeal. Reversed, with $10 costs and disbursements.

Argued before WOODWARD, JENKS, RICH, and GAYNOR, JJ.

William F. Goldbeck (Bainbridge Colby, on the brief), for appellants Mercantile Trust Co. and Alvin W. Krech.

William C. Prime, for appellants McCook and Alexander.

Robert D. Murray, for respondent.

JENKS, J. We are of opinion that the demurrer is not so plainly bad as to require no argument to show it so, and that bare inspection of the pleading indicates that it was made in bad faith. Therefore, it

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cannot be disposed of as frivolous. Cook v. Warren, 88 N. Y. 37; Strong v. Sproul, 53 N. Y. 497; Shaw v. Feltman, 99 App. Div. 514, 91 N. Y. Supp. 114. The learned counsel for the respondent contends that we should go beyond the question of frivolousness to the merits, but, under our decision in Shaw v. Feltman, supra, we think that we should not do so.

The order should be reversed, with $10 costs and disbursements, and the motion denied, with costs. All concur.

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## In re WATERMAN'S ESTATE.

(Supreme Court, Appellate Division, Second Department. April 27, 1906.)

1. EXECUTORS—DUTIES—TRANSACTION OF BUSINESS.
   Where testator appointed three executors, one of whom was his daughter, the other two were not bound to transact business pertaining to the estate in the presence of the daughter's son, who was her personal attorney, and who made himself obnoxious to such executors.

2. SAME—GROUND FOR REMOVAL.
   The refusal of such executors to transact business of the estate in the presence of such attorney was not ground for their removal at the instance of the daughter, in the absence of a showing that the estate was suffering in any manner from their acts.

3. APPEAL—RECORD—CASE—ADMISSIONS.
   In proceedings for the removal of executors no evidence was taken. The decree of removal was made on the pleadings and admissions of counsel. All the facts found by the surrogate did not support such decree, and the record declared that it contained all the evidence taken or given on the trial of the proceeding. *Held*, that the fact that the admissions did not appear as a part of the case made and settled, as provided by Code Civ. Proc. § 2576, did not preclude defendants from a review of the facts on appeal.

Appeal from Surrogate's Court, Kings County.

Petition by Julia Kenyon for the revocation of letters testamentary, issued to Henry M. Waterman and Samuel H. Coombs. From a surrogate's decree removing such executors, and directing them to deliver the assets of the estate to petitioner, they appeal. Reversed.

Argued before JENKS, WOODWARD, HOOKER, GAYNOR, and RICH, JJ.

Robert H. Wilson, for appellants.

Thaddeus D. Kenneson (Ralph W. Kenyon, on the brief), for respondent.

WOODWARD, J. Henry Waterman died, leaving a last will and testament, which was duly admitted to probate in the county of Kings; letters testamentary being issued to Julia Kenyon, Henry M. Waterman, and Samuel H. Coombs, the executors named in such will, on the 21st day of October, 1904. Each of said executors qualified and entered upon the discharge of the duties of his office. In July, 1905, Julia Kenyon filed her petition and affidavit asking that a citation be issued requiring Henry M. Waterman and Samuel H. Coombs to show cause why a decree should not be made revoking the letters testamentary

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issued to them, and on July 15, 1905, a citation was issued requiring them to show cause why the letters testamentary issued to them upon the estate of Henry Waterman should not be revoked, as prayed in said petition. The citation was duly served upon the parties mentioned, and upon the return day of the citation the surrogate removed the executors, basing such removal upon the petition of the said Julia Kenyon, her affidavit, and the answers of Samuel H. Coombs and Henry M. Waterman, as construed by the said surrogate upon counsel's statement of the contents of such answer. Subsequently the learned surrogate made findings of fact and conclusions of law, passing upon proposed findings of fact and conclusions of law presented in behalf of Messrs. Coombs and Waterman, and on the 31st of July, 1905, entered his decree removing Samuel H. Coombs and Henry M. Waterman, and directing that they file and judicially settle their accounts, and also directing them to turn over to Julia Kenyon all assets of the deceased in their possession. Exceptions to the findings of fact and conclusions of law were filed by counsel, and exceptions were likewise filed to the surrogate's refusals to find proposed findings of fact and conclusions of law, and appeal comes to this court upon the record thus made up from the decree of the surrogate removing such executors.

It appears from the pleadings in this case, no evidence being taken (the learned surrogate reaching a determination to dismiss the two executors upon the statement of counsel of the contents of their answers), that the difficulty between the two executors who have been removed and the one upon whose petition such action was taken arises from the fact that Julia Kenyon, a daughter of the testator, insists on bringing her son, Ralph W. Kenyon, into all meetings of the executors, and the other two executors, because of the offensive conduct of the said Ralph W. Kenyon, have refused to act with the same Julia Kenyon in the presence of her son. The broad question is thus presented whether the mere fact that the two executors refuse to act in their capacity of executors in the presence of a person in nowise related to the office of executor, and whose conduct toward them is concededly offensive, is a sufficient justification for their removal, under the provisions of section 2685 of the Code of Civil Procedure; whether one of three executors named in the will of a testator may intrude her personal attorney into the affairs of the estate, regardless of the other two, thus bringing about a situation not contemplated by the language or the spirit of the will. We are clearly of opinion that Julia Kenyon had no such right under the circumstances, and that the two executors had a perfect right to refuse to conduct the affairs of the estate under the personal supervision of Ralph W. Kenyon. The law of this state permits a testator to nominate and appoint one or more executors. When this power is exercised, and more than one individual is named, the testator says, in effect, that he is unwilling to trust the carrying out of his desires to one individual, but that he intrusts it to the harmonious action of those whom he names; that while there are reasons why he desires the services of each, he is unwilling that any one of them should be controlling; that he desires his estate administered, not by the arbitrary will of one, but by the will of all, as modified and matured by mutual consultation. One of them may be venture-

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some and aggressive, another timid, and a third the embodiment of courage and decision, and it is the combined qualities of these individuals which he desires in his executor, for in contemplation of law there is but one executor, no matter how many individuals may be involved. 18 Cyc. 1330. The testator calls together those whose judgment, integrity, and business capacity command his approval, and says to them, in effect:

"I want you to join with each other in determining all questions arising under my will; the manner of dealing with my estate. I do not want the arbitrary judgment of any one of you, but the harmonious action of all in administering my estate, and producing the best results for my creditors and beneficiaries."

Obviously in such a scheme there is no place for the personal attorney of any one of these executors. The testator, if he had desired the services of four persons, rather than three, would have provided for it in his will; and, not having done so, and the several executors having accepted the trust as fixed by the testator, each has a right to insist that no one shall be admitted to their deliberations except those named by the testator. That is the fair intention of the testator as expressed in his will, and the intent of the testator in this, as in other respects, should control where it is in harmony with the law. The executors as a body would have an undoubted right to employ counsel if it became necessary, and it is not to be doubted that each individual executor would have the right to have the advice of counsel as to his or her individual duty in respect to the estate; but none of them has an absolute right to intrude his or her personal counsel into the meetings of the executors, for that would, in effect, be substituting the counsel for the individual named in the will, and the testator did not contemplate any such situation. In the present instance Julia Kenyon was one of two daughters of the testator; the other being incompetent. Henry M. Waterman is Julia Kenyon's brother, and is one of the executors named in the will, while the third member of the board of executors is Mr. Coombs, for years the personal counsel of the testator. The testator desired that his estate should be administered by his competent children to the extent that they should be in a position to look after their own interests, but he was likewise desirous of protecting his incompetent daughter against any selfish purposes on the part of the others, and to this end Mr. Coombs was made a third testator (at least, we may assume these to have been the considerations); and to remove two of these executors, and place the estate in the control of a single person, simply because the other two executors, who appear to be in perfect harmony, refuse to submit to the conduct of Julia Kenyon's son, is to defeat the very purpose which the testator had in mind in appointing three persons to administer his estate, and can be justified only upon the ground that the estate is suffering by reason of the disagreement of the executors. There is nothing in the record before us, which "contains all the evidence taken or given on the trial of this proceeding," which justifies the conclusion that any interest of the estate has suffered because of the refusal of the majority of the executors to transact the business of the estate in the presence of the personal counsel of Julia Kenyon, and the rule is well settled that, while the court may remove an executor who has unfriendly relations with a

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coexecutor, if the interests of the estate are thereby jeopardized, such remedy will not be applied merely because there is a disagreement between them, or to gratify the malice or bad feeling of one against the other. 11 Am. & Eng. Ency. of Law, 824, and authorities cited in note 1. Neither of the executors who have been removed has refused to transact business with Julia Kenyon, the person whom the testator named as a coexecutor with them; they have simply declined to transact business with her in the presence of a person who is an entire stranger to the board of executors as created by the will under which they are acting, and, as we have already pointed out, they had a perfect right to do this. Julia Kenyon might refuse to act unless she was permitted to have her personal counsel present; she might refuse to act for any reason which pleased her; but she has no right to the removal of her coexecutors simply because they do not choose to act in the presence of one who appears to have been an active disturber of the harmony of the executors.

Viewing the question broadly (and it is the one which goes to the merits of this controversy, and appears necessary to the welfare of the estate), we are of opinion that the learned surrogate has erred in the exercise of the discretion vested in the court, and that the decree cannot stand. It defeats the lawful purpose of the testator to have his estate administered by persons of his own choosing, and does not promise any advantage to any of the material interests of the estate or of those beneficially interested.

Counsel for the petitioner urges that there are no questions of fact open for review upon this appeal, as it is suggested that the learned surrogate, in determining upon the return day of the order to show cause that the two executors should be removed, found the facts upon the pleadings and upon admissions of counsel in open court, and that these admissions do not appear as a part of the case made up and settled by the surrogate, as provided by section 2576 of the Code of Civil Procedure. We are of opinion, however, that, no evidence having been taken, and the record before us declaring that it contains all of the evidence taken or given on the trial of this proceeding, the exceptions to the findings of fact and conclusions of law and the exceptions to the refusal of the surrogate on the return day that he would remove the executors before making the findings and conclusions, could hardly be permitted to defeat the right of the appellants to a review of the facts as found by the learned surrogate afterward. But we do not think it necessary to review the facts as found by the learned surrogate, or his refusals to find, for the reason that, if all of the facts are just as he has found them, it does not justify the decree. Before executors duly nominated and appointed by a testator can be properly removed, it must be shown upon a fair trial that the interests of the estate, as distinguished from the caprice of an individual executor, are jeopardized; and a careful examination of the alleged facts in this case, many of which are not supported by admissions or by evidence of any character, fails to show such a situation.

The decree should be reversed.

**Decree of the Surrogate's Court of Kings County reversed, without costs. All concur.**

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## HAASE et al. v. SCHNEIDER.

(Supreme Court, Appellate Division, Second Department. April 27, 1906.)

BROKERS—COMMISSIONS—FAILURE OF NEGOTIATIONS.

In the absence of a special contract, a broker was not entitled to commissions on merely bringing a purchaser who was ready, willing, and able to pay the price demanded, where no sale was consummated because of a disagreement as to when the transfer should take place.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Brokers, §§ 75–81, 91–97.]

Hirschberg, P. J., dissenting.

Appeal from Municipal Court.

Action by Benjamin Haase and another against Heinrich Schneider. From a judgment for plaintiffs, defendant appeals. Reversed, and new trial ordered.

Argued before HIRSCHBERG, P. J., and WOODWARD, JENKS, RICH, and GAYNOR, JJ.

Louis J. Halbert, Jr., for appellant.

Isidor Buxbaum, for respondents.

WOODWARD, J. This is an action to recover certain commissions alleged to be due to the plaintiffs for services in negotiating the sale of certain real estate. In Sibbald v. Bethlehem Iron Co., 83 N. Y. 378, 38 Am. Rep. 441, it was laid down as the fundamental and correct doctrine "that the duty assumed by the broker is to bring the minds of the buyer and seller to an agreement for a sale, and the price and terms on which it is to be made, and until that is done his right to commissions does not accrue," and the authority of this case, or the correctness of the rule deduced, has never been questioned. Donovan v. Weed, 182 N. Y. 43, 46, 74 N. E. 563. In the case now before us it is conceded that the plaintiffs did not bring the vendor and purchaser to an agreement as to terms, and yet the plaintiffs have a judgment for the full amount of their claim. What was done was to bring a purchaser, who, we may assume, was ready, willing, and able to pay the price demanded by the defendant, and it was proper to find from the evidence that the parties did reach an agreement as to the price. When, however, it came to drawing the contract, there was a disagreement between the parties as to the time when the transfer should take place, as well as to other matters of detail; the defendant demanding that the title should be closed within a period of about 11 days, and the purchasers insisting upon having 30 days in which to close the transaction, and, to support the plaintiffs' contention that they were entitled to commissions under this state of facts, they were permitted to show an alleged custom in relation to the time of taking title, where no time had been agreed upon between the parties.

It is doubtful if the defendant's objection to the form of the question raises any question for review here, but we are clearly of opinion that, even though there was such a custom, it could not give the plaintiffs any rights in this action. In order that the plaintiffs might recover in this action it was necessary for them to show that the parties actually

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reached an agreement as to the terms and conditions of the sale, and this they have failed to do, because it appears that the parties never agreed to the conditions which the defendant named, and which he had a perfect right to insist upon. It might be that, if at the time of the employment of the plaintiffs it was agreed that the commissions should be earned when the latter had produced a party ready, willing, and able to pay the price named by the defendant at that time, the defendant could not, by imposing other conditions, defeat their right to commissions; but it nowhere appears that any contract of employment, other than the customary and legal contract of brokerage, was ever entered into, or that the defendant named any terms which the plaintiffs were at liberty to propose to purchasers which would bind the defendant further than as to the price. But, as we have seen, something more is required to earn commissions; the parties must be brought to an agreement, not alone as to the price, but as to the terms of exchange, the time of taking title, and all the incidents of the transaction. The minds of the parties must meet in a contract, the details of which are worked out and understood between them, and, because the plaintiffs have failed to show such a consummation of their labors, the judgment appealed from must be reversed.

The judgment should be reversed, and a new trial ordered.

**Judgment of the Municipal Court reversed, and new trial ordered; costs to abide the event. All concur, except HIRSCHBERG, P. J., who dissents.**

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## GURSKI v. DOSCHER.

**(Supreme Court, Appellate Division, Second Department. April 27, 1906.)**

1. CONTRACT—TIME OF PAYMENT.

**Where a contract for the construction of a building fails to fix a time for payment, the law fixes the completion of the work as the time for payment.**

**[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, §§ 980–988.]**

2. TRIAL—EVIDENCE—OBJECTIONS—SUFFICIENCY.

**An objection to the admission of evidence of a change in a contract on the ground that the same is incompetent, immaterial, and irrelevant, and as tending to vary a contract executed, does not raise the point that there is no consideration for the new agreement.**

**[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 211–213.]**

3. SAME—INSTRUCTIONS—OBJECTIONS—SUFFICIENCY.

**In an action for the value of work done and materials furnished, plaintiff claimed the making of a new contract, modifying the original contract. Defendant denied the making of a new contract. The court left it to the jury to determine whether a new contract was made. Defendant excepted to the instruction without raising the question of the invalidity of the new contract for lack of consideration. His request to charge omitted the same question. Held, that the objection that the new contract was invalid for want of consideration was not raised.**

Appeal from Trial Term, Kings County.

Action by Joseph Gurski against Claus Doscher. From a judgment for plaintiff, defendant appeals. Affirmed.

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The plaintiff submitted the following writing signed by him to the defendant, who was receiving estimates to build 22 houses on Wyona street, Brooklyn; "Mr. Claus Doscher: I hereby agree to do all the brick work for twenty two houses, two story and cellar, put in concrete for the foundations, for the sum of $4,600." The next day the defendant told him to go ahead with the work. Nothing else occurred between them, and the plaintiff went to work on the houses. After working a week the plaintiff asked the defendant on Saturday for money and the defendant gave him $300. He testifies that he said to the defendant that that was not enough to pay his men for the week, and that they had to make some arrangement that he could get more money, and that the defendant answered "All right, make an agreement out and fetch it to me." Five days later he handed to the defendant a paper signed by himself which set out seven payments at seven stages of the work, viz., when the brick work is ready for the first tier of beams, $40 for each house, when it is ready for the second, $40, and so on. He testifies that the defendant said "That is right, that is the way it is got to be done," and kept the paper. On the Saturday following the plaintiff went to the defendant for money, and the defendant offered him $300. He declined it. The defendant denied that he had agreed to pay by the stages, and said if the plaintiff did not take the $300 he would give him nothing until the contract was completed. The plaintiff testifies that he had 19 houses up to the first tier and 3 up to the second, which would make $840 due on the installment basis, less the $300 paid. As the defendant would not pay this the plaintiff quit. This action is to recover the value of the work done and material furnished.

Argued before HIRSCHBERG, P. J., and WOODWARD, JENKS, GAYNOR, and RICH, JJ.

Henry F. Cochrane, for appellant.

B. R. Duncan, for respondent.

GAYNOR, J. No time of payment having been fixed by the original contract the law fixed the time, viz., when the contract was completed. The defendant's counsel objected to the admission of the evidence of the change of the contract by providing for payments at stages of the work on the ground that it was "incompetent, immaterial and irrelevant, and as tending to vary a contract already executed between the parties." This general objection was of course not good; it did not raise the point that there was no consideration for the new agreement as is now urged. The difficulty with that is that there was no such objection taken on the trial. The court left it to the jury to say whether the new contract was made, the defendant having denied it on the witness stand. This was excepted to, but no question of invalidity for lack of consideration was raised. The exception was in terms to the charge (paraphrased by counsel) "that a binding contract could be subsequently modified between the parties." The request to charge has the same omission; indeed, it only asked the court to charge that "neither party" could change a contract. The brief for the appellant states that the foregoing is the only question the appellant submits.

The judgment and order should be affirmed.

Judgment and order of the County Court of Kings County affirmed, with costs. All concur.

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## DOUGHERTY v. McCOLLUM.

(Supreme Court, Appellate Division, Second Department. April 27, 1906.)

TRIAL—DISMISSAL—FAILURE TO ANSWER QUESTIONS.

The court is not justified in dismissing the complaint because of failure of plaintiff to satisfactorily answer questions on cross-examination; it appearing that there was no intentional or willful defiance of the court, but that he was trying to answer the questions.

Appeal from Municipal Court of New York.

Action by John T. Dougherty against Alexander J. McCollum. From a judgment dismissing the complaint, plaintiff appeals. Reversed, and new trial ordered.

Argued before HIRSCHBERG, P. J., and HOOKER, GAYNOR, RICH, and MILLER, JJ.

Charles Goldzier, for appellant.

Rodolphe Claughton, for respondent.

RICH, J. This action was brought to recover a balance alleged to be due the plaintiff for services. Upon the trial and before the plaintiff had rested his case, the court, upon its own motion, dismissed the complaint because of plaintiff's failure satisfactorily to answer questions propounded by defendant's counsel upon cross-examination. The proceeding was as follows:

"Q. Why were you at his house that night? A. He invited me down to talk it over. Q. To talk what over? A. To talk the business over. Q. What did you say? A. He said he didn't want anybody to know anything about his business. Mr. McDermott: I move to strike it out as not responsive. Motion granted. Stricken out. Q. What did you say? A. We talked the ice business over from beginning to end; that's what I said, and that's what he said. The Court: Strike that out; if he don't answer the question, I will dismiss the complaint. Q. Will you tell me the first thing you said, the very first time you went into Mr. McCollum's house? A. I told him everything I knew about the ice business, and he told me to go ahead. The Court: Complaint dismissed. Gentlemen of the jury, you are discharged."

We are convinced that there was no intentional or willful defiance of the court; on the contrary, we believe the witness was trying to answer the questions, and an effort on the part of the trial justice to aid him might have been wise. There was nothing in the conduct of the witness which would justify the court in inflicting such a punishment, and its action was without authority.

The judgment must therefore be reversed, and a new trial ordered; costs to abide the event. All concur.

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## BIOGIONI v. EGLEE BUNTING CO.

(Supreme Court, Appellate Division, Second Department. April 27, 1906.)

APPEAL—PRESENTATION OF GROUNDS FOR REVIEW—MOTION TO DISMISS.

Though defendant moved to dismiss at the close of plaintiff's case, where such motion was not renewed at the close of the entire evidence, the action of the trial court in submitting the issues to the jury is not open to review.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 1302.]

Hooker and Jenks, JJ., dissenting.

Appeal from Trial Term, Westchester County.

Action by Oreste Biogioni, an infant, by Peccini Emelio, his guardian ad litem, against the Eglee Bunting Company. From a judgment for plaintiff, and an order denying a motion for a new trial, defendant appeals. Judgment and order affirmed, with costs.

Argued before HIRSCHBERG, P. J., and WOODWARD, JENKS, HOOKER, and GAYNOR, JJ.

Gustav R. Hamburger, for appellant.

George W. Alger, for respondent.

WOODWARD, J. The plaintiff, an inexperienced Italian boy 17 years of age, was employed by the defendant in constructing a piece of railroad and ballasting the same in the city of Mt. Vernon. A car loaded with stones and dirt was being pushed by hand up an incline track, which had been constructed the day before. The plaintiff was one of the men so employed, under the direction of one Doran, the foreman. While the car was upon this incline, the whistle blew indicating quitting time, and the gang abandoned their work and started away. The car, thus left, started back down the track, and the foreman ordered the plaintiff to take his bar and stop the car; at least, there was evidence from which the jury might properly reach this conclusion. In attempting to obey this order of the foreman, the plaintiff was crushed under the bar which he used, in such a manner as to require the amputation of one of his limbs. The issues were submitted to the jury under a charge to which there are no pertinent exceptions, and a verdict for $10,000 has been found for the plaintiff. The defendant appeals from the judgment entered upon such verdict, and from the order denying a motion for a new trial upon the minutes, under the provisions of section 999 of the Code of Civil Procedure.

The action is brought under the provisions of the employers' liability act (chapter 600, p. 1748, Laws 1902), and the questions urged on this appeal are, for the most part, not open to the defendant, because not raised upon the trial. The defendant made a motion to dismiss at the close of plaintiff's case on various grounds, and took an exception to the refusal of the court to grant the motion; but at the close of the whole case this motion was not renewed, and the rule is well established that a failure to move at the close of the entire evidence for the dismissal of the complaint operates as an admission or concession that there are questions for the jury, and these, when dis-

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posed of by the triors of fact, are not open to review in the absence of such a motion.

An examination of the questions raised fails to convince us that the judgment is contrary to law, and all of the questions of fact being conclusively established by the verdict of the jury, the judgment appealed from, as well as the order, must be affirmed.

The judgment and order should be affirmed, with costs.

GAYNOR, J., concurs. HIRSCHBERG, P. J., concurs in result.

HOOKER, J. (dissenting). In view of the large amount of the verdict, I am of the opinion that the court cannot say that the remarks of the learned trial justice, commencing at folio 160, did not influence the size of the verdict, and perhaps this is a case where it should be reduced. The rule of law laid down in the opinion, at the close of the last proposition in the second paragraph, is not the true one, viz., "and these, when disposed of by the triors of fact, are not open to review in the absence of such a motion." Should the defendant fail, after having made a motion to dismiss the complaint at the close of plaintiff's case, to move for a direction at the close of the entire case, he might yet raise the question that the verdict was against the weight of evidence by a motion for a new trial.

JENKS, J., concurs.

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## DERBY v. DEGNON-McLEAN CONTRACTING CO. (two cases).

(Supreme Court, Appellate Division, Second Department. April 27, 1906.)

MUNICIPAL CORPORATIONS—DEFECT IN STREET—LIABILITY OF COMPANY CAUSING DEFECT—NEGLIGENCE.

Where a company placed planking four inches thick over a hole which it had lawfully made in the pavement at some distance from the usual crossing, and at a point where there was heavy traffic, and the street was well lighted, it was not guilty of negligence rendering it liable for injuries to a pedestrian caused by stubbing her toe on the planking.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 1630, 1688, 1689.]

Hooker, J., dissenting.

Appeal from Trial Term.

Actions by Orville P. Derby against the Degnon-McLean Contracting Company and by Minnie L. Derby against the same defendant. From judgments for the plaintiffs, and from orders denying new trials, defendant appeals. Reversed, and new trial granted.

Argued before WOODWARD, JENKS, HOOKER, RICH, and GAYNOR, JJ.

James F. Donnelly, for appellant.

Melville J. France, for respondents.

WOODWARD, J. These two actions—one by the wife for personal injuries and the other by the husband for the loss of his wife's services,

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medical treatment, etc.—were tried together, and the questions on appeal necessary to be determined are the same. We will consider the record in the case of the wife.

The plaintiff was injured on the night of the 20th of November, 1902, by stubbing her toe upon the planking which defendant had placed over a hole cut in the asphalt pavement for the lawful purpose of carrying on a detail of the work of constructing the subway, for which the defendant had the contract for a section at the point where this accident occurred, at the corner of Forty-Second street and Broadway, in the borough of Manhattan. This planking was about six by eight feet, overlapping the hole to be covered about one foot on each side, was several feet below the crossing where people usually passed, and was between the curb and the street railroad tracks. The plaintiff, with her mother and an uncle, were returning from the theater, and were about to take the car. The car stopped below the crossing, and the plaintiff, in attempting to reach the car, stumbled over the planking, and fell, receiving the injuries for which the jury has found a verdict in her favor. The planking, the jury might have found from the evidence, was four inches thick, though the preponderance of evidence would indicate that it was something less than that; probably nearer three inches. Considering its location, the necessity for having thick planking to support the heavy traffic at Broadway and Forty-Second street, did this constitute negligence on the part of the defendant? This planking was placed below the crossing, not in the sidewalk, but in the driveway. It was placed there to cover holes necessarily made in carrying on the work of constructing the subway, and reasonable care in covering these holes required that the planking should be thick and strong enough to sustain the weight and wear of a very heavy and constant traffic. It was not in the line of ordinary foot travel, and was constructed for the purpose of temporarily making the highway safe for teams and vehicles while the work was under way. The rule was early asserted in this state that:

"That which never happened before, and which in its character is such as not to naturally occur to prudent men to guard against its happening at all, cannot, when in the course of years it does happen, furnish good ground for a charge of negligence in not foreseeing its possible happening, and guarding against that remote contingency." Hubbell v. City of Yonkers, 104 N. Y. 434, 439, 10 N. E. 858, 58 Am. Rep. 522, and authorities there cited.

In this case, if men of ordinary prudence had been asked the question whether any accident was likely to befall a pedestrian lawfully using the highways at the point of this accident, can there be any doubt of the universal answer? Was there any good reason to expect that any one would, under the conditions which always prevail at this junction of thoroughfares, go outside of the ways provided for pedestrians, and stumble over these planks? True, any one had a right to make use of the highways at any point, but the question here is not what rights people have in the highways, but whether the defendant, which was lawfully occupying the highways in the construction of a great public work, had any reason to anticipate the accident which has happened. It seems to us that this case cannot be distinguished in principle from that of Beltz v. City of Yonkers, 148 N. Y. 67, 42 N. E. 401,



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or from Hamilton v. City of Buffalo, 173 N. Y. 72, 65 N. E. 944, and unless this can be done the judgments must be reversed.

It is urged that Fordham v. Gouverneur Village, 160 N. Y. 541, 55 N. E. 290, supports the plaintiff's recovery in this case; but we think it is clearly distinguishable. In that case the village authorities maintained a bridge across a stream which divided the municipality. During the day they had cut several holes through the footway of the bridge for the purpose of carrying a pipe under the bridge and across the stream. At night they covered these holes along the footway with three-inch planks, which projected about that distance above the ordinary level of the footway, without placing any lights, or giving any warning of the obstruction. The evidence showed that there were no street lamps nearer than 150 feet from either end of the bridge, and that it was dark when the plaintiff's intestate went upon the bridge, and the court very properly held that a question was presented for the jury. There is a vast difference between placing a three-inch obstruction upon a footpath in a dark place, and placing a similar obstruction in a driveway, where it was not expected that any one would be walking except under special circumstances, and then with that degree of care which is always required when one goes out of the regular way, and where it is always sufficiently light to enable any one to see the obstruction plainly. If this obstruction had been in the sidewalk or in the crosswalk, and the place had been dark, we should agree that it was a question for the jury to determine whether the defendant had exercised reasonable care; but the obstruction being out of the line of foot travel, and the way being light, we cannot see that the case is one for the jury.

The judgments and orders appealed from should be reversed, and a new trial granted; costs to abide the event. All concur, except HOOKER, J., who dissents.

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## AGRESTA v. STEVENSON et al.

(Supreme Court, Appellate Division, Second Department. April 27, 1906.)

MASTER AND SERVANT—INJURIES TO SERVANT—NEGLIGENCE OF FOREMAN.

Where there was an adequate supply of good rope which could have been used in hanging a skid from the side of a vessel, the use of a defective piece did not render the master liable for the death of a servant who was working on the skid, caused by the breaking of the defective rope.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 572.]

Appeal from Trial Term, Kings County.

Action by Anna Agresta, as administratrix of Gaetano Agresta, deceased, against William Stevenson and another. From a judgment for plaintiff, and an order denying a motion for a new trial, defendants appeal. Judgment and order reversed.

Argued before HIRSCHBERG, P. J., and JENKS, HOOKER, RICH, and MILLER, JJ.

H. Snowden Marshall, for appellants.

Henry A. Powell, for respondent.

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HIRSCHBERG, P. J. This action is brought to recover damages for the death of the plaintiff's decedent, alleged to have been caused by the negligence of the defendants. The defendants were stevedores, engaged in the unloading of a steamship in the harbor of New York. A lighter was moored at the side of the vessel, and the defendants at the time of the accident were transferring ballast from the steamship to the lighter. In the performance of the work the ballast was brought up from the hold of the vessel, and conveyed upon wheelbarrows along a skid or platform hung at the vessel's side between the vessel and the lighter, and dumped by the workmen into the lighter. The plaintiff's intestate was engaged in wheeling one of the wheelbarrows, and while he was so occupied one of the ropes by which the skid was suspended broke, and he was thrown into the water and drowned. The action was not brought under Employers' Liability Act, Laws 1902, c. 600, p. 1748. The case was submitted to the jury upon the theory that the skid was a place to work on, in the sense which would make it the duty of the master to render it safe to the extent that he would be responsible for the negligence of the servant to whom the task of preparing it was delegated.

There is evidence which would justify the conclusion that the work of hanging the skid was in charge of the defendants' foreman, and it may be conceded that a finding of negligence on his part could be supported by the evidence. It appears that there was plenty of good rope under the foreman's control, and that if a defective rope was selected it was the result either of an error of judgment or of negligence on his part. At the time of the trial, the decision of this court in Vogel v. American Bridge Co., 88 App. Div. 68, 84 N. Y. Supp. 799, was the law. It was held there that the foreman, in the circumstances stated, was the alter ego of the master, and that the latter could be held liable for a personal injury sustained by one of his employés in consequence of the breaking of a rope negligently used by such foreman. That case, however, has been recently reversed by the Court of Appeals (180 N. Y. 373, 73 N. E. 1, 70 L. R. A. 725), and the logic of the reversal is to the effect that the selection of an unsafe rope, where an adequate and proper supply has been furnished, is a detail of the work, and that neither an error of judgment nor negligence in the selection is sufficient to charge the employer with liability, notwithstanding the delinquency may be that of a foreman in charge. It is true that in the case at bar the plaintiff's intestate was working upon the skid when the rope broke, and the skid was literally furnished to him as a place to work upon; while in the Vogel Case the rope which broke was used in raising a truss which was being elevated to its place in the structure above the person of the injured workman. The distinction, however, cannot be deemed controlling in view of the decision of the Court of Appeals in McCampbell v. C. S. Co., 144 N. Y. 552, 39 N. E. 637. In that case the accident occurred while the plaintiff was unloading a steamer upon a skid extending from the vessel to the dock, and the accident occurred because the "mouthpiece," so called, by which the skid was fastened to the dock, was not securely tied. It was held that, if the work of securing the skid was improperly done, it was the negligent

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act of the plaintiff's co-employés, and that there could be no recovery therefor. To the same effect in Hudson v. Ocean Steamship Co., 110 N. Y. 625, 17 N. E. 342. There the plaintiff, while helping to load a vessel, was precipitated into the water by the falling of a skid over which he was carrying freight. The fault which caused the accident was an omission to have the fastenings of the skid secure, and a dismissal of the complaint was sustained upon the ground that the negligence was that of fellow servants.

The learned trial justice charged the jury in this case that the defendants could not be held liable for an error of judgment of their servant, to whom the selection of the rope which broke was committed, but he further charged, in substance, that the duty of furnishing the skid as a reasonably safe place for the plaintiff's intestate to work was a duty of the defendants, which they could not delegate to others, and that if they did so delegate it, and the duty was negligently performed. the defendants were responsible therefor. He further charged that the act of the foreman in the premises was the same as the act of the master, to be tested by the rule which enjoins the exercise of reasonable care, and that the jury were to apply that rule to the act of the foreman the same as they would do if it had been the act of the master personally. This necessarily excluded all question of immunity on the part of the defendants afforded by the negligence of the co-servants of the plaintiff's decedent, and, under the authorities cited, would appear to be error.

The judgment and order must be reversed.

**Judgment and order reversed, and new trial granted; costs to abide the event. All concur.**

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## ABRAHAMSON v. GENERAL SUPPLY & CONSTRUCTION CO.

**(Supreme Court, Appellate Division, Second Department. April 27, 1906.)**

MASTER AND SERVANT—INJURIES TO SERVANT—NEGLIGENCE OF "PUSHER."

**A "pusher" in charge of a gang of five or six structural ironworkers, whose work is the same except that he sees that they all work to advantage, is not a superintendent, within the employers' liability act, for whose negligence in directing the starting of the hoisting engine the master is liable.**

**Hooker, J., dissenting.**

Appeal from Trial Term.

Action by Harry Abrahamson against the General Supply & Construction Company. From a judgment for plaintiff, and an order denying a motion for a new trial, defendant appeals. Judgment and order reversed, and new trial granted.

Argued before WOODWARD, JENKS, HOOKER, GAYNOR, and RICH, JJ.

Frank Verner Johnson, for appellant.

A. L. Pincoffs (Edward D. O'Brien, on the brief), for respondent.

WOODWARD, J. The plaintiff was employed by the defendants as a structural iron worker, engaged with others in erecting the ironwork

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on a building at Spring street and Broadway, in the city of New York, and he brings this action to recover damages for personal injuries alleged to have been sustained by reason of the negligence of the superintendent, or of one "whose principal duty was superintendence, and who was intrusted with and exercised such superintendence," etc., in behalf of the defendant; the effort being to bring the plaintiff's case within the employers' liability act. The case was submitted to the jury, and, assuming the facts to be as the jury has found them, is the defendant liable? That is the broad question submitted upon this appeal. The evidence shows that the plaintiff was employed with others in the erection of the ironwork for a building at the corner of Spring street and Broadway; that the work was under the superintendence of one Norton, who was present and in charge of the work at the time of the accident; that in the practical work of erecting the iron superstructure it is customary to divide the workmen up into gangs of four to six persons, each gang having its particular branch of the work to perform, some in assembling the iron, others in hoisting it by means of derricks, engines, and other apparatus into position, while others are engaged in riveting the irons thus placed; that by a process of natural selection one of each gang is picked out as leader, or, as he is known in the business, as the "pusher." He is engaged in the actual manual labor, the same as the others, but he is indicated as the one who is to keep things moving, to see that the men work to advantage, and he is given a slight advance in his pay because of this extra responsibility. He is not a superintendent of construction, he has no voice in determining anything in relation to the general work, but is simply pointed out as the leader of the gang for the purpose of securing greater efficiency in the detail of the work assigned to the particular gang, and it is the alleged negligence of one of these "pushers" that forms the basis of the plaintiff's claim of negligence on the part of the superintendent. On the day of the accident the plaintiff composed one of a gang engaged in hoisting certain iron I-beams, about 22 feet in length and 15 inches in width, from one of the floors of the building to the floor above by means of a derrick. These beams were standing upright on their flanges, alongside of each other and a few inches apart. While in the act of hoisting one of these beams, it in some manner hit against another standing alongside of it, tipping the latter over onto the plaintiff's foot, causing the injuries for which he seeks recovery; it being alleged, and the jury may be assumed to have found, that this was caused by the "pusher" signaling to the man at the engine to start up before all of the men engaged in the work were in their proper positions, it being stated that the plaintiff was unable to reach the position where his duties required him. Assuming that a mere error in judgment on the part of a superintendent in directing the engine to be started in the detail of this work constitutes negligence, it is entirely clear that under the circumstances of this case there was no common-law liability, for the master owed no duty except to furnish a reasonably safe place in which the work was to be performed, reasonably safe and proper tools and appliances, and competent fellow servants, and no neglect is suggested in these particulars. The sole ground of liability, if there be any, must

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be under the employers' liability act, because of the negligence of the defendant's superintendent. There is no suggestion that there was any negligence on the part of Mr. Norton, the superintendent regularly employed by the defendant; there is no dispute that Mr. Norton was present, and in general charge of the work at the time of the accident; and the whole case rests upon the verdict of the jury that the "pusher" was acting in the capacity of a superintendent, and we are clearly of the opinion that the evidence does not justify the conclusion. The use of the word "superintendent" in the statute suggests to the mind at once the idea of one who superintends; of one who has general authority; who stands in relation to the particular work in the same relation that the master would stand if he were personally present. The statute, in its spirit, says that it proposes to enlarge the liability of the master by making him liable for the negligence of the master as represented by the superintendent whom he has selected; that, in addition to the common-law duties, the master must see to it that the man who is placed in charge of his work shall not, in the exercise of the authority of the master, involve the employés in dangers, and the scope of the enactment should not be enlarged beyond the fair intent of the Legislature, by attempting to hold the employer liable for every act of every individual who at any given moment assumes to be acting with authority. Clearly, the Legislature never intended to make the master liable for the negligence of a fellow servant engaged in the details of a work, simply because that fellow servant may have been designated as the leader of his particular group, for the mere purpose of harmony and efficiency in the carrying on of the work; and the evidence in this case goes no farther than this. It shows only that the man who signaled the engineer to start the engine was at work in the same gang with the plaintiff, that they were all engaged in a common purpose, and that the only authority of the man whose act it is alleged to have caused the accident was to lead the men, to indicate to them where to take their places in the conduct of the work, and what to do in hoisting these beams. If no one had been selected as such leader, there would have been a leader developed by the natural law of selection, and it can hardly be claimed that the master would have been liable for the acts of such a leader; and it is hardly more in harmony with common sense to suggest that this common laborer, one of a gang of five or six men engaged in hoisting beams in the general scheme of construction, was in any proper sense a superintendent, for whose negligence in the performance of a mere incidental detail of the work the master could be held liable. If Mr. Norton, or, in his absence, some one who was recognized as his representative, had stepped in and interfered with the detail of the work, and it had resulted in an injury, it might be that the master would be liable; but no such situation is presented. Competent and experienced men were engaged in operating a hoisting machine, requiring no special superintendence. No one was employed to suprintend this particular work with any discretionary powers, and the only facts on which the theory of the plaintiff are based is that one Knott had been designated as "pusher"; that he had been picked out to push the work along, and keep the men in his gang intelligently engaged in

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this portion of the work, and that he received perhaps 25 cents per day more for doing the same work that the others were engaged in, and seeing that they all worked to advantage. The testimony is undisputed that Knott worked just the same as the others worked. He was there to help in moving these iron beams, and he did whatever was necessary in the work the same as the others, and he had no authority over any of them, except in the mere matter of placing them in their work. There was no requirement for a superintendent in any proper use of that word. The master had not assumed to place a superintendent over this gang of men, although a superintendent of the general work had been chosen and was in actual charge, and we find no case in which it has been held that such an employé was within the language of the act imposing a liability upon the master for the neglect of his superintendent.

This is not the case of a train dispatcher, charged with the duty of superintending the yard and regulating the running of trains within such yard, giving a signal to start before seeing that employés were out of danger, as in McHugh v. Manhattan Ry. Co., 179 N. Y. 378, 385, 72 N. E. 312, but is simply the act of a fellow laborer giving a signal to start a stationary engine for the purpose of carrying on a detail of the work, and, even if Knott had had some of the attributes of a superintendent, this act would not have been an act of superintendence. It was an act that the plaintiff himself, or any one of the gang, might have made with equal propriety, so far as the evidence discloses. They were to hoist these beams. To hoist them required the operation of the engine, and it is conceded that the plaintiff and another had made the proper fastenings to enable the engine to lift the beams, and the alleged negligence consisted in starting the engine at a time when the plaintiff claims the fall was not in exactly the right position. But that might be a mere error in judgment, nor constituting negligence. and it was not made the duty of Knott, more than of any one else, to signal the engineer; and the fact that he may have signalled the engineer in the performance of a mere detail of the work in which all were engaged was not an act of superintendence, as distinguished from a detail of the work. "There are many acts," say the court in McHugh v. Manhattan Ry. Co., supra, "the nature of which is such as to clearly establish their character, whether of ordinary labor or of superintendence, and this regardless of whether the act may be done on a particular occasion by a superintendent, or by an ordinary workman", and this, we take it, is the real test to be applied, whether the occasion is one demanding superintendence, and whether the master has authorized any one to assume that relation to the work. If the work is such that the master owed no duty of furnishing a superintendent as a part of the corps of competent fellow servants, or if he has furnished a competent superintendent, and the accident happens through no neglect of such superintendent, but through the error or neglect of a fellow servant engaged in the carrying out of the details of the work, there can be no liability under the employers' liability act, and that seems to us to be the situation presented by the case now before us. This seems to be the doctrine of the Massachusetts case arising under a

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similar statute, and we are persuaded that it is in harmony with the legislative intent. See Joseph v. George C. Whitney Co., 177 Mass. 176, 178, 58 N. E. 639, and authority there cited; Riou v. Rockport Granite Co., 171 Mass. 162, 164, 50 N. E. 525, and authorities there cited; Flynn v. Boston Electric Light Co., 171 Mass. 395, 50 N. E. 937; McPhee v. New England Structural Co., 188 Mass. 141, 144, 74 N. E. 303, and authorities there cited. In the latter case one Cairns was in charge of a gang of men engaged in constructing the ironwork for a bridge. He was not only the superintendent in charge of the work, but he ran the engine used in placing the iron, and it was held that the superintendent, in deciding that the engine should be started, was engaged in an act of superintendence; but that was a case in which there was no question of the position which Cairns occupied. He was there in charge of the work. He was the superintendent supplied by the master, and his negligence in starting the engine was held to be chargeable to the master; but that is a very different case from that at bar, for here there was a superintendent in actual charge of the work, and the accident occurred, as we may assume, from the negligence of one engaged in a mere detail of the general work.

The judgment and order appealed from should be reversed, and a new trial granted; costs to abide the event. All concur, except HOOKER, J., who dissents.

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## BURNHAM, Overseer of Poor, v. TRYON.

(Supreme Court, Appellate Division, Third Department. March 7, 1906.)

1. BASTARDS—PROCEEDINGS—APPEAL.

Code Cr. Proc. § 850, provides that a magistrate in making an order of filiation must certify the reasonable costs of arrest and of the order. Section 851 makes a defendant found guilty liable for the costs of arrest and order. By section 873 the court must award costs to the party in whose favor an appeal is determined, and section 866, in relation to appeals, provides that, if the child be not born alive, defendant must be discharged from custody and from the obligation of his undertaking. *Held*, that defendant's discharge on appeal under section 866, was not a determination in his favor, so as to entitle him to have refunded to him the costs certified by the magistrate under section 850.

2. SAME—ORDER—VACATION.

Where, on appeal to the county court from an order of filiation, defendant failed to give any undertaking, as required by statute, and the county court on appeal inadvertently discharged defendant from the obligation of his undertaking, and erroneously relieved him from the costs by requiring that the costs be refunded to him, it was proper for the county court to grant a motion vacating the order, notwithstanding that plaintiff had taken an appeal.

Appeal from Tompkins County Court.

Proceedings in bastardy by William H. Burnham, as overseer of the poor of the town of Groton, against Amos Tryon. From an order granting a motion to cancel an order discharging the defendant from his undertaking on appeal from the magistrate, and directing his costs to be refunded, he appeals. Affirmed.

The defendant, on the complaint of the plaintiff, was adjudged upon a trial before two justices of the peace to be the father of a child likely to be born a

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bastard, which would be chargeable upon the plaintiff's town. The justices made an order of filiation, and certified their reasonable costs of arresting the defendant and of the order of filiation to be the sum of $42.50, which costs the defendant paid, and served a notice of appeal from the order of filiation to the County Court. Before the appeal was heard, the child was stillborn. The counsel for the parties appeared at the next term of the County Court, and, on showing that the child had not been born alive, an order was made, under section 866 of the Code of Criminal Procedure, discharging the defendant "from the obligation of his undertaking," and directing the plaintiff to pay to the defendant or to his attorney the amount paid by the defendant to secure his appeal, and for costs of the appeal. The plaintiff's counsel objects to the provision contained therein requiring the plaintiff to refund to the defendant the costs paid by the latter, and thereafter appealed from the order. When the plaintiff's attorney undertook to prepare his papers on such appeal, he was unable to find that any undertaking had been given by the defendant under either subdivision of section 851 of the Code of Criminal Procedure, and no undertaking of any kind whatever could be found in the clerk's office or elsewhere. Plaintiff's attorney then made a motion on notice, at a term of the County Court held by the same judge who made the previous order discharging the defendant, to set aside and cancel such order, and from an order granting that motion the defendant has appealed.

Argued before PARKER, P. J., and SMITH, CHESTER, KELLOGG, and COCHRANE, JJ.

W. W. Hare, for appellant.
G. M. Stoddard, for respondent.

CHESTER, J. The controversy appears to be wholly over the question of costs. The County Court held on discharging the defendant, under section 866 of the Code of Criminal Procedure, when it appeared that the child was not born alive, that the defendant was entitled to costs and disbursements as a matter of right, and therefore directed the plaintiff to refund to the defendant the amount paid by him to secure an appeal from the order of filiation. That section simply authorizes the court or magistrate, upon proof of the facts therein stated, to discharge the defendant from custody if he is in custody, or from the obligation of an undertaking if he has given one. There is nothing said therein on the subject of costs. The order discharging the defendant was in no sense a determination of his appeal to the County Court in his favor, so as to entitle him to costs under section 873 of the Code of Criminal Procedure; nor did it in any wise affect the correctness of the determination of the magistrates adjudging him to be the father of the child. The costs were incurred in that proceeding, and were certified to by the magistrates as the reasonable costs of arresting the defendant and of the order of filiation, as required by section 850, and by section 851 of such Code the defendant is expressly required to pay the amount so certified for such costs. The fact that the defendant is discharged under section 866, because of facts arising subsequent to the order of filiation, is no reason why the costs lawfully incurred and imposed upon him should be refunded to him by the plaintiff, and the court was in error in requiring them to be refunded.

That part of the order discharging the defendant was evidently made upon the erroneous supposition that an undertaking had been

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given by him. The court in granting the order to vacate necessarily passed adversely upon the contention of the defendant that he had given an undertaking. Therefore there was no need of allowing an order to stand which discharged him from an obligation which did not exist.

The court which had inadvertently made the order discharging him, and which improperly relieved him from the costs by requiring the plaintiff to refund the amount thereof to him, had power to vacate the order on notice, and it was a proper exercise of power so to do. This is so notwithstanding the order had been appealed from, as the plaintiff's inability to find the necessary papers in the clerk's office, where they should have been, and the defendant's failure to give the undertaking, practically made it impossible for the plaintiff ever to present his appeal to the court for a determination thereof on the merits.

The order should be affirmed, with $10 costs and disbursements. All concur.

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## JOHNSON v. ONONDAGA PAPER CO.

(Supreme Court, Appellate Division, Fourth Department. May 2, 1906.)

1. MASTER AND SERVANT—GUARDING MACHINERY—QUESTION FOR JURY.

   Whether it is practicable to guard a particular belt and pulley, as required by Labor Law 1892, p. 1375, c. 673, § 8, providing that all gearing, belting, shafting, set screws, and machinery contained in a manufacturing establishment shall be properly guarded, is for the jury.

2. SAME—INJURY TO SERVANT—DEFECTIVE APPLIANCES—NOTICE TO EMPLOYER—NECESSITY.

   An employé injured in consequence of being caught in an unguarded belt and pulley need not, in order to recover, prove that the employer or any superior person had personal knowledge of the defect, though the employé knew thereof, and did not give notice.

   [Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 243-246.]

Appeal from Trial Term, Onondaga County.

Action by Marshall Johnson against the Onondaga Paper Company. From a judgment dismissing the complaint, and in favor of defendant for costs, plaintiff appeals. Reversed, and new trial ordered.

Argued before McLENNAN, P. J., and SPRING, WILLIAMS, NASH, and KRUSE, JJ.

Frank C. Sargent, for appellant.

T. E. Hancock, for respondent.

NASH, J. The action was brought to recover damages resulting to the plaintiff through the alleged negligence of the defendant by reason of his right foot slipping upon a grease or oil spot upon the floor, causing him to be thrown down, and in falling his left foot and ankle were drawn into an unguarded belt and pulley, which the defendant maintained in violation of the so-called "Labor Law" (chapter 673, p. 1372, Laws 1892), section 8 of which provides that all gearing, belting, shafting, set screws, and machinery of every description contained in a manufacturing establishment shall be properly guarded.

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At the time of the injury complained of, the plaintiff was in the employ of the defendant at its paper mill at Marcellus Falls, Onondaga county, as a "back tender" upon a paper machine, where he had been employed for about a year. As such, his duties called him to assist in feeding the machine, and to oil it whenever necessary. The machine was a standard paper-making machine known as a "Fourdrinier Machine," about 75 feet long, 68 inches wide, and 3 feet high. It had along the top of the machine a series of tube rolls, carrying a wire screen, over which the pulp goes, and as the pulp is carried over the screen water is sifted out, and in oiling the ends of the tube and other parts of the machinery oil gets on the floor, and there is always considerable water on the floor around the machine. The pulley, belt, and shafting connected with the screen shaft and the fan pump, from which the power was transmitted to this machine, were changed eight days before this accident. Before these changes were made there was a single pulley and shaft. These were removed, and new and different pulleys and shafting installed, which were placed in a different location; two pulleys in the place of a single pulley, having other belts and shaftings. During the eight days after the new belt and pulleys were installed, and at the time of the accident, the belt and pulleys were unguarded; there were no guards, protection, or covering over either belt or pulleys, of any kind. The plaintiff at the time he was injured went behind the machine for the purpose of oiling the tube rolls, and was between the "fan pump pulley belt" and the side of the machine, and trying to work himself around betwen the fan pump pulley and the fan pump. The fan pump was 1½ feet from the belt, operated by a shaft. He was in the act of stepping over this shaft, and at the same time stepping under this feed box, and while in a stooping, crouching position astride the fan pump, his head about three feet from the floor, he slipped upon the grease or oil on the floor. In falling his left foot caught between the upper part of the pulley and under the upper belt. His foot went around the pulley, and broke his leg, and permanently injured his ankle and foot.

Upon the motion for a nonsuit the learned justice in announcing the decision said that under the statute the defendant is not liable, except where the servant gives notice to the employer of the negligence of which he complains, except where it shall appear that the defect or negligence was known to the employer. That meant personal knowledge, not constructive notice. Plaintiff must show actual knowledge, assuming that the servant knew of the defect, and did not give notice; that the pulley which had been changed eight days before was put up by somebody undoubtedly in the employ of the company, but it may not have been done with the knowledge of the company. The court permitted the case to be reopened, and the plaintiff recalled to give further evidence, and the motion for a nonsuit was renewed. The court in granting the motion said:

"I will grant the motion simply on the ground that there is no evidence from which the jury might find personal knowledge on the part of the employer or any superior person of the defect of which complaint is made."

The appellant cites Twist v. City of Rochester, 37 App. Div. 307, 55 N. Y. Supp. 850, where this court held that—

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"It was no defense that the charter of the city provided that it should not be liable for any unlawful obstruction of a roadway, unless actual notice of the unsafe condition had been given to the city officers having charge of the highways a reasonable time before the happening of such injury, as, in so far as the city was liable for the negligent construction of the patrol line and its acts in that connection, it needed no actual notice, because it was presumed to know its own acts, and therefore had such notice."

We think the rule there held is applicable here, and therefore the nonsuit was erroneously granted.

Whether it was practicable or feasible to inclose or guard the particular belt and pulleys is a question for the jury, and should be left open for determination when the case is fully presented upon all the evidence that may be adduced upon a new trial; as also the question whether the plaintiff voluntarily and unnecessarily chose an unsafe method of oiling the machine at the place where he was injured. The circumstances in this respect may be made clearer upon another trial. We place our decision solely upon what we regard as an erroneous conclusion of the court upon the question of the notice which defendant must be deemed to have had of the condition of its machinery.

The judgment should be reversed, and a new trial granted.

**Judgment reversed, and new trial ordered, with costs to the appellant to abide event. All concur.**

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## ELECTRIC STEEL ELEVATOR CO. v. JOHN KAM MALTING CO.

**(Supreme Court, Appellate Division, Fourth Department. May 2, 1906.)**

**ARBITRATION AND AWARD—VACATION OF AWARD.**

**Where a submission agreement was so defective that the proceedings did not amount to a statutory arbitration, so that the court had no power to order judgment on the award, it had no power to vacate the award.**

**[Ed. Note.—For cases in point, see vol. 4, Cent. Dig. Arbitration and Award, § 403.]**

Appeal from Special Term, Erie County.

Action by the Electric Steel Elevator Company against the John Kam Malting Company. From an order denying defendant's request to vacate an award of arbitrators, defendant appeals. Affirmed.

Argued before McLENNAN, P. J., and SPRING, WILLIAMS, and NASH, JJ.

W. C. Carroll, for appellant.

Charles B. Wheeler, for respondent.

NASH, J. This is an appeal by the defendant from an order of the Erie Special Term, denying defendant's application to vacate an award made by arbitrators in favor of the plaintiff. The plaintiff moved for an order confirming the award and for judgment thereon, pursuant to the provisions of the Code of Civil Procedure, and upon the argument of the motion requested the court to vacate the award. The motion to confirm was denied, as was also the application to vacate the award. It was further ordered that the motion to confirm be denied, without prejudice of any rights the plaintiff may have to maintain an action at law or such other proceeding or remedy on the award as the

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plaintiff may be advised. The defendant opposed the confirmation of the award, upon the ground, among others, that the stipulation of the parties to the submission was not acknowledged or proved and certified, as required by section 2374 of the Code, and hence the court had no jurisdiction to order judgment upon the award. It was so held.

The defendant's contention is the same now, and also, further, that the controversy was attempted to be submitted to the arbitration committee of the chamber of commerce of the city of Buffalo; that under the arbitration laws of the chamber of commerce the provisions of the Code of Civil Procedure are applicable, and upon sufficient ground shown, on application of either party to the submission, the court must make an order vacating the award.

The contention of the plaintiff is that, if the submission agreement was so defective that the court had no power to order judgment on the award, it had no power to vacate the award. This contention is correct. If it was not a statutory arbitration, the court was without jurisdiction to confirm or vacate the award, or take any action upon it.

Order affirmed, with $10 costs and disbursements. All concur.

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## NOBLE v. HAHNEMANN HOSPITAL OF ROCHESTER.

(Supreme Court, Appellate Division, Fourth Department. May 2, 1906.)

1. CHARITIES—INJURIES TO THIRD PERSONS.

A hospital organized under Laws 1889, p. 93, c. 95, providing for the organization of hospitals, the directors and managers of which receive no financial benefit, and which is not a business project, though it receives compensation for some of its patients, is not liable for the negligence of its ambulance driver.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Charities, § 103.]

2. HOSPITALS—PERFORMANCE OF GOVERNMENTAL FUNCTIONS.

Where a hospital, under an agreement with a city, took charge of the city's ambulance service, the hospital was not liable for the negligence of its ambulance driver while responding to a call from the police department of the city, as the hospital was performing a governmental function.

Action by Sarah Noble against the Hahnemann Hospital of Rochester. Verdict directed for defendant, and exceptions thereto ordered heard in the first instance at the Appellate Division of the Supreme Court. Exceptions overruled, and judgment ordered for defendant on the verdict.

Argued before McLENNAN, P. J., and SPRING, WILLIAMS, NASH, and KRUSE, JJ.

John D. Lynn, for appellant.

James S. Havens, for respondent.

SPRING, J. The plaintiff was sitting in a wagon on South avenue, in the city of Rochester, on the 23d of September, 1902, while her husband was delivering produce. The wagon was reasonably close to the curb, with plenty of room for a team to pass it in the street. An ambulance of the defendant, drawn by one horse, in charge of one of the

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defendant's employés, responding to a hurry call for a person needing immediate medical assistance, was passing rapidly along the street, and collided with the wagon occupied by the plaintiff, overturned it, throwing her to the pavement, and inflicting injuries upon her. There was sufficient proof of want of care by the driver and freedom from negligence on the part of the plaintiff to require the submission of these questions to the jury, except for other facts which exempt the defendant from liability. The defendant was incorporated pursuant to chapter 95, p. 93, Laws 1889. That act is a general one for the organization "of hospitals, infirmaries, and dispensaries for invalids or aged and indigent persons." A corporation formed by virtue of this act does not require any capital stock, and it is not a money-making venture or a business project. The managers serve without compensation. Section 9. The certificate incorporating the defendant states:

"We, the undersigned, do hereby certify that we desire to form a corporation for the purpose of erecting, establishing, maintaining, and operating a hospital for the reception, care, maintenance, giving of medical and surgical advice, aid, and treatment to persons afflicted with maladies or physical injuries or weaknesses. * * * That the object for which this corporation is formed is the erecting, establishment, maintenance, and operating of the Homeopathic Hospital, a medical dispensary in the city of Rochester, the practice of which shall be forever based on the principle of homeopathy."

The hospital of the defendant is located in the city of Rochester, and has sufficient capacity to take care of about 50 patients. Some of these patients pay for the services they receive, some pay nothing; partial support for others is furnished by the city or county of Monroe. The hospital is supported by "donations, contributions, legacies, revenue from pay patients, money received from city and county for public patients, and the ambulance money, of course, is used, as other moneys in the hospital are used, to carry on its general work." The directors and managers receive no compensation for their services, and the medical staff, comprising 12 or 15 physicians, also get no pay from the defendant, and the institution is not self-supporting. An ambulance service is connected with the hospital. Prior to 1896 the city of Rochester maintained its own ambulance service. At that time its common council entered into an agreement with each of the four hospitals in the city to take charge of that service, paying each of them $1,000 a year out of the poor fund, and the defendant was one of those thus employed by the city, and the employment has continued in pursuance of the agreement. The defendant being a benevolent institution, and no financial benefit accruing to its directors and managers, we think the doctrine of respondeat superior does not apply. Corbett v. St. Vincent's Ind. School, 79 App. Div. 334, 79 N. Y. Supp. 369, affirmed 177 N. Y. 16, 68 N. E. 997; Collins v. N. Y. Post Grad. Med. College, 59 App. Div. 63, 69 N. Y. Supp. 106; Benton v. Trustees of City Hospital, 140 Mass. 13, 1 N. E. 836, 54 Am. Rep. 436; Downs' Adm'x v. Harper Hospital (Mich.) 60 N. W. 42, 25 L. R. A. 602, 45 Am. St. Rep. 427. In each of the cases cited the injury was inflicted on the person while in the institution, either involuntarily an inmate, or there for some other specific purpose. A master is liable for the negligence of his servant because he employs him expecting to derive

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profit from the employment. The defendant and similar institutions are not liable for negligence because they are organized for benevolent or charitable purposes. There would, therefore, seem to be no distinction whether the servant—a competent man for the service in which he is engaged—carelessly injures one while in the hospital or in the street.

Even though the defendant received compensation for some of its patients, it still falls within the definition of a charitable institution. People ex rel. Inst. for Blind v. Fitch, 154 N. Y. 14, 47 N. E. 983, 38 L. R. A. 591; Corbett v. St. Vincent's Ind. School, supra; Downs' Adm'x v. Harper Hospital (Mich.) 60 N. W. 42, 25 L. R. A. 602, 45 Am. St. Rep. 427. Passing that, however, the defendant at the time of the collision was responding to a call from the police department of the city. It was performing a duty imposed upon the city as one of its governmental functions, but intrusted to the defendant. The defendant was representing the city, and was no more liable for the negligence of its driver than the city would be for an assault committed by a policeman in the discharge of his duty, or if a fireman in answering an alarm of fire should run over a traveler in the street. Dillon's Mun. Corp. §§ 975, 976; Corbett v. St. Vincent's Ind. School, 177 N. Y. 16, 68 N. E. 997; Maxmilian, Adm'x, v. Mayor, 62 N. Y. 160, 20 Am. Rep. 468; Lefrois v. County of Monroe, 162 N. Y. 563, 57 N. E. 185, 50 L. R. A. 206.

The municipality in its corporate capacity is not benefited specially by the exercise of the sovereign power in the cases instanced, but is performing a service essential for the welfare of the public in preserving the peace, or in preventing the destruction of property, or some other kindred obligation; and public policy demands that the city be given immunity from liability for the want of care of those who are actually performing the duty. The rule is not altered because defendant, instead of the city, had charge of the ambulance. In Corbett v. St. Vincent's Ind. School, supra, the defendant was a charitable industrial asylum, but received minors convicted of crimes, and it was held exempt from liability, for injury resulting from the negligence of its managers. The defendant is the agent or representative of the city, and the same principle which gives freedom from liability to the city is also effective to exonerate the hospital corporation.

The plaintiff's exceptions should be overruled, with costs and disbursements of this appeal, and judgment ordered for the defendant on the verdict, with costs. So ordered. All concur.

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## HAHN et al. v. BRETTLER et al.

(Supreme Court, Appellate Term. April 24, 1906.)

FRAUDS, STATUTE OF—SALE OF INTEREST IN REALTY.

The sale of an interest in a contract for the sale of land is not within the statute of frauds, and need not be in writing.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Frauds, Statute of, § 123.]

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Appeal from City Court of New York, Special Term.

Action by David Hahn and others against Max Brettler and others. From an order setting aside a verdict for the plaintiff and dismissing the complaint on the merits, and from the judgment entered thereon, plaintiffs appeal. Reversed, and remanded for entry of judgment on the verdict.

Argued before SCOTT, P. J., and TRUAX and BISCHOFF, JJ.

Joseph Fischer, for appellants.

Sternberg & Jacobson, for respondents.

BISCHOFF, J. The plaintiffs as vendees and the defendants as vendors entered into a contract for the sale of the defendants' real estate. Thereafter the defendants proposed a sale to them of the plaintiffs' interest in the contract for the sum of $1,600. The plaintiffs accepted the offer, and a payment of $50 was made by the defendants on account. The plaintiffs being ready and willing to carry out the agreement, and the defendants having refused to pay, this action was brought to recover the balance of the agreed sum, and, after verdict for the plaintiffs, the court entertained a motion to set aside the verdict, granted the motion, and directed a dismissal of the complaint. The ground of the decision was that the agreement in suit, for the purchase of the vendee's interest in a contract for the sale of lands, was an agreement involving the transfer of plaintiffs' interest in real estate; hence, not being evidenced by a writing signed by the plaintiffs, was void under the statute of frauds, and afforded no consideration for the defendants' promise, upon which the action is founded. In the case of Fleischman v. Plock, 19 Misc. Rep. 649, 44 N. Y. Supp. 413, the question now before us was considered by this court, and the conclusion was reached that the statute of frauds was not available under these circumstances to defeat an action founded upon the defendants' promise.

The judgment and order appealed from must therefore be reversed, and the cause remitted to the court below for entry of judgment upon the verdict, with costs to the appellants. All concur.

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## ISHAM v. ERIE R. CO.

(Supreme Court, Appellate Division, Fourth Department. May 2, 1906.)

1. CARRIERS—CARRIAGE OF GOODS—DELAY.
Where a carrier by rail undertook to transport goods to a point beyond its terminus, the transfer from the terminus to the destination to be made without charge to the shipper, the carrier was liable for delay at its terminus.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 766–769.]

2. SAME—ORDER OF PERSON NOTIFIED OF SHIPMENT.
Where goods were billed for shipment to a point beyond the terminus of a railroad, with a direction to notify a third person, and on their arrival at the terminus the railroad notified the third person, and on his order retained them at that point for a week, it is liable for the delay; the order from the third person not being sufficient to justify it.

3. SAME—CONNECTING CARRIERS.
Where goods were delivered to a carrier for shipment to a point beyond the terminus of its road, under a bill of lading containing a provision that the carrier should not be liable after the property was ready for delivery to the next carrier, it is nevertheless liable for withholding for seven days delivery to the lighters which were to transfer the goods to their destination.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 817–822.]

4. SAME—NOTICE OF CLAIM—WAIVER.
Where a bill of lading contains a provision that claims for loss or damage must be made in writing within 30 days, this provision is waived where the railroad company deliberated on a claim made after the expiration of the 30 days, and placed its refusal to pay the claim on the merits.

5. DAMAGES—REDUCTION—EVIDENCE.
In an action for delay in the delivery of a shipment of potatoes, by reason of which they were frozen before delivery, evidence of their sale by a commission merchant after delivery was admissible where the transaction was honest, and there was no overcharge for the services of the commission merchant.

Williams, J., dissenting.

Appeal from Trial Term, Livingston County.

Action by Frank N. Isham against the Erie Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

The action is to recover damages for negligence, and the charge is that the defendant improperly detained at Jersey City two car loads of potatoes belonging to the plaintiff until they were frozen. At the close of the evidence, by consent of the parties, the jury was discharged, and the issues submitted to the court. A decision was made containing findings of fact and conclusions of law. Nearly all of the facts were stipulated, and there was no conflict in those proved.

Argued before McLENNAN, P. J., and SPRING, WILLIAMS, NASH, and KRUSE, JJ.

F. A. Robbins, for appellant.

Royal R. Scott, for respondent.

SPRING, J. The defendant's railroad extends from Avon, in the state of New York, to Jersey City, N. J. The defendant received



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from the plaintiff at Avon two car loads of potatoes; one February 2, 1899, which reached Jersey City on February 5th, and the other was received February 4th, arriving at Jersey City on the 6th. These car loads were to be transported to Palmer's dock, Brooklyn, and which is reached by lighters from defendant's eastern terminus at Jersey City. The plaintiff was the consignee named in each bill of lading, and it contained the direction, "Notify Casey & Rosenblum," who were the intended purchasers, and whose place of business was in Brooklyn. The destination noted on the bill of lading was "Palmer's dock, Brooklyn, N. Y." The evidence does not precisely disclose the defendant's connection with the dock mentioned. It does appear that Carpenter, the chief clerk in the management of the dock, and employed by its owner, was also the agent of the defendant, and also that there was no lighterage charge for transferring the freight from Jersey City to the dock. On the morning of the 6th a list of the cars in the terminal yards of the defendant at Jersey City in transit for Palmer's dock, and which included the two car loads of potatoes consigned to the plaintiff, was delivered to Carpenter, by the defendant. He promptly notified Casey & Rosenblum of the arrival of the cars at Jersey City, and they requested the defendant to hold said cars at Jersey City subject to their orders, as "they were overstocked, and did not want them brought over on that account, and that the weather was against the market, and therefore it would suit them better to leave them in Jersey City." The defendant acceded to this request until February 13th, when "said cars were ordered to Palmer's dock, but owing to the severity of the weather at that time it was impossible for defendant to flat them until February 18th, on which date they reached Palmer's dock, and were refused by said firm of Casey & Rosenblum." The potatoes when received at Palmer's dock were frozen, and the damage to them occurred during the severe storm between the 13th and 18th of February. After the refusal of Casey & Rosenblum to accept the potatoes, the plaintiff at Avon was notified by wire, went to Brooklyn, and caused the potatoes to be sold by a commission house. The bills of lading contain the provision:

"If the word 'order' is written immediately before or after the name of the party to whose order the property is consigned, the surrender of the bill of lading, properly indorsed, shall be required before the delivery of the property at destination, as provided by section 9 of the conditions of the uniform bill of lading, on the back hereof."

The form of shipment was, "Marked consignee, order F. N. Isham, destination Palmer's dock, Brooklyn, N. Y." The import of this method was that the goods were shipped to be paid for on delivery, and in order to make this plan effective the bills of lading must be produced before the potatoes could be turned over to Casey & Rosenblum. The plaintiff at the time of the delivery of the potatoes to the defendant at Avon caused drafts to be made on Casey & Rosenblum, and attached to the bills of lading, and they were by the local bank at Avon transmitted to a bank in Brooklyn, to be delivered to Casey & Rosenblum upon the arrival of the goods and upon acceptance and payment of the drafts. Ordinarily, where goods are received by a common carrier for transportation over a connecting line, its liability

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terminates upon the proper delivery to the succeeding carrier. Farnsworth v. N. Y. C. & H. R. R. R. Co., 88 App. Div. 320, 84 N. Y. Supp. 658. That rule does not obtain in the present case. The evidence is sufficient to warrant the finding of fact made by the court that the defendant undertook to transport these potatoes to Palmer's dock. The defendant kept its representative at this dock. The transfer was without charge to the shipper, and the first stipulation entered into concedes that the potatoes were "to be transported by defendant to Palmer's dock, Brooklyn, New York."

Irrespective of that question, however, we think negligence is fairly imputable to the defendant. The plaintiff was the consignee of the goods, so the defendant was apprised of his ownership. The defendant knew that the destination was Palmer's dock, and it certainly had no authority, while the potatoes were in transit, affirmatively to interfere with their onward course. The direction in the bills of lading to notify Casey & Rosenblum did not authorize the defendant to change its contract with the plaintiff. The potatoes were at Jersey City February 6th, and by ordinary carriage they would reach Palmer's dock on the same day. The interests of Casey & Rosenblum, and the plaintiff were not identical. The defendant, without communicating with the plaintiff, followed the request of Casey & Rosenblum, and held the potatoes at its yard at Jersey City for a week, during any day of which they could have been readily delivered at their destination. They departed from their obligation to the consignee, and recognized without warrant Casey & Rosenblum as the consignees, ignoring the plaintiff entirely. The direction to notify Casey & Rosenblum did not justify a notification while the goods were en route. The object of the notice prescribed in the waybills was to advise the proposed purchasers that the potatoes had arrived at their destination, and were ready for delivery to them upon the production of the bills of lading. In that way the sale would be consummated. Notification while the goods were in transit subserved no such purpose. Much less did the direction imply that the defendant was to follow the request of Casey & Rosenblum in the matter of the shipment of the potatoes while in transit. The interest of Casey & Rosenblum did not become effective until they had in their possession the bills of lading, and the defendant understood those instruments would not be delivered until the goods were at Palmer's dock. Casey & Rosenblum asked for the delay because "the market was overstocked * * * and the weather was against the market"; indicating that the request was solely for their benefit. The direction to notify Casey & Rosenblum was notice to the defendant that they were not consignees. Furman v. Union Pacific R. R. Co., 106 N. Y. 579, 13 N. E. 587; North Penn. R. R. v. Commercial Bank, 123 U. S. 727–736, 8 Sup. Ct. 266, 31 L. Ed. 287. In the first case cited, 100 bags of peanuts were shipped from Norfolk, Va., to Denver, Colo. The bill of lading contained the following, "Marked, Y. ——— order. Notify Zucca Bros." No consignee was named. The defendant delivered the goods to Zucca Bros. at Denver without the production of the bill of lading. The court, in construing the effect of this clause, said:

"Here is no statement that Zucca Brothers are the consignees. The very presence of the word 'notify,' in its relation to them, shows that they are not

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intended as consignees. If they were, the word is wholly unnecessary. It is the duty of the carrier to notify the consignees of the arrival of the goods. Price v. Powell, 3 N. Y. 322. To place in the bill of lading a direction to notify certain persons to whom, if consignees, it was the carrier's duty to deliver, or at least to notify of the arrival of the goods, is a plain notice that, in the absence of further directions, they are not the consignees."

The bill of lading contains the provision common to such contracts that "no carrier * * * shall be liable after said property is ready for delivery to the next carrier or consignee."

The counsel for the appellant invokes the rule adverted to that the liability of the defendant terminated when the potatoes were ready for delivery to the lighters. In addition to the facts enumerated, showing, as we believe, that the principle is not applicable to this case, there is another adequate reason why the rule does not obtain. We think the evidence warrants the conclusion reached that the defendant is chargeable with negligence in withholding the delivery of these potatoes in Jersey City for seven days. It was in the month of February, when freezing weather was probable. In adopting the request of a third party in such circumstances, and not delivering the potatoes in the usual way, the defendant is chargeable, not merely with breach of its agreement, but with negligence.

The exemption from liability urged does not exonerate the defendant from the exercise of a fair degree of diligence as the carrier of the goods of the shipper (Mynard et al. v. Syracuse, etc., R. R. Co., 71 N. Y. 180, 27 Am. Rep. 28; Rathbone v. N. Y. C. & H. R. R. R. Co., 140 N. Y. 48, 35 N. E. 418; Jennings et al. v. Grand Trunk R. R. Co., 127 N. Y. 438–450, 28 N. E. 394), and there will be no enlargement of the limitations to relieve a common carrier from responsibility for loss resulting from its negligence (cases cited, and Security Trust Co. v. Wells Fargo & Co., 81 App. Div. 426–431, 80 N. Y. Supp. 830, affirmed on opinion below, 178 N. Y. 620, 70 N. E. 1109).

Condition 3 on the bill of lading contains the following:

"Claims for loss or damage must be made in writing to the agent at the point of delivery promptly after arrival of the property, and, if delayed for more than thirty days after the delivery of the property, or after due time for the delivery thereof, no carrier hereunder shall be liable in any event."

No claim was presented to the agent of the defendant at Palmer's dock or at Jersey City. On the 21st of June, 1899, more than three months after the delivery of the potatoes at Palmer's dock, a written claim was presented to the division freight agent of the defendant at Rochester. This officer rejected the claim in a letter September 16, 1899, setting forth his reasons at large, and which are substantially the same as are now urged to defeat the claim. The omission to present the claim within 30 days was not one of the reasons assigned for its rejection. The defendant deliberated upon the claim for three months, and placed its refusal to pay on the merits, and thereby waived the 30-day limitation. Falkenberg v. Erie R. R. Co., 28 Misc. Rep. 165, 59 N. Y. Supp. 44; Frankfurt et al. v. Weir, 40 Misc. Rep. 683, 83 N. Y. Supp. 112; Jennings v. Grand Trunk Ry. Co., 52 Hun, 227, 5 N. Y. Supp. 140. We doubt whether the limitation applies to a case like the present. The provisions of the bill of lading extending immunity to the

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defendant from liabilities imposed upon it as a common carrier, not including acts of negligence, the limitation prescribed ought not to embrace loss due to its lack of care. Security Trust Co. v. Wells Fargo & Co., supra; Porter v. Southern Express Co., 16 Am. Rep. 762.

The plaintiff while in Brooklyn delivered the frozen potatoes to a respectable commission merchant, and realized from the two cars $121.46. The evidence of this transaction was objected to, on the ground that it did not tend to establish the proper measure of damages. The value of the property at the time and place of shipment is the basis, according to the conditions of the bill of lading (condition 3), and the value at Avon and the quantity of potatoes loaded are conceded. The damages as awarded were ascertained by deducting from the stipulated value the amount received by the plaintiff from the commission merchant.

If a carrier is liable for damages for delay in the delivery of goods, the measure of damages is the difference in value of the goods at the time and place they should have been delivered and the time when in fact they were delivered. Sherman et al. v. Hudson R. R. Co., 64 N. Y. 254. So, if there is no delivery at all, the carrier is liable, as a general rule, for the value of the goods at the place where delivery was to be made, with interest thereon (Sedgwick on the Measure of Damages, p. 355), although the rule is not an inflexible one. The measure in each of these cases is easily fulfilled, and carries out the principle of indemnity to the shipper, which is the controlling principle where damages for loss of personal property are recoverable. Likewise, where there is a breach of an executory contract to sell and deliver personal property, the measure of damages is usually the difference between the contract price and the market price when and where delivery was to be made. Messmore v. The N. Y. Shot & Lead Co., 40 N. Y. 422–427. Each of these rules is of general application, but subject to variation, in order to compensate the loser for damages sustained at the instance of one who was responsible for the loss.

In the present instance the plaintiff was obliged to dispose of the potatoes promptly, in order to lessen the damages as far as practicable. There would be no definite market for frozen potatoes. He accordingly turned them over to a reliable commission merchant, known to him, and accounted for what he received. No question is raised as to his failure to respond fully for what he derived from the commission merchant, and no claim is made that the latter was remiss in any way. Keeping in mind the condition of the potatoes, the necessity for prompt action, and the liability of the defendant to make whole the plaintiff for his loss, we think the rule adopted was just to both parties. The general rule invoked by the counsel for the appellant could not prevail, for it is clear the plaintiff would not be able to establish a fixed market value in New York or Avon for potatoes injured as these were. Whether of any value at all depended upon the ability of the merchant to peddle them out speedily. What the plaintiff "realized" from the sale is some evidence of its value, like evidence of the price obtained at a private sale; and, if there is no other proof on the subject, is sufficient to warrant a recovery of that sum. Parmenter v. Fitzpatrick,

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135 N. Y. 190, 31 N. E. 1032; Matter of Johnston et al., 144 N. Y. 563–565, 39 N. E. 643.

It is important to note that the only objections to the evidence were that it was "incompetent, and not the proper measure of damages." It was competent to show what the plaintiff realized, for in that way the extent of his loss would be ascertained. The net sum realized by him was the proper measure of damages, providing the transaction by the commission merchant was honest, and he obtained all that the potatoes were fairly worth, and made no overcharge for his services. If the claim had been made that the merchant did not realize a fair price, or did not account honestly, or that there was a market price for frozen potatoes, these objections might have been met and explained. There was no objection to the mode of proof, and no contradictory evidence given, and in all the circumstances we think there was a proper basis for the damages awarded.

The judgment should be affirmed, with costs.

**Judgment affirmed, with costs. All concur, except WILLIAMS, J., who dissents, and NASH, J., not voting.**

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## BLAIR v. UTICA & M. V. R. CO.

**(Supreme Court, Appellate Division, Fourth Department. May 2, 1906.)**

RELEASE—VALIDITY—INSTRUCTIONS—EVIDENCE.

**Where evidence showed that a release of claims for personal injuries was signed after considerable discussion as to the amount to be paid, and ther was no excitement, and no threats were indulged in, and the signer had full opportunity to read the instrument, an instruction that, if there was fraud or imposition or undue influence in obtaining the release, it would not bar a recovery, was error, as not based on the evidence.**

Appeal from Trial Term, Oneida County.

Action by Della A. Blair against the Utica & Mohawk Valley Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Reversed, and new trial granted.

Argued before McLENNAN, P. J., and SPRING, WILLIAMS, NASH, and KRUSE, JJ.

Warnick J. Kernan, for appellant.

Frederick B. Adams, for respondent.

SPRING, J. The plaintiff claims to have been injured on the 11th day of August, 1903, when stepping from defendant's car on Genesee street at its intersection with Jewett Place, in the city of Utica. She testified that she signaled the conductor to stop the car, and it was stopped, and, as she attempted to alight, it was started again, and she was thrown to the pavement, sustaining injuries. While there is considerable conflict in the testimony, we are not disposed to hold on this branch of the case that the verdict is contrary to the evidence. On the 17th of September Mr. Hamilton, the claim agent of the defendant, called at the house where the plaintiff was boarding, to negotiate a settlement with her, and they arranged to meet at her room that evening.

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He called about 8 o'clock, and the plaintiff, who was an unmarried lady of 25 years of age, and Miss Bishop, her roommate, were present. Mr. Hamilton made an offer of $50, which was not accepted, but after considerable bantering they agreed upon the sum of $90. The plaintiff and Miss Bishop testified that Mr. Hamilton agreed also to pay the expenses of the physician who had attended the plaintiff, and also the expenses incurred at the hospital, where she had been cared for about two weeks. Hamilton testified that he promised to reimburse her for the hospital charge. There is no great importance to this testimony, for the defendant has not been presented with or requested to pay either of these items. A release in full under seal was executed by the plaintiff and witnessed by her friend, Miss Bishop, and the $90 paid to her. A week later she returned the money to the defendant, with a notice that she canceled the release; but the defendant declined to receive the money, and advised her that it was on deposit, subject to her order. The plaintiff testified that at the time of the execution of the release she was nervous, and Miss Bishop confirms this statement, and further testified that she herself was also in the same mental condition. Miss Bishop testified:

"I had full opportunity to read this release; I had it in my hands. Mr. Hamilton didn't say anything to me about not reading it. He didn't make any pretense to keep me from reading it. I wouldn't say that Miss Blair didn't have this instrument in her hands. I won't say that she didn't have opportunity enough to read it. I won't swear that Mr. Hamilton did not read this release. I will not swear that Mr. Hamilton did not read this release exactly as it reads to-day."

There is no pretense that Mr. Hamilton tried to prevent either the plaintiff or her friend from reading this release, or that he did not read it aloud, as testified to by him. Beyond that, the parties testified that the haggling over the price continued for some time, and, as a result of it, the agreement to accept $90 was reached. The release simply evidences the agreement. It was fully understood that the cause of action was to be satisfied upon the payment of this sum, except as to the doctor's bill and the account at the hospital, which is unimportant, for the action is not to reform the original release, or to recover on a collateral independent agreement.

The trial judge instructed the jury that:

"If this defendant was guilty of a fraud or imposition or undue influence whereby the release in question was obtained from this plaintiff, then your verdict in this case must be for the plaintiff."

Again, he stated to the jury that the plaintiff claimed the "release was a fraud"; and further, that:

"It was an imposition, due to undue influence and fraudulent design; a fraudulent attempt to obtain from her, her signature to the instrument in question. If on this testimony you believe that that instrument was signed and executed by her through undue influence, or fraud, or imposition, and that it was not her real contract, then you will find on that question that this release is not a bar to a recovery here if the plaintiff is right."

There was no evidence justifying the inference that the release was obtained through fraud, or that any compulsion or undue influence was exerted on the plaintiff to induce the execution of the release. The

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claim agent met her by appointment. She knew the object of his errand. She was about the room and with her roommate. There was no excitement; no threats were indulged in; no fear was manifested. She signed the release voluntarily, appreciating its contents, and expecting that the money received was in payment of her claim for the injuries she claimed to have suffered. The settlement may have been unfortunate for her. She possibly ought to have received a greater sum. Courts, however, will not interfere to annul the compromise of a pending litigation evidenced by a sealed instrument, unless convinced that an unfair advantage has been taken by one party over the other. The mere fact that, in the light of subsequent events, one party has been benefited at the expense or detriment of the other is not sufficient to nullify an adjustment made by the parties willingly and knowingly. Before the plaintiff can recover, she must be relieved from the effect of this release. Szymanski v. Chapman, 45 App. Div. 369, 61 N. Y. Supp. 310. Undoubtedly, the plaintiff may be permitted to impeach the instrument. Fleming v. Brooklyn Heights R. R. Co., 95 App. Div. 110, 88 N. Y. Supp. 732; Grockie v. Hirshfield, 50 App. Div. 87, 63 N. Y. Supp. 365. Presumptively it is valid, and there was not sufficient proof in this case to warrant the jury in finding that the settlement was not honestly made, and the terms of the release fairly comprehended.

The judgment should be reversed, and a new trial granted, with costs to the appellant to abide the event.

**Judgment reversed, and a new trial granted, with costs to appellant to abide the event upon questions of law only. All concur.**

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## DIKER v. HUTCHINSON.

**(Supreme Court, Appellate Term. April 24, 1906.)**

LANDLORD AND TENANT—TERMINATION OF LEASE—SURRENDER.

**A lease dated January 25th for a year and three months stipulated that two months' notice should be given before the expiration of the lease, or the same should be renewed for one year at the same terms. The lessee vacated the premises about May 1st in the following year. No written notice of his intention to vacate was given. He did not know whether he gave the key to the landlord or to the elevator boy, or whether he left it in the office. He did not know when the landlord said he would accept the surrender of the lease. *Held* not to warrant a finding that the landlord accepted a surrender before the expiration of the lease.**

Appeal from Municipal Court, Borough of Manhattan, Eleventh District.

Action by George Diker against Edwin B. Hutchinson. From a judgment for defendant, plaintiff appeals. Reversed, and new trial ordered.

Argued before SCOTT, P. J., and TRUAX and BISCHOFF, JJ.

Simon Sultan, for appellant.

McLaughlin & Stern, for respondent.

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TRUAX, J. The action was brought to recover three months' rent, under the lease made by the plaintiff as lessor to the defendant as lessee. The lease is under seal, and is dated January 25, 1904, and is for the term of one year and three months. The lease contains the provision:

"That, in case of default of any of the covenants, the landlord may resume possession of the premises, and relet the same for the remainder of the term at the best rent he can obtain for and on account of the tenant, who shall make good any deficiency."

It also contained a provision that:

"Two months' notice shall be given by either party before the expiration of the lease, and that in case such notice was not given, the lease shall be renewed for one year at the same terms, and the same for each subsequent year."

The defendant vacated the premises on or about the 1st day of May, 1905. It is conceded that no written notice was given by him of his intention to vacate the premises. He claims, however, that he notified the plaintiff of his intention to move on the 1st day of May, and that the plaintiff said "All right," and that subsequently he delivered the key of the apartments to the plaintiff, or some one connected with the plaintiff.

I am of the opinion that the evidence did not warrant the justice in finding that the plaintiff accepted a surrender of the apartment before the expiration of the lease. The defendant's testimony is altogether too vague and uncertain. He does not know whether he gave the key to the plaintiff, or whether he gave it to the elevator boy, or whether he left it in the office. He does not know when the plaintiff said he would accept the surrender of the lease.

Judgment reversed, and new trial ordered, with costs to appellant to abide the event. All concur.

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## STEWART v. NEW YORK CITY RY. CO. et al.

(Supreme Court, Appellate Term. April 24, 1906.)

COURTS—TIME FOR RENDITION OF JUDGMENT—JURISDICTION.

Where at the close of a trial in the Municipal Court it was stipulated that briefs were to be submitted by January 15th, and that the time for decision should run from January 15th, the court was without jurisdiction to render judgment on January 31st.

Appeal from Municipal Court, Borough of Manhattan, Tenth District.

Action by James E. Stewart against the New York City Railway Company and another. From a judgment of the Municipal Court of the city of New York in favor of plaintiff, defendant the New York City Railway Company appeals. Reversed, with costs.

Argued before SCOTT, P. J., and TRUAX and BISCHOFF, JJ.

William E. Weaver, for appellant.

Frank A. Acer, for respondent.

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PER CURIAM. At the close of the case it was stipulated upon the record that briefs were to be submitted by January 15, 1906, "and the court's time for decision to begin to run from that date." The judgment should therefore have been rendered on or before January 29, 1906. It was not rendered until January 31, 1906. The court therefore lost jurisdiction of the cause, and the judgment must be reversed. Moscowitz v. N. Y. City Ry. Co. (Sup.) 91 N. Y. Supp. 352; A. M. Eisenberg Co. v. Janzlik (Sup.) 92 N. Y. Supp. 247.

Judgment reversed, with costs.

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## MASLON v. SPRICKERHOFF et al.

(Supreme Court, Appellate Term. April 24, 1906.)

1. APPEAL—PRESUMPTIONS—DISPOSITION OF MOTION.
   Where the record does not show what disposition was made of a motion to strike out testimony, the appellate court will assume that it was decided in favor of the successful party.
2. EVIDENCE—ADMISSIONS—FORMER HOLDER OF NOTE.
   In an action on a check by an alleged bona fide holder, evidence of statements alleged to have been made by the original payee to persons other than plaintiff, and not in his presence, was not admissible to contradict his testimony as to the bona fides of his ownership.
   [Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 873–875.]

Appeal from Municipal Court, Borough of Manhattan, Fourth District.

Action by Wolf Maslon against George Sprickerhoff and another. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

Argued before SCOTT, P. J., and TRUAX and BISCHOFF, JJ.

Meyer Greenberg, for appellant.

Menken Bros. (Mortimer M. Menken, of counsel), for respondents.

TRUAX, J. This action was brought to recover the amount of a check made by the defendants to one Rabinowitz, and by him transferred to the plaintiff. The sole question litigated was whether or not the plaintiff was a holder for value in due course. The check was given to Rabinowitz on the evening of December 7, 1905, and on December 8, 1905, the defendants stopped payment thereon. The plaintiff testified that he got the check the night of December 7, 1905, of Rabinowitz, paying in cash the full face value of the check. Aside from statements alleged to have been made by Rabinowitz to several persons after the time payment of the check was stopped by the defendants, there is but slight testimony tending to contradict the testimony of the plaintiff as to the bona fides of his ownership. These alleged statements are not claimed or shown to have been made in the presence of the plaintiff, and were objected to, and were received only upon the promise of the defendants' attorney that they would be connected with the plaintiff. This not having been done, the plaintiff's attorney moved at the close of the case to strike from the record all such testimony. Decision upon

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this motion was reserved by the trial judge, who subsequently gave a judgment in favor of the defendants. As the record contains nothing from which we can determine what disposition was made of the motion, we must assume that it was decided in favor of the successful party. Herzfeld v. Reinach, 44 App. Div. 326–328, 60 N. Y. Supp. 658; Hillman v. De Rosa, 46 Misc. Rep. 261, 92 N. Y. Supp. 67. Such testimony was clearly inadmissible (Paige v. Cagwin, 7 Hill, 361; Clews v. Kehr, 90 N. Y. 633), and what effect it may have had upon the mind of the court in determining the issue in favor of the defendants it is impossible to say, and the judgment must therefore be reversed.

Judgment reversed, and new trial ordered, with costs to appellant to abide the event. All concur.

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## KOPPEL v. HATCH.

(Supreme Court, Appellate Term. April 24, 1906.)

1. DISCOVERY—EXAMINATION OF PLAINTIFF BEFORE ANSWER.

A defendant in an action on a note, seeking to raise the question whether plaintiff is a bona fide holder, is entitled to an examination of plaintiff before answer, for the purpose of obtaining facts necessary in the framing of an answer raising the issue.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Discovery, § 50.]

2. BILLS AND NOTES—ANSWER—DEFENSES.

A defendant sued on a note must, in order to avail himself of the defense that plaintiff is not a bona fide holder, allege that fact in his answer.

[Ed. Note.—For cases in point, see vol. 7, Cent. Dig. Bills and Notes, §§ 1532, 1561.]

Appeal from City Court of New York, Special Term.

Action by Sigfried Koppel against Walter P. Hatch. From an order vacating an order requiring plaintiff to appear and be examined, in order to enable defendant to frame his answer, defendant appeals. Reversed, with costs.

Argued before SCOTT, P. J., and TRUAX and BISCHOFF, JJ.

George H. Mallory, for appellant.

Simis & Coyle, for respondent.

PER CURIAM. The affidavits presented by the defendant on the application for an order to compel the plaintiff to appear for examination complied with the statute, and showed that the information sought by the defendant was material and necessary. In the language of the Appellate Division in Kramer v. Kramer, 70 App. Div. 615, 74 N. Y. Supp. 1049:

"It is evident that the testimony of the plaintiff, in view of the peculiar circumstances surrounding the execution and the delivery of the note, is material and necessary to the defense of this action. * * * The facts as to how the plaintiff became possessed of the note and the consideration, if any, that was paid are peculiarly within the knowledge of the plaintiff, and upon such a subject the defendant must be presumed to be absolutely ignorant. It

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devolves upon him to show that the plaintiff is not a bona fide holder of the note, and it is quite likely that he can only show that upon examination of the plaintiff. * * *"

In order to show that plaintiff is not such a bona fide holder, he must allege that fact in the answer.

The order appealed from is reversed, with costs and disbursements.

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## MYERS v. READE.

(Supreme Court, Appellate Division, Second Department. April 27, 1906.)

LANDLORD AND TENANT—COVENANTS IN LEASE—CONSTRUCTION.

Where the lessee of the second loft of a building covenanted to pay any charge which might be imposed on the premises for the Croton water by meter measurement, and there was a water meter for that portion of the building, which correctly measured the amount of water used, the lessee was liable for his proportion of the amount used in the building, though the city authorities rendered a single bill for the entire amount used in the building as measured by a meter through which all the water used in the building passed, and refused to render separate bills for the amounts used by the different tenants.

Appeal from Municipal Court of New York.

Action by Frederick S. Myers against William J. Reade. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Argued before HIRSCHBERG, P. J., and WOODWARD, JENKS, GAYNOR, and RICH, JJ.

Hamilton R. Squier, for appellant.

Daniel S. Decker, for respondent.

HIRSCHBERG, P. J. There is no dispute about the facts in this case, and the appeal presents but a single question of law for determination. The action is brought to recover rent for the second loft of certain buildings in the borough of Manhattan, leased by the plaintiff to the defendant, and also to recover the water rents for that portion of the premises. After the commencement of the action, the defendant paid the rent, leaving the claim for the water taxes alone to be litigated, and the justice has dismissed the complaint on the merits, on the ground that the right to recover is not given by the lease.

By the covenant in the lease the defendant agrees as follows:

"And also to pay any rent or charge which is or may be assessed or imposed according to law upon the said premises for the Croton water, on or as the same may become due and payable, by meter measurement or otherwise, in each year during the term, and, if not so paid, the same shall be added to the month's rent then due."

There were various other tenants in the building. It appears from the evidence that the city officials in charge of the water supply placed a water meter in the building, through which all the water passed which was used by the various tenants. The plaintiff, however, installed a separate meter for the defendant's loft, and it is not disputed that that meter accurately registered the amount of water which was used by him. The demand is for payment for that amount of water charged at the city's price. It further appears that the city officials refused to

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make out and present bills against the tenants separately, or for the quantity of water used by each separately, but made one charge against the plaintiff for the entire consumption. In these circumstances, the justice held, in effect, that no charge had ever been assessed or imposed for the water used by the defendant, and that the contract between the parties as made did not provide for the payment by the defendant of a charge for the just proportion of the water used by him when accurately measured and ascertained, but only when actually assessed or imposed as a separate and distinct item by the city authorities.

It seems quite clear to me that the contract between the parties provided, in express terms, that the defendant should pay to the plaintiff that sum of money which would represent the proportionate share of the entire water supply furnished to the buildings which would be chargeable at the city's price to the second loft as manifested by the reading of his meter. In Bristol v. Hammacher, 30 Misc. Rep. 426, 62 N. Y. Supp. 517, it was held by the Appellate Term that under a similar covenant the landlord could not recover an arbitrary proportion of the whole water rent, but in that case, while there were several tenants in the building using the water, there was but one water meter, and the attempt made in the action was to recover from the defendants a proportionate share of the entire charge, based upon that amount of water which they were assumed to have used by arbitrary estimate. It was held that the only manner in which the water rent could have been lawfully "imposed" upon the defendants would have been by the landlord's installment of a separate water meter for them, which would have shown the precise amount of water used by them. The logic of the decision is that a recovery could be had where a separate water meter is installed. The court said (page 428, of 30 Misc. Rep., page 518, of 62 N. Y. Supp.):

"In the case at bar the clause in the lease contains an express covenant. It is plain and certain in its provisions, and contains neither patent nor latent ambiguity, and no extrinsic testimony is necessary to determine its meaning. It obligates the defendants to pay only such charges for the use of water as might be 'imposed according to law' upon the demised premises. It is evident that there could be no liability on the part of the defendants under that covenant in the lease until such water rent was lawfully assessed upon that portion of the premises occupied by them under the lease. This could have been ascertained by the plaintiff by the placing of a water meter, so that the actual amount of water used by the defendants could have been determined, and they be lawfully charged therewith. Sections 350, 352, Consolidation Act (Laws 1882, pp. 91, 92, c. 410), provide that the commissioner of public works shall be authorized to cause water meters to be placed in buildings of this character, and scales of rent to be fixed for water used as determined by the meter. In that way the defendants could have been lawfully charged with the amount of water used by them, and their liability fixed under their covenant in the lease."

The provisions of the consolidation act cited by the court are substantially re-enacted in section 475 of the Greater New York Charter. Chapter 466, p. 212, Laws 1901.

In the case at bar the conduct of the parties clearly indicates the interpretation which they placed upon the clause of the lease which is in question. They understood and intended that the defendant should pay to the plaintiff, for the amount of water actually used by the former as

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indicated by the meter, his proportionate share of the rent or charge which should be assessed or imposed according to law by the city authorities upon the entire premises.

The judgment should be reversed.

**Judgment of the Municipal Court reversed, and new trial ordered; costs to abide the event. All concur.**

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## BUCKLEY v. CITIZENS' INS. CO.

**(Supreme Court, Appellate Division, Fourth Department. March 7, 1906.)**

1. INSURANCE—CANCELLATION—PROVISION IN POLICY—CONSTRUCTION.

**Where one insured by a fire policy gave his note for the premium to an insurance agent, and the company charged the agent with the amount of the premium, which he thereafter paid, the premium was, as between the insured and insurer, actually paid, within a provision of the policy giving the insurer the right to cancel it on five days' notice, and providing that, in case the premium had been actually paid, the unearned portion should be returned on surrender of the policy.**

**[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 398.]**

2. SAME.

**Where a fire policy contained a provision giving the insurer the right to cancel it on five days' notice, provided that, in case the premium had been actually paid, the unearned portion should be returned on surrender of the policy, the insurer could not effect a cancellation without a return or tender of the unearned premium.**

**[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 510.]**

3. SAME—SURRENDER OF POLICY.

**Notice of the insurer in a fire policy to the insured that the policy was canceled, in accordance with a provision giving the insurer that right, but providing that the insured should be entitled to a return of the unearned premium, and the return by the insured of the policy on receiving the notice, did not amount to a cancellation by agreement, where the insured failed to return the unearned premium.**

**[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 504.]**

**Nash, J., dissenting.**

Appeal from Trial Term, Oneida County.

Action by George Buckley against the Citizens' Insurance Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

The following is the opinion of the referee:

On the 12th of April, 1903, the defendant issued and delivered to the plaintiff its policy of insurance, dated April 12, 1903, insuring the plaintiff's hotel for the term of one year against loss or damage by fire to the amount of $625. There was other insurance upon the building, the whole amounting to $2,500. On the 21st of June, 1903, the building was injured by fire to the amount of $53, and the amount chargeable to defendant was $13.25. There is no dispute as to this. On the night of the 5th–6th of July the building was totally destroyed by fire. There is no dispute about the amount of the loss. The claim of the defendant is that the policy was canceled and was not in force at the time of the fire. Becker & Co. of Little Falls, N. Y., were the agents of the defendant in the issuing of the policy. On the 23d of June, 1903, they mailed to the plaintiff, who then lived at Remsen, a notice signed by them, and dated June 20, 1903, stating that the policy, describing it, "is hereby canceled from and after five days of the date hereof," and requesting the plaintiff to return the policy to their office, when the unearned premium,

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if any be due, would be returned to him pro rata. The notice also stated that it was given in pursuance of a condition of the policy which gave the insurance company the right to cancel the policy at any time by giving five days' notice of such cancellation, and provided that, in case the premium had been actually paid, the unearned portion should be returned on surrender of the policy; the company retaining only the pro rata premium. This notice was received by the plaintiff on the 23d or 24th of June. On or about the 26th of June, plaintiff mailed to Becker & Co. the policy, no letter or communication being sent with it. The unearned premium was not paid to the plaintiff before the fire, or at any time. The policy was returned by Becker & Co. to the defendant after the fire, and on July 7, 1903. Becker & Co. at the time of issuing the policy gave the plaintiff credit for the premium. Its amount, together with the premiums on policies in two other companies issued at the same time on the same property, was $97.51. The plaintiff also owed Becker & Co. $100 for premiums on policies on other property. In payment of these two items, the plaintiff, on or about May 20, 1903, gave to Becker & Co. his note for $197.50, dated May 20, 1903, payable three months after date to the order of Becker & Co. at the First National Bank of Remsen, with interest. Becker & Co., soon after receiving this note, indorsed it, and discounted it at a Little Falls bank, and received the proceeds thereof. The bank held the note until its maturity, when it was taken up by Becker & Co., and they still hold it. The $100 item seems to have been paid by plaintiff. It was the custom of Becker & Co., as agents of the defendant, to make daily reports to it of insurance placed in that company, and the premiums would be charged by defendant to Becker & Co., and periodically they had to make payment thereof to the company, whether they had collected them or not. It was their general custom to pay in 60 days. In case a policy was canceled, the agents would be credited with the unearned premium when the policy was actually sent to the company for cancellation. The premium on the policy in question was charged to Becker & Co. by the defendant in its April account. The full amount of this account was paid by Becker & Co. to defendant in August following. The defendant on the return to it of the policy credited them with the amount of the unearned premium, and this credit would appear in the July account, which would be subsequently paid.

As between the plaintiff and the defendant, the premium was, I think, actually paid, within the meaning of the policy. Battle v. Colt, 26 N. Y. 404, 406; Train v. Holland Ins. Co., 62 N. Y. 598, 602; White v. Conn. Ins. Co., 120 Mass. 330. If so, the defendant, in order to effect a cancellation under the notice, was bound to return or tender to the plaintiff the unearned premium. Tisdell v. New Hampshire Ins. Co., 155 N. Y. 163, 49 N. E. 664, 40 L. R. A. 705. This was not done, and the policy was therefore in force at the time of the fire, unless there was prior to the fire a waiver by plaintiff of such return or tender.

Upon the part of the defendant, it is, in effect, suggested that the act of the plaintiff in mailing to Becker & Co. the policy after the receipt by plaintiff of the cancellation notice amounted to a cancellation by agreement. I think not. Presumptively, the return of the policy to Becker & Co. was in compliance with the request in the notice, in order to obtain the unearned premium, and was not an assent to a cancellation without the performance by Becker & Co. of what they expressly offered to do in the notice. No intent of that kind can properly be inferred. Becker & Company did not return the policy to the defendant until after the fire—a circumstance of some considerable significance, not only on the question of waiver, but also on the question whether, as testified by plaintiff, Becker & Co. at an interview on the 26th or 27th of June agreed to hold the policy in force until they replaced the insurance in some other company. They had commenced an effort in this line before any interview with plaintiff, and continued it after the interview above referred to. The plaintiff was not informed of the amount of the unearned premium until after the fire, and it is probable that until that time there was no definite offer of adjustment.

Waiver is said to be the voluntary relinquishment of a known right. Richards on Insurance (2d Ed.) § 63; 29 Am. & Eng. Cyc. Law (2d Ed.) p. 1091. The burden of proof rests upon the party who asserts it. It must, I think,

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be said upon the evidence that the defendant has not established a waiver, and, if not, the policy was in force at the time of the fire, and the plaintiff is entitled to recover.

Argued before McLENNAN, P. J., and SPRING, WILLIAMS, HISCOCK, NASH, and KRUSE, JJ.

McGuire & Wood, for appellant.
Van Auken & Rice, for respondent.

PER CURIAM. Judgment affirmed, with costs, on opinion by MERWIN, Referee.

NASH, J. (dissenting). Conditions of the policy for its cancellation:

"This policy shall be canceled at any time at the request of the insured, or by the company, by giving five days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided, * * * the premium having been actually paid, the unearned premium shall be returned on surrender of this policy; * * * this company retaining the customary short rate, except that when this policy is canceled by this company by giving notice it shall retain only the pro rata premium."

The notice of cancellation addressed to the plaintiff, after giving the requisite notice and reciting the cancellation clause of the policy, stated as follows:

"You are requested to return said policy to this office accordingly when the unearned premium, if any be due, will be returned to you pro rata, as provided in said condition.
"[Signed] Becker & Co."

The notice was given June 20, 1903. Similar notices of cancellation of policies of the Westchester and Thuringia Insurance Companies were at the same time given by Becker & Co. to the plaintiff. Two or three days after receiving the notices by mail, the plaintiff mailed the three policies of insurance to Becker & Co. The plaintiff had obtained other insurance of Becker & Co. The bills for the premiums for the other insurance and upon these policies were rendered to the plaintiff, in settlement of which the plaintiff gave to Becker & Co. his promissory note for $197.50, dated May 20, 1903, payable three months after date to their order at First National Bank of Remsen, N. Y., with use. The note had been discounted at the time the notices of cancellation of the policies were given. It does not appear that the plaintiff had knowledge of this fact at the time of the return of the policies. The note was not paid at maturity, and was taken by Becker & Co. and produced upon the trial. It thus appears that at the time notice of the cancellation of defendant's policy was given to the plaintiff the premium had not been paid. The policy was valid as a contract of insurance, the company being bound by the credit given by its agent for the payment of the premium. But the premium had not been actually paid, which was the condition of the return of the unearned portion of the premium upon cancellation. Giving a promissory note is not payment. While it is held by the creditor and before maturity, the right of action upon the original consideration upon which it was received is suspended. It operates as a conditional payment. If transferred, and it remains in

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the hands of the transferee before maturity, so long as it thus remains it operates as an absolute payment of the original consideration upon which it was taken. If the creditor, who takes the note, indorses it, and is charged as indorser, and takes it up, he is remitted to his original right of action either upon the original consideration or the note. Putnam v. Lewis, 8 Johns. 389; Burdick v. Green, 15 Johns. 247; Battle v. Coit, 26 N. Y. 404, 406, 407. When, therefore, the plaintiff received the notice of the cancellation of the policy, the premium not having been actually paid, he was not entitled to a return of the unearned portion of the premium in cash. Having returned the policy to Becker & Co. upon their request, he must be deemed to have assented to the cancellation thereof; relying upon the return of the unearned premium by application of the amount upon his indebtedness to Becker & Co.

The judgment should be reversed, and new trial granted.

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## COLE v. SWEET.

**(Supreme Court, Appellate Division, Third Department. March 13, 1906.)**

1. WITNESSES—TRANSACTION WITH DECEASED PERSON—OBJECTION—WAIVER.
   In a suit brought by an executor at the instance of a residuary legatee against defendant for an accounting, plaintiff introduced defendant's evidence taken before the surrogate on exceptions by the residuary legatee to the executor's accounts, based on the executor's failure to recover certain alleged claims against defendant, in which proceeding defendant had been examined as a witness on behalf of the residuary legatee, after which the proceeding was suspended by the surrogate because he deemed himself without jurisdiction. *Held* that, the residuary legatee being the real party in interest, the reading of defendant's evidence constituted a waiver of the executor's right to object that defendant was disqualified to testify as to the whole of the transactions referred to in such testimony, under Code Civ. Proc. § 829, prohibiting a party from testifying to a personal transaction with a deceased person in an action brought by an executor.
   [Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 722.]
2. GIFTS—INTER VIVOS—VALIDITY—UNDUE INFLUENCE.
   In an action by an executor for an accounting, evidence *held* insufficient to show that certain gifts made by testatrix in her lifetime to defendant, who performed services for her as a servant and nurse, were obtained by fraud and undue influence.
   Smith, J., dissenting.

Appeal from Trial Term, Warren County.

Action by Norman Cole, as executor of the last will and testament of Elizabeth Thomas, deceased, against Mary Sweet. From a judgment in favor of defendant, plaintiff appeals, with the intention to bring up for review an interlocutory order denying plaintiff's motion for an order modifying the decision of the court by striking therefrom a provision for costs in favor of defendant. Affirmed.

The testatrix, Elizabeth Thomas, entered into an agreement in 1889 with the defendant, Mary Sweet, who before that time was earning $5 per week, whereby the latter agreed to live with the former as a domestic servant, and to perform the duties pertaining to such occupation, and said Elizabeth Thomas agreed to pay for such services $1 per week, and to bequeath to the defendant in her will $1,000 additional. Pursuant to such agreement, defend-



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**ant entered into the employment of said Elizabeth Thomas in 1889, and continued therein for nearly 14 years, and until the death of said Elizabeth Thomas. The plaintiff is the executor of the will of said Elizabeth Thomas, and has brought this action at the instigation of the residuary legatee thereunder, claiming that during the time defendant was in the employ of the said testatrix the latter was weak in body and mind, and that the defendant, while acting in a fiduciary capacity as the agent of the testatrix, wrongfully and fraudulently influenced her to sign and deliver to her, without any adequate consideration, checks for considerable sums of money, which the defendant drew thereon, and appropriated and converted the same to her own use, and also influenced testatrix to leave large sums of money in her hands, which she also wrongfully converted to her own use, and it is sought in this action to procure an accounting of such transactions, and to charge any amount found due to the plaintiff against the legacy for $1,000 given to the defendant by the will of the testatrix, and to recover a judgment against the defendant for the balance thereof. The testatrix died on the 20th day of July, 1903. The defendant denied in her answer that any fiduciary relations ever existed between her and the testatrix, and denied all allegations of fraud and undue influence and conversion of moneys. The court upon the trial dismissed the complaint, with costs against the plaintiff. From the judgment of dismissal, and from the order denying the motion to strike out the provision as to costs, plaintiff has appealed.**

Argued before PARKER, P. J., and SMITH, CHESTER, and COCHRANE, JJ.

J. A. Kellogg, for appellant.
A. Armstrong, for respondent.

CHESTER, J. Prior to the commencement of this action, proceedings were taken by the residuary legatee before the surrogate of Warren county to compel an accounting by the executor. In that proceeding the residuary legatee under the will of the testatrix, who is her son, filed objections to the account, filed by the executor, and made the claim that the executor had failed to collect from Mary Sweet, the defendant, the moneys she had improperly obtained from the deceased; claimed that she was indebted to the estate therefor, and asked that such moneys be offset against the legacy to her. The defendant was called and sworn as a witness for the contestant in that proceeding, and upon the examination of his counsel, who is the same counsel that represented the plaintiff on the trial of this action, she was required to testify concerning personal transactions she had with the deceased in regard to the very matters involved in this suit. The surrogate finally determined that he had no jurisdiction to pass upon the claim made by the residuary legatee upon the accounting. The proceeding was then suspended, and it was agreed that an action should be brought in the name of the executor against Mary Sweet to recover the same moneys that had been the subject of the accounting, and for such cause of action as the residuary legatee may deem proper; the residuary legatee to designate attorneys and counsel in such action, who shall have full charge of the prosecution thereof, and to save the executor harmless from any claim which may arise against him on account of the institution of such action. This action was commenced accordingly in the name of the executor as plaintiff.

Immediately upon the opening of the trial, the plaintiff offered in evidence all the testimony which had been given by the defendant in the

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proceeding in the Surrogate's Court, and under the defendant's objection that such testimony was incompetent, because the witness was in court, and should be examined in the regular way, such testimony, which covers some 23 pages of the printed record, was received and read as a part of the plaintiff's case. After the plaintiff rested on the trial, the defendant was sworn in her own behalf. Objections were then made by the plaintiff to all testimony on the defendant's part, involving personal transactions between her and the deceased, as being incompetent, under section 829 of the Code of Civil Procedure. These objections were overruled, and the defendant was allowed to testify fully concerning such personal transactions with the deceased as had been made the subject of inquiry on her prior examination. The exceptions to these rulings present the first question to be determined upon this appeal.

The appellant's counsel contends that the evidence of the defendant before the surrogate is to be regarded simply as her admissions, and that the proving of such admissions on this trial gives the defendant no right to explain or amplify the same, as the shield of section 829 of the Code of Civil Procedure stands in the way. It is true that such evidence of the defendant was not elicited in the first instance in this action by the plaintiff. If it had been, no doubt would exist as to her right to testify fully concerning the same transactions mentioned in the evidence, notwithstanding the prohibitions of section 829. But it was elicted on the part of the residuary legatee, who is the real, although not the nominal, plaintiff in this action, and in a proceeding instituted by him for substantially the same relief he is seeking in this action against the defendant, viz., to recover from her for his benefit moneys which he claims she improperly received from the testatrix. In that proceeding she was examined at great length concerning her personal relations and transactions with the deceased, and concerning every transaction which was the subject of inquiry upon this trial. These covered the subject of gifts from the deceased to the defendant, the method of drawing money from the bank upon checks, and the making of deposits in banks.

It seems to me that the plaintiff, under the circumstances presented here, by reading the defendant's testimony given in the Surrogate's Court, in evidence as a part of his case on this trial, is in no different position than if he had called the defendant to the stand as his witness, and elicited from her the same testimony which she had given in the Surrogate's Court. The evident purpose in not calling her was to prevent her giving upon cross-examination the testimony now objected to by the plaintiff. It would have been competent in the Surrogate's Court, after she had been examined by the contestant there, to have given upon cross-examination all the testimony which the plaintiff now seeks to exclude. That proceeding is still pending, and she could yet, in the discretion of the surrogate, be permitted to further testify there, and state the whole of transactions which she insists were only partially detailed there. If she had testified fully there, it could not be successfully contended that a part only of her testimony could be extracted and used against her here. The plaintiff, by the course adopted in getting her testimony, has, it appears to me, clearly opened the door to the defendant to detail the whole of any transaction about which she had

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been partially examined, and should be held to have waived the right to invoke the aid of section 829 to prevent her from so doing. The court was therefore right in overruling the objections.

The plaintiff also seeks to show that the parties stood in a confidential and fiduciary relation, so as to cast the burden upon the defendant of showing, by clear and convincing evidence, that the gifts made by the deceased to the defendant were free from fraud and undue influence. But the learned trial court has found upon sufficient evidence that the defendant held no fiduciary relations toward the deceased, except to deposit moneys when directed by her, collect interest when directed, make purchases when directed, pay moneys from her purse or put moneys in her purse when directed, and to do other things which an attendant would do when under the direction and supervision of an employer. The evidence is clear that whatever the defendant did she did pursuant to the explicit directions of the deceased with reference to the specific transaction. It was the relation of master and servant, with the servant faithfully obeying the orders which the master gave. There was no discretion at all left to the servant with respect to the manner in which these orders were to be obeyed, and while, in a sense, the relation was one involving some degree of confidence, it was not a fiduciary relation in the ordinary legal interpretation of that term. Nor is there any proof in this case of any undue influence by the defendant over the deceased, nor any evidence whatever of any fraud on the defendant's part. The evidence, too, is that the deceased was a woman of strong will, and kept a firm grasp upon all her business affairs, and that only upon two or three occasions, when she was ill or had a fever, did the deceased show any evidence of mental aberration. The evidence is to the effect that the defendant was faithful in every respect to the deceased, and performed not only the duties that she agreed to perform as a domestic, but all kinds of other services and attentions, many of which would ordinarily be performed by a nurse or by workmen or artisans; that the deceased felt under great obligations to the defendant for her valuable services, and said she thought as much of her as if she had been her own daughter. With this feeling she made gifts of money and other property to her from time to time while she was in her employ, which, the trial court has found, with the legacy and wages paid, were reasonable and in just recognition and compensation for her services, and for the affection and care shown by her towards her mistress, and the evidence shows, and the court has found, that all such gifts were freely and voluntarily made. The services covered a period of nearly 14 years, and after these gifts had been made the testatrix executed her will, giving to the defendant a legacy of $1,000, the amount covered by the original agreement, which clearly indicated that she intended the legacy to be in addition to the gifts.

While it is not easy to reconcile all of the statements made by the defendant in her examination before the surrogate with some of her statements made upon this trial, yet the relations between the defendant and the deceased and the gifts made have ample support in the testimony of the witnesses outside of the testimony of the defendant. The case was properly disposed of at the Trial Term and no reason is ap-

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parent why we should interfere with the judgment dismissing the complaint, or with the discretion of the trial justice in allowing costs to the defendant.

The judgment and order should be affirmed, with costs. All concur, except SMITH, J., who dissents.

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## JOHNSON v. GRENELL.

(Supreme Court, Appellate Division, Fourth Department. May 2, 1906.)

1. BOUNDARIES—HIGHWAYS.

Where a lot portrayed on a map as abutting on a street is sold in recognition of the map, but no reference is made to the street, the purchaser takes the fee to the center thereof, though the street be a private one, or an alley used in connection with the premises conveyed.

[Ed. Note.—For cases in point, see vol. 8 Cent. Dig. Boundaries, § 131.]

2. SAME—NAVIGABLE WATERS.

Where a riparian owner conveys a lot delineated on a map fronting on a street extending along the bank of a navigable river, the title conveyed reaches across the street to the water's edge, transferring the riparian rights of the vendor.

[Ed. Note.—For cases in point, see vol. 8. Cent. Dig. Boundaries, §§ 108, 135.]

3. SAME—PRESUMPTIONS—SUFFICIENCY OF EVIDENCE TO OVERCOME.

An owner of an island in a navigable river laid out the land into lots and streets, one street extending along the river bank. There was no access to the land abutting on the street except by water. Summer cottages were to be built on the lots. A lot abutting on the street was conveyed with reference to the map, but without referring to the street. The grantee during his occupancy built a dock on the river shore in front of his lot, and a third person erected a building on the dock, with the consent of the owner of the island, to whom he paid rent. Subsequently the grantee conveyed the lot, together with the dock and building which he had purchased and water rights. *Held*, that the presumption that the grantee took the title to the water's edge, including the riparian rights of the vendor, was not overcome, and the purchaser acquired title to the street to the river, subject to the easement of travel thereon, and to the dock and building.

Williams and Nash, JJ., dissenting.

Appeal from Trial Term, Jefferson County.

Action by Charles H. Johnson against Samuel B. Grenell. From a judgment granting insufficient relief, plaintiff appeals. Reversed, and new trial ordered.

McLENNAN, P. J., and SPRING, WILLIAMS, NASH, and KRUSE, JJ.

Virgil K. Kellogg, for appellant.

John O'Leary, for respondent.

SPRING, J. In 1886 Lucy Grenell owned Jeffers Island in the River St. Lawrence, in the county of Jefferson, and the defendant, her husband, has succeeded to her title and interest. In that year Mrs. Grenell caused said island to be surveyed and laid out into 176 lots, with streets and boulevards, and in October of that year caused said map to be filed in the clerk's office of said county, designating said

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island "Grenell Island Park." Conveyances of said lots have since been made with reference to, and in recognition of, said map. South Boulevard, one of the avenues or streets delineated upon said map, is about 50 feet in width, and extends along the southerly shore of said island, reaching from the lots northerly from said boulevard, and fronting thereon to the river front. Lot 34, represented upon said map, is one of those adjacent to said boulevard, and the easterly half thereof is now owned by the plaintiff, and is contiguous to lot 175. One Eldredge G. Robbins, by mesne conveyances from the Grenells, on the 24th of July, 1897, acquired by purchase lot 34, with the following description:

"All that tract or parcel of land situate in the town of Clayton, county of Jefferson, and state of New York, being lot No. 34 as laid down on the map of Grenell Island Park, said lot laying on southeast shore, and adjoining lot No. 175 on the west of lot now deeded to Widner, the lot one hundred and twenty-six feet front and sixty-eight feet deep, supposed to contain sixty by one hundred feet, more or less, and being the same premises conveyed by Samuel B. Grenell and Lucy M. Grenell to said Chauncey W. Hopkins and Ely Chamberlain by deed dated August 20, 1894."

Robbins during his occupancy built a pier and crib dock on the river shore in front of lot 34, and immediately south of the boulevard, extending into the river. Robbins erected a building on the westerly end of the dock, about 28 by 32 feet. A year or two later a man named Brooks constructed a boathouse on the easterly end of the dock, and in front of the premises now owned by the plaintiff. This boathouse was erected with the knowledge of the defendant, and rent was paid to him therefor. In September, 1901, Robbins conveyed the easterly half of lot 34 to the plaintiff, including the dock, dockage, boathouse, and water rights, and in June, 1903, Brooks sold to him the building which he had erected upon the easterly end of the dock. The defendant claims that no part of the boulevard passed by the conveyance, and this action was commenced in October, 1903, to determine the title to the street, and also to the wharf and the dock, which are south of the boulevard and below high-water mark. The referee held that the plaintiff acquired by his conveyance the fee to the northerly half of the street in front of lot 34; that the defendant owns the southerly half thereof, each owning subject to the easement of the lot owners; that the plaintiff owns the building at the easterly end of the dock; and "that the defendant, Samuel B. Grenell, is the owner of the riparian rights and of the dock south of South Boulevard, in front of the easterly one-half of lot 34, subject to the rights of the state of New York, and subject to the rights of the plaintiff of free access to the navigable waters of the St. Lawrence river over the same."

If a conveyance of premises adjacent to a street is made, the presumption is that the title extends to the center of the street, subject to the public easement. Hennessy v. Murdock, 137 N. Y. 317, 33 N. E. 330; Paige v. Schenectady Ry. Co., 178 N. Y. 102–110, 70 N. E. 213 et seq. And where a lot portrayed upon a map is sold in recognition of the map, and a street is delineated thereon, but no reference is made to it in the conveyance, the plaintiff takes the fee to the center, even though the road be a private one, or an alley used in connection with the premises conveyed. Bissell v. N. Y. C. & H. R. R. Co., 23

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N. Y. 67; Lowenberg v. Brown, 79 App. Div. 414, 79 N. Y. Supp. 1060; Gere v. McChesney, 84 App. Div. 39, 82 N. Y. Supp. 191; Hennessy v. Murdock, supra. This rule is founded on the presumption that the owner's title extends that far, and it is not reasonable to assume that, having parted with the title to the premises fronting on the highway, he will reserve the narrow strip which composes one-half of the road. If his title embraces the whole street in front of his land, the reason for the presumption that he parts with his title thereto clear across the street is equally sound, and that presumption obtains. Haberman v. Baker, 128 N. Y. 253, 28 N. E. 370, 13 L. R. A. 611. The court say, at page 259 of 128 N. Y., page 371, 28 N. E., 13 L. R. A. 611:

"Where the highway has been, as in the present case, wholly made from and upon the margin of the grantor's land, his subsequent grant of the adjoining land should be deemed to comprehend the fee in the whole roadbed, upon the same principle that exists for giving the fee to the center in the other cases. The grantor should be presumed to have intended by his conveyance the full investiture of the grantee with all appurtenant property rights in the highway. What other intention could be consistently supposed? In the early case of Jackson v. Hathaway, 15 Johns. 447, 8 Am. Dec. 263, it was observed that there was reason for intending that the parties to a conveyance of property bounded along or upon a highway meant to the middle of the highway. Would there not be equally reason for the legal intendment that they meant the whole highway where it was the property of the grantor in its entirety? Can we suppose an intention in the grantor to reserve to himself or to his heirs the fee in half of the highway? I think not."

If a highway passes over a farm, the owner by his conveyance of the whole farm grants the fee of the whole highway owned by him. So where the riparian owner sells lots delineated upon a map, fronting upon a street extending along the bank of a navigable river, the title conveyed reaches across the street to the water's edge, transferring all the riparian rights of the vendor. Stetson v. City of Bangor, 60 Me. 313; Wait v. May et al., 48 Minn. 453, 51 N. W. 471.

There is no proof to show that the presumption should not prevail in the present case. On the contrary, there seems to be good reason for holding that the defendant or his predecessor in title never expected to retain this narrow strip. When Mrs. Grenell laid out her land into lots, she outlined one street which skirted along the river, extending clear to its edge. There was no land owned by her between the street and the river. There was no access to the lots except by water. Wharfage of some kind was almost a necessary adjunct to the proper use and enjoyment of these lots fronting on that avenue. They did not purchase anticipating that they were limited to the use of the public dock owned by the defendant, nor did they expect that, whenever they built a dock extending into the river and outside the avenue, they must first obtain his consent, and possibly be compelled to attorn to him for its user, or be forbidden any dock privilege at all. These lots were to be built upon with summer cottages, and one of the chief enjoyments must be derived from boating and the use of the docks. Northerly of lot 34 and the other lots similarly located in that block or distinct parcel are several lots which front on another avenue on the other side of the block. Whether the rights of the owners of

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these lots are affected in any way by the devesting of the title from the defendant in the street does not appear. No right of way seems to have been reserved by the adjoining lot owner on the rear of the plaintiff over his lot, and the natural access to the street or avenue from such rear lot is on the other side, not on the South Boulevard.

The question of the rights of these other lot owners over the street is not important in this case. If their easement in the boulevard is interrupted, they may have cause of complaint; but the plaintiff is not here asserting any paramount right to the use of the street. So the question of trespassing on the lands of the state is not here for consideration. The controversy is between the grantor and her remote grantee, and involves simply a question depending upon the conveyances; the location of the lot with reference to the avenue and the surrounding circumstances shedding light upon the probable intention of the parties.

We think the title of the street in front of the easterly half of lot 34 is in the plaintiff to the river, subject to the easement, and that he is also the owner of the boathouse and dock; but beyond that we do not go.

The judgment should be reversed, and a new trial ordered, with costs to the appellant to abide the event.

Judgment reversed, and a new trial ordered, with costs to the appellant to abide the event. All concur, except WILLIAMS and NASH, JJ., who dissent.

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## SARGENT v. ST. MARY'S ORPHAN BOYS' ASYLUM et al.

(Supreme Court, Appellate Division, Fourth Department. May 2, 1906.)

1. INJUNCTION—PRELIMINARY INJUNCTION—BOND—LIABILITY.

The costs and expenses of opposing a motion made on an order to show cause why an injunction pendente lite should not be granted, where the temporary restraining order is limited to expire on the hearing of the motion, are not recoverable as damages, because of the preliminary injunction.

2. SAME—ACTION—REFERENCE.

After the final dismissal of the complaint, it was proper to direct a reference to ascertain the damages sustained by defendant by reason of a temporary restraining order.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, §§ 550, 561, 586.]

Kruse, J., dissenting.

Appeal from Special Term, Monroe County.

Suit by James Sargent against the St. Mary's Orphan Boys' Asylum and others. From an order confirming the report of a referee, to whom a reference was had to determine defendants' damages by reason of a restraining order, plaintiff appeals. Reversed, and motion for a confirmation of the referee's report denied.

The action was commenced on or about May 22, 1901, for the purpose of restraining the board of education of the city of Rochester and the public officials from paying the defendants Leonie, Adrian, Cassimer, and Gerard for services rendered as teachers in St Mary's Orphan Boys' Asylum. Accom-

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panying the summons and complaint were an order to show cause, restraining order, and an undertaking by the plaintiff, which are the basis of this proceeding and the defendant's claim for damages. On the 20th day of May, 1901, the plaintiff, upon the summons, complaint, affidavits, and an undertaking, obtained from the county judge of Monroe county an order requiring the defendants to appear at a special term of this court to be held on the 25th day of May, 1901, and show cause why an order should not be granted restraining the board of education of the city of Rochester and its individual members, as commissioners of common schools and as members of said board, during the pendency of the action from auditing, allowing, directing the payment of, and paying, any bill or demand in favor of the defendants Leonie, Adrian, Cassimer, and Gerard for services rendered as teachers in the defendant asylum, and restraining the treasurer of the city of Rochester during the pendency of the action from signing or issuing any check upon the public moneys in payment of any such bill or demand, and restraining the comptroller of the city of Rochester during the pendency of the action from auditing any such bill or demand, and from countersigning any such check in payment thereof. And further ordering that said board of education and officials be restrained until the hearing and determination of the motion, not exceeding 20 days, from auditing, allowing, and directing the payment of, and paying, any bill or demand in favor of the defendants Leonie, Adrian, Cassimer, and Gerard, or either of them, for services which they have rendered, or during such period shall render, as teachers in the school and institution of learning maintained and conducted at the city of Rochester, N. Y., by the defendant St. Mary's Orphan Boys' Asylum; and restraining the city treasurer from signing and issuing checks in payment of such bill or demand, and the comptroller from auditing the same, until the hearing and determination of the motion. The undertaking is in the usual form, and recites that the plaintiff is about to apply for and obtain an injunction order restraining the board of education of the city of Rochester and other officers from auditing or paying the defendants, naming them, for services which they have rendered, or during the pendency of the action shall render, as teachers in the school of the St. Mary's Orphan Boys' Asylum; restraining the comptroller from auditing such bill or demand; restraining other officers from signing, delivering, or countersigning such checks, and concludes: "Now, therefore, we [the plaintiff and surety] do hereby, pursuant to the statute and said order, jointly and severally undertake that the plaintiff herein will pay all costs that may be awarded the defendants herein, or either of them, if the court shall finally determine this action in favor of such defendants, or either of them, not exceeding $1,000; and also in like manner undertake that the plaintiff will pay to the said defendants Sister Leonie, Sister Mary Adrian, Sister Mary Cassimer, and Sister Mary Gerard, and each of them, such damages as they, or either of them, shall sustain by reason of said injunction if the court shall finally determine that the plaintiff is not entitled to such injunction." The motion upon the order to show cause was argued May 29, 1901, and on June 21, 1901, an order was granted denying the motion, as follows: "That the said motion be, and the same hereby is, in all respects denied, with ten dollars costs." The defendants having succeeded in the action, and the complaint of the plaintiff finally dismissed, this proceeding was commenced by an order of the Monroe (March, 1904) Special Term, directing a reference to ascertain the damages sustained by the defendants, or either of them, by reason of the restraining order and injunction, and report the same to the court. The reference was executed, and on April 25, 1905, the referee filed his report, wherein he found that the damages sustained by the defendants Leonie, Adrian, Cassimer, and Gerard and St. Mary's Orphan Boys' Asylum by reason of the restraining order of May 20, 1901, amounted in the aggregate to the sum of $737.36. By an order of the Monroe (September, 1905) Special Term, the report of the referee was in all respects confirmed, with $10 costs of the motion, and from that order the plaintiff appeals to this court.

Argued before McLENNAN, P. J., and SPRING, WILLIAMS, NASH, and KRUSE, JJ.

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David N. Salisbury, for appellant.
James M. E. O'Grady, for respondent.

NASH, J. The learned referee in his opinion says:

"If the question were a new one, I should find difficulty in coming to the conclusion that this expense was incurred by the defendants by reason of the injunction, and such it must be to come within the terms of the undertaking. The injunction was self-limited. Whatever order the court might make upon the return of the order to show cause would supersede the original order granting the injunction in question. If the court had granted the plaintiff's motion, it would have granted a new injunction, to continue during the pendency of the action. Having denied the plaintiff's motion, there was no need for the court to vacate the original order, because it fell of its own weight. The defendants were concerned in making diligent preparation to oppose the motion, not in order that they might dissolve the preliminary injunction, because that would dissolve itself on the determination of the notice, but to prevent the granting of a new injunction, which would continue until final judgment, and might be fraught with serious consequences. If it is suggested that if the defendants had not appeared the plaintiff might have failed to bring the motion on for argument, and therefore the injunction would have continued by force of its own terms, the rejoinder is sufficient that to prevent this the defendants need only appear, and take the plaintiff's default and a denial of his motion, and that preparation was necessary only to prevent the new and more serious evil of the new injunction. This view is sustained by Sweet v. Mowry, 71 Hun, 381, 25 N. Y. Supp. 82, in which the opinion was written by Justice Parker, and in which the facts were similar to those in the case at bar. A contrary view has, however, been taken in the case of Perlman v. Bernstein, 93 App. Div. 335, 87 N. Y. Supp. 862, and, as this case has been affirmed by the Court of Appeals in 179 N. Y. 531, 71 N. E. 1138, I feel that the decision in the case at bar must be controlled by it, unless it can be distinguished in its facts."

We think the two cases are clearly distinguishable. Perlman v. Bernstein was an action brought to set aside a lease made by the plaintiff to Bernstein, and by the latter assigned to the defendant Hammer. The latter was out of possession, and had instituted a proceeding in the Municipal Court to remove the plaintiff from the leased premises and to recover their possession. The injunction order was contained in an order to show cause, and restrained the defendant, until the further order of the court, from entering upon or into the store mentioned in a lease of the premises, and from using the store as a drug store or pharmacy, or any similar business, or for any other business than the sale of general merchandise; and also enjoined and restrained the defendant Hammer, until the further order of the court, from prosecuting the proceeding in the Municipal Court for the possession of the store, and the removal of the plaintiff therefrom, and requiring the defendants to show cause at special term why the injunction "herein contained" should not be continued during the pendency of the action. App. Div. Records, vol. 1375. As stated in the opinion, the injunction order entirely tied the defendant's hands, and prevented his enjoyment of the leased premises, and also the prosecution of any steps to obtain their possession. The complaint demanded, inter alia, a perpetual injunction, restraining the defendants from using the store as a drug store or pharmacy, or from carrying on therein the drug store or a similar business, and also that they be restrained from prosecuting the proceeding brought in the Municipal Court.

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The defendant appeared on the return day of the order to show cause, and succeeded in having the injunction set aside. The order denied the motion to continue the injunction during the pendency of the action, and further ordered that the "said injunction heretofore granted herein, be, and the same hereby is, vacated and set aside." The distinguishing feature of the case at bar is that here the injunction was temporary. It was to continue only until the hearing and determination of the motion for an injunction pendente lite. The defendants employed counsel to oppose that motion, not to move to vacate an order which upon the hearing and decision of the motion would be no longer of any force or effect. No order to vacate the temporary restraining order was required, and none was made. The motion for an injunction during the pendency of the action was simply denied, with $10 costs. As was said by Judge Parker in Sweet v. Mowry, the defendants would have been relieved from that order whether they appeared pursuant to the order to show cause or not. "They went to the expense of hiring counsel, not because the temporary injunction had been granted, but to prevent another and more extensive one from being made. If the judge had made the order to show cause, and not granted the temporary injunction, the defendants would have had the same condition before them, and the same expense to incur." The decision in Perlman v. Bernstein was placed upon the ground that the expenses incurred were allowed as a direct result of the injunction. The ground of the decision is stated in the opinion of the court, as follows:

"The defendant, when he appeared in court upon the return of the order to show cause, was there, not alone for the purpose of preventing the issuance of a further injunction, but was also there for the purpose of procuring the dissolution of the injunction which had been granted. The order which was entered upon such hearing recites that the defendant was successful in procuring the injunction order, which had been granted, to be vacated and set aside; and such services were clearly incurred on account of the injunction, within the cases to which we have called attention, as well as others."

The distinguishing features may not be broad, but they are clear, and were so understood by the court in Perlman v. Bernstein. Judge Hatch, writing for the court, says:

"The ground upon which the learned court at Special Term refused confirmation of the report was that the damages sustained did not result from the granting of the injunction, but were expended in preventing the issuance of a subsequent order continuing the injunction. Under such circumstances, the cases cited of Sweet v. Mowry, 71 Hun, 381, 25 N. Y. Supp. 32, Randall v. Carpenter, 88 N. Y. 293, and others cited by the court below, sustain his conclusion. These cases, however, have no application to the one represented by this record."

—Referring to a previous decision in the same case (83 App. Div. 203, 82 N. Y. Supp. 148).

In concluding his opinion, Judge Hatch said:

"It is evident, therefore, that this case is distinguishable from the cases cited by the court below, and calls for the application of a different rule."

We conclude that the rule is settled that the costs and expenses of opposing a motion made upon an order to show cause why an injunction pendente lite should not be granted, where the temporary restrain-

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ing order is limited to expire upon the hearing of the motion, are not recoverable as damages because of the preliminary injunction.

The appeal from the order confirming the referee's report properly brings up for review the question of the right of the defendant to the damages which have been awarded. The order of reference was a matter of right. It could not be determined what damages the defendants were entitled to recover by reason of the preliminary injunction until the facts were before the court. While it is held that the damages here awarded are not recoverable, it is not held that no damages can be recovered because of a preliminary injunction such as was included in the order to show cause. There may be damages directly affecting a party to his injury by reason of a temporary injunction which would be recoverable. The practice adopted here is the same as that followed in Sweet v. Mowry. We think it is correct.

It follows that the order appealed from should be reversed.

Order reversed, with $10 costs and disbursements, and motion denied, with $10 costs. All concur, except KRUSE, J., who dissents.

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## O'BRIEN v. LEVINE et al.

(Supreme Court, Appellate Term. April 24, 1906.)

1. LANDLORD AND TENANT—LEASES—ABANDONMENT—DEPOSIT FOR RENT—RETENTION BY LANDLORD.

   Plaintiff deposited certain money sued for to secure performance of a lease, one of the provisions of which was that, if any part of the premises should be abandoned, the landlords or their representatives might re-enter and re-let the premises as plaintiff's agents, and receive the amount, applying the same, first, to the payment of re-entry expenses, and then to the payment of the rent due; the balance, if any, to be paid to the tenant, who was liable for any deficiency. Plaintiff defaulted in the payment of rent, whereupon the landlords re-entered after plaintiff had voluntarily left the premises without cause. *Held*, that the landlords were entitled to retain the deposit until the expiration of the lease.

2. SAME—RENT—PAYMENT.

   Where a lease required the tenant to "do all inside and outside repairing," the tender of a check for a month's rent, less $32 claimed for repairs, which check was immediately returned by the landlords, did nct constitute payment of the rent.

3. SAME—LEASE—PROVISION FOR CANCELLATION—OPTION.

   Where a lease recited that, in case of any default by the tenant in any of the covenants therein, the landlords should have the right to collect rents from the subtenants, and that the lease should be canceled, such provision only authorized a cancellation at the option of the landlords in case of the tenant's default.

Appeal from Municipal Court, Borough of Manhattan, Fourth District.

Action by James O'Brien against Saul Levine and another. From a Municipal Court judgment in favor of plaintiff, defendants appeal. Reversed.

Argued before SCOTT, P. J., and TRUAX and BISCHOFF, JJ.

Pollak & Deutsch, for appellants.

Guiseppe L. Maggio, for respondent.

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TRUAX, J. The facts in this case are substantially undisputed. The plaintiff by written lease rented from the defendants certain premises in this city for the term of 4 years and 11 months from September 2, 1905, at an annual rental of $2,000, payable in monthly instalments of $166.66 on or before the 15th of each and every month in advance. At the same time the plaintiff deposited the sum of $333.33, to be held by the defendants "as security for the faithful performance of this lease by him. If all the conditions in this lease be performed by said tenant, said security will be returned to him at the time of the expiration of the term of this lease, with interest," etc. The lease also contained these clauses:

"Eighth. That if the said premises, or any part thereof, shall become abandoned by the tenant, the landlord or their representatives may re-enter the same, either by force or otherwise, * * * and relet the said premises as the agents of the said tenant, and receive the rent thereof, applying the same, first, to the payment of such expenses as they may be put to in re-entering, and then to the payment of the rent due by these presents; the balance, if any, to be paid over to the tenant, who shall remain liable for any deficiency. In case of any default by the tenant in any of the covenants herein, said landlords or their agent to have the right to collect rents from the subtenants, and this lease shall then become canceled. Said tenant does hereby waive any and all legal proceedings for the cancellation of this lease."

The tenant defaulted in payment of the rent for the month of October, 1905, which was due on the 15th of that month. Subsequently, and about November 1, 1905, the defendants took possession of the premises, and proceeded to collect the rents of the subtenants. On November 18, 1905, the plaintiff began this action to recover the amount of his deposit, less the rent due from October 15th to November 15th, and recovered a judgment for the difference between the sum deposited and one month's rent. The defendants in their answer pleaded a forfeiture of the security, and also that they had a right to retain the amount of the deposit until the expiration of the term named in the lease. Upon the trial the claim of forfeiture was abandoned, and the only question presented upon this appeal is the right of the defendants to retain the deposit aforesaid until the end of the term.

Under the testimony, I am of the opinion that the contention of the defendants is correct. The defendants instituted no summary proceedings, but simply resumed possession of the premises after the plaintiff's default in payment of rent. It is claimed by the plaintiff that he was forcibly ejected from the premises by the defendants. This is not sustained by the evidence. The plaintiff on the due day sent his check, concededly for less than the amount of rent due, claiming the balance to be due him for repairs made after his term began, although the lease provided that he should "do all inside and outside repairing." This check was not payment, and was promptly returned. On October 21st the plaintiff saw Saul Levine, one of the defendants, who, he testified, told him (plaintiff):

"If I didn't give the full month's rent, I ought never to stay any more; and if I didn't go away they would try to have me arrested. They told me to go out right away, and gave notice to the tenants not to pay me."

This was substantially disputed by Levine, who testified that the plaintiff on October 22d insisted upon giving his check for $134, and

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claimed allowance of a bill for repairs for $32, which was refused, and that upon November 1st Levine took possession of the premises, and began to collect the rent of the tenants.

Assuming plaintiff's testimony to be true, he was not forcibly evicted. He knew on October 15th his rent was due. Concededly, he has never paid it. After his conversation with Levine, he immediately left the premises, and did so voluntarily and without cause. By the eighth clause of the lease above quoted, the landlord had a right to re-enter the premises if abandoned, and relet the same as agents of the tenant, and it must be presumed that they are in possession of the premises in pursuance of the conditions of the lease and for the purposes therein specified. The clause in the lease reciting, "In case of any default by the tenant in any of the covenants herein, said landlord to have the right to collect rents from the subtenants, and this lease shall then become canceled," simply gives the landlord the option of declaring the lease canceled if default on the part of the tenant occurs, and does not give the tenant the right, by making a default, to then assert that the lease is canceled.

The theory upon which the courts have required the return of deposits under somewhat similar clauses contained in leases has been that such leases have been terminated, and such termination has been shown by the taking of summary proceedings, in which the issuing of a warrant "cancels the agreement for the use of the premises." Section 2253, Code Civ. Proc. Of course, in the absence of an agreement, a reentry and reletting on the part of the landlord would operate as a surrender and acceptance of the premises (Underhill v. Collins, 132 N. Y. 269, 30 N. E. 576), but such is not this case.

Judgment reversed, and new trial ordered, with costs to appellant to abide the event. All concur.

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## FULLER v. CHRISTIAN.

(Supreme Court, Appellate Term. April 24, 1906.)

**SALES—BREACH OF CONTRACT—DEFENSES.**

Where a contract for the sale of corporate stock was modified by extending the time for performance by the seller, this constituted no defense to an action for the breach of the contract by him, where the certificates of stock were never delivered, though the condition which the delivery was to await was fulfilled.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 1159.]

Appeal from Municipal Court, Borough of Manhattan, Twelfth District.

Action by Frank Fuller against Eugene Christian for breach of contract for sale and delivery of corporate stock. From a judgment in favor of defendant, plaintiff appeals. Reversed, and new trial ordered.

Argued before SCOTT, P. J., and TRUAX and BISCHOFF, JJ.

Arthur J. Gotthold, for appellant.

Gardenhire & Jetmore, for respondent.

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BISCHOFF, J. Accepting the defendant's testimony as a modification of his agreement as expressed in the receipt delivered at the time the money in question was paid in, time for performance upon his part in the delivery of the certificates of stock was postponed, but the agreement was not otherwise changed, and it remained that the buyer (the plaintiff's assignor) was entitled to an actual delivery of the certificates evidencing the issue of stock. The condition which the delivery was to await, as agreed, was concededly fulfilled, and the certificates were not delivered by the defendant, who rested his defense upon the claim that the stock was issued according to the stock-book of the corporation, and upon his belief that the certificates were mailed to the plaintiff's assignor. There was, however, no proof of mailing, and the fact that the stock was issued (assuming the proof to have been competent) was wholly immaterial to the question of the defendant's performance of his agreement to deliver the certificates. Non-performance was sufficiently indicated by the plaintiff's evidence of the failure to deliver the stock, and the evidence for the defendant in no way supported a defense to the cause of action.

The judgment must therefore be reversed, and a new trial ordered, with costs to the appellant to abide the event. All concur.

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## LATHAM v. WOODWARD.

(Supreme Court, Appellate Term. April 24, 1906.)

LANDLORD AND TENANT—TENANT HOLDING OVER—AGREEMENT FOR TERMINATION—EVIDENCE—SUFFICIENCY.

**In an action for rent against a tenant holding over for a year after the expiration of the term of his written lease, examined, and *held* not to justify a finding of a verbal agreement for the termination of the tenancy before the expiration of the year.**

**Bischoff, J., dissenting.**

Appeal from Municipal Court, Borough of Manhattan, Twelfth District.

Action by Henrietta A. Latham against Robert S. Woodward. From a judgment for defendant, plaintiff appeals. Reversed, and new trial granted.

Argued before SCOTT, P. J., and TRUAX and BISCHOFF, JJ.

Z. Melville Knowles, for appellant.

H. A. Cushing, for respondent.

SCOTT, P. J. I am not disposed to assent to the affirmance of this judgment, as the testimony upon which it rests is too doubtful to be relied upon. The action is for rent of a house for July, August, and September, 1905. The defendant first became a tenant under a written lease for three years from October 1, 1899. That lease was renewed by an interchange of letters from October 1, 1902, to October 1, 1903. No second written renewal was had, but defendant continued to occupy the house after October 1, 1903, thus becoming a hold-over tenant for a year, or until October 1, 1904. After that date he continued to occupy the house, and consequently became again a hold-over

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tenant for a year, unless his term was shortened by the agreement he relies upon. The defendant's testimony is that on June 1, 1903, he wrote to plaintiff that he would like to keep the house until May or June, 1905, and then surrender it. No written reply to this proposition was made by plaintiff. Defendant relies upon a verbal acquiescence, concerning which his testimony is not very convincing, and which plaintiff absolutely denies. That she ever acquiesced seems to be inherently improbable, as no reason suggests itself why she should agree two years ahead to have her house left tenantless at a time when it was practically certain that she would lose three months' rent. The agreement, if made as defendant testifies, was undoubtedly void under the statute of frauds, but the plaintiff for some reason did not take that objection below. Passing that point, however, I think that such an improbable agreement as defendant relies upon should not be sustained, except upon proof much stronger and more convincing than was presented in this case.

The judgment should be reversed, and a new trial granted, with costs to appellant to abide the event.

TRUAX, J., concurs.

BISCHOFF, J. (dissenting). There is no ground for our disturbing this judgment. The plaintiff's claim for rent was based upon the theory that the lease continued from October 1, 1904, to October 1, 1905, through the tenant's remaining in possession after October 1, 1904. It appeared, however, from testimony which the justice was well authorized to accept, that in June, 1903, the parties had orally agreed that the tenancy should end July 1, 1905. When this agreement was made the defendant was in possession as a tenant, whose term was to endure until October 1, 1903, and proof of the oral lease from that date to July 1, 1905 could, we may assume, have been assailed as in contravention of the statute of frauds; but all the evidence upon the subject was received without objection, except that in one instance, after the matter had been fully testified to, an objection was made to a responsive answer upon the ground that oral proof of the lease was not competent. At no time was the court asked to make any actual ruling, in accordance with the claim now asserted, that the oral lease was void, and thus the plaintiff, by acquiescence at the trial, waived any available objection to the contract and the mode of proof. Crane v. Powell, 139 N. Y. 379, 34 N. E. 911.

The judgment should be affirmed, with costs.

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## McCLELLAND v. LYNCH.

(Supreme Court, Appellate Term. April 24, 1906.)

HUSBAND AND WIFE—CONTRACT OF WIFE—LIABILITY OF HUSBAND.

**In an action for work done on a house belonging to the wife, the facts *held* to show that plaintiff had not contracted with defendant, but with his wife.**

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Appeal from Municipal Court, Borough of Manhattan, Seventh District.

Action by Robert McClelland against Cornelius Lynch. From a judgment in favor of plaintiff, defendant appeals. Reversed, and new trial granted.

Argued before SCOTT, P. J., and TRUAX and BISCHOFF, JJ.

William Brunner, for appellant.

Denis O'Sullivan, for respondent.

SCOTT, P. J. The plaintiff evidently sued the wrong person. The house upon which the work was done belonged to defendant's wife, and that plaintiff understood that he was contracting with her is shown by the fact that the original estimate is addressed to her, and not to defendant. For this reason the judgment must be reversed, and it will not be necessary to consider the question whether the work was properly done, of which there seems to be much doubt.

Judgment reversed, and new trial granted, with costs to appellant to abide the event. All concur.

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## BOLLINGER v. INTERURBAN ST. RY. CO.

(Supreme Court, Appellate Term. April 24, 1906.)

CARRIERS—INJURY TO PASSENGER—SUDDEN STARTING OF CAR—EVIDENCE.

In an action against a street railroad company for injuries to plaintiff's wife, alleged to have been caused by the violent starting and stopping of a car, evidence merely that the car started and stopped with a "violent jerk" or a "sudden jerk," not shown to have differed from that usually attending the starting and stopping of an electric car, was insufficient as evidence of defendant's negligence.

[Ed. Note.—For cases in point, see vol. 9. Cent. Dig. Carriers, § 1205.]

Appeal from City Court of New York, Trial Term.

Action by Leo Bollinger against the Interurban Street Railway Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Argued before SCOTT, P. J., and TRUAX and BISCHOFF, JJ.

Bayard H. Ames, for appellant.

Adolph Ruger (W. Harry Sefton, of counsel), for respondent.

SCOTT, P. J. This is a husband's action for the recovery of damages suffered by him in consequence of an accident to his wife. The claim is that, after the wife, who was carrying a child in her arms, had safely boarded the car (a closed one), and was entering the car from the rear platform, the car was started with such a violent jerk that she was thrown forward onto her knees, and that then the car was stopped with a jerk so violent that she was thrown backwards onto her back. The only evidence as to the accident was given by the injured wife and her sister; the defendant proving that it had received no report. The negligence claimed is the violent starting and stopping of the car. The only evidence as to the character of the start and stopping was



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that of the plaintiff's wife, who repeatedly used the words "violent jerk," and that of her sister who said that the car started with a "sudden jerk." This evidence conveys no definite impression to the mind as to the character of the movement of the car, does not show that that movement differed in any way from that usually attending the starting and stopping of an electric car, and is insufficient as evidence of defendant's negligence. Black v. Third Ave. R. Co., 2 App. Div. 387, 37 N. Y. Supp. 830. The cases upon which respondent relies, such as Dochtermann v. Brooklyn Heights R. R. Co., 32 App. Div. 18, 52 N. Y. Supp. 1051, and Grotsch v. Steinway Ry. Co., 19 App. Div. 130, 45 N. Y. Supp. 1075, differ from the present in that the evidence as to the nature of the movement of the car was satisfactorily shown to be unusual and of great violence. It is difficult, also, to see how the sudden starting and stopping of the car could have caused the plaintiff's wife to fall as she and her sister say that she did. She was at the rear doorway, facing forward in the direction the car was about to proceed. The sudden starting of the car (if it was suddenly started) would tend to throw her backwards, not forward onto her knees, and after she had fallen to her knees the sudden stopping of the car would tend to throw her still further forward, not to turn her completely over backward, with her head out of the rear door, and her feet pointing toward the front of the car. No plausible explanation is suggested why the injured person fell twice, in apparent violation of well-known and established physical laws. The damages are probably excessive. They consist, in large part, of a considerable bill for the services of a physician, covering a period of some three years. Obviously, some of the ailments for which these services were rendered are not traceable to the accident, and the court very properly so instructed the jury; but no attempt was made to divide up the physician's charges, or to show how much was properly chargeable to consequences flowing from the accident.

We think that the judgment should be reversed, and a new trial granted, with costs to appellant to abide the event. All concur.

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## REGLING v. LEHMAIER et al.

(Supreme Court, Appellate Term. April 24, 1906.)

1. MASTER AND SERVANT—INJURIES TO SERVANT—VERDICT—WEIGHT OF EVIDENCE.

Plaintiff's hand was smashed by the plunger of a tin stamping machine, and in an action for such injuries she testified that some two weeks prior to the accident she found that the machine would start and stop itself without any movement of the controlling levers; that she notified the foreman, who repaired the defect, and he directed plaintiff not to use a stick to unclog the machine, but to use her hand, and that the injury occurred while plaintiff was endeavoring to remove a piece of tin with her hand while the machine had been stopped, and without any movement of the starting lever. Defendants' witnesses testified that the machine was not out of order, and that plaintiff negligently used her hand when she had been threatened with dismissal if she failed to use the stick provided for that purpose. *Held*, that plaintiff's story was not so inherently improbable that a verdict in her favor could be disregarded as against the weight of the evidence.

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2. SAME—EMPLOYMENT OF MINORS—NEGLIGENCE.

Where defendant employed plaintiff, a girl under 16 years of age, to operate a dangerous tin stamping machine, in violation of Laws 1899, p. 353, c. 192, § 81, such employment was evidence of negligence in an action for injuries to plaintiff while operating the machine.

3. SAME—ADEQUATE APPLIANCES.

Where, in an action for injuries to a female child under 16 years of age, negligently employed to operate a dangerous machine, as provided by Laws 1899, p. 353, c. 192, § 81, plaintiff testified that her foreman had directed her to use her hand to unclog the machine, and not a stick provided by the master for that purpose, the fact that the master had provided such stick which if used would have furnished adequate means to prevent the accident did not, as a matter of law, absolve him from negligence.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 1086.]

4. SAME—CONTRIBUTORY NEGLIGENCE.

Plaintiff's obedience of the foreman's direction to unclog the machine with her hand instead of using the stick was a circumstance bearing on the absence of contributory negligence on her part as a matter of fact.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 940.]

5. TRIAL—INSTRUCTIONS—MODIFICATION—REQUESTS.

In an action for injuries to a minor servant there was an issue whether plaintiff had or had not represented her age to be 16 years when she was employed; the dispute being as to defendant's claim that plaintiff had written her age on a card handed her by the foreman at the time. The court charged that the fact that she put her age down as 16 years without more would not excuse defendants from complying with Laws 1899, p. 353, c. 192, § 81, prohibiting the employment of children under 16 years of age to operate dangerous machinery. Defendants' counsel excepted only to that part of the charge in which the court said that plaintiff's "writing her age did not excuse the defendants." *Held*, that such exception was not sufficient as a request for a modification of the charge that plaintiff's statements of her age might be considered on the question of negligence.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 646.]

Appeal from City Court of New York, Trial Term.

Action by Emma Regling against James M. Lehmaier and others. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Argued before SCOTT, P. J., and TRUAX and BISCHOFF, JJ.

Fred. E. Fishel, for appellants.

August P. Wagener, for respondent.

BISCHOFF, J. The plaintiff was injured when operating a machine in the defendants' factory, at a time when she was under the age of 16 years, and the action proceeded upon the theory of negligence arising through the defendants' violation of the statute (Laws 1899, p. 353, c. 192, § 81) relative to the employment of children in the operation of dangerous machines, as well as through the alleged failure of these employers to provide a safe place of work. The machine was a device for stamping or shaping tin cups, was operated by steam, and consisted of cylinders, each fitted with a plunger, which pressed the tin discs, supplied automatically, upon a die affixed to the table which formed the base of the machine. Sticks were provided for the purpose of enabling the operator to loosen such of the tin discs as

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might become wedged, and there were two control levers on the table, one near the plaintiff, to stop the machine, and the other, to start as well as to stop it, at the place occupied by another operator. From the plaintiff's testimony it appeared that at a time some two weeks prior to the accident she found that the machine would start and stop itself without any movement of the control levers, and that she notified the foreman, who said he would fix it, which he did, and also told the plaintiff not to use the stick to dislodge the tin cups, but to use her hand, as the stick would injure the die. The injury was testified to have occurred through the fall of the plunger upon the plaintiff's hand, when she was trying to loosen a piece of tin, while the machine had been stopped, but without any movement of the starting lever. The defendants' witnesses gave testimony to the effect that the machine was not out of order; that the plaintiff, instead of being told to use her hand upon the machine, had been threatened with dismissal if she failed to use the stick which was provided; and that the injury was due to her placing her fingers in the machine when it was actually in operation.

We find no inherent improbability in the plaintiff's story such as should lead us to say that the jury, when accepting her testimony, disregarded the weight of the evidence, and there was clearly sufficient proof to support a finding of the defendants' negligence and of the plaintiff's freedom from contributory negligence. This was a machine of a dangerous character, as the term is usually understood, and the fact of the plaintiff's employment to operate it, when under the age required by the statute, was evidence of negligence, to be considered by the jury in connection with the other facts in the case (Marino v. Lehmaier, 173 N. Y. 530, 66 N. E. 572, 61 L. R. A. 811), while the extent of the plaintiff's assumption of the risk of injury from the machine was necessarily for the jury. Thus that the act of the foreman in directing the plaintiff not to use the stick provided for her safety, treated as the act of a fellow servant merely, led to the injury which the master had furnished adequate means to prevent, would not, as matter of law, absolve the defendants in such a case from the charge of negligence, and the plaintiff's obedience to the foreman's direction was a circumstance favoring the absence of contributory negligence as a matter of fact.

A point is made that reversible error was committed in the charge to the jury. There was an issue whether the plaintiff had or had not represented her age to be 16 years when she was employed; the dispute being as to the defendants' claim that she had written her age, as well as her name and address, upon a card handed her by the foreman at the time. The plaintiff testified that she did not write the words stating her age, and the question was simply one of credibility, which the jury, with the writing before them, could intelligently decide. The court in the course of the colloquial charge said upon this subject:

"That fact, gentlemen of the jury, would not excuse the defendants, even assuming that the child put down her age as sixteen years; there was something more and further required of the defendants in order to comply with the statute which I have read you."

It may well be that this instruction was open to modification in so far as it failed to leave to the jury directly the question whether, in the

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light of the plaintiff's representation of her age, if found to have been made, the defendants were negligent when violating the statute; the fact of negligence through the violation being, as noted, for the jury to decide, in connection with all the circumstances of the case. The charge as quoted simply related to the bearing of the plaintiff's representation upon the fact of the defendants' compliance with the statute, and so far it was not erroneous; but the defendants did not present the point to the court that the statement of her age by the plaintiff should be considered upon the question of negligence, the words of counsel being only, "I except to that part of your honor's charge in which you said her writing her age did not excuse the defendants." The correct proposition being that the defendants were not, as matter of law, to be deemed excused, but that the plaintiff's statement of her age might be considered upon the question of negligence, this exception, accompanied by no suggestion of a modification of the charge, cannot properly be deemed sufficient present error to justify a reversal of the judgment.

We conclude that the judgment should be affirmed, with costs. All concur.

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## ROSENSTEIN v. CASEIN MFG. CO.

**(Supreme Court, Appellate Term. April 24, 1906.)**

1. **Sales—Action for Price—Burden of Proof.**

**Where, in an action for goods sold by sample, the buyer pleaded the general issue, and alleged that the goods fell below the sample, the seller had the burden of proving that the goods delivered were equal to the sample.**

**[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 1047.]**

2. **Same—Issues and Proof.**

**In an action for the price of goods sold by sample, the buyer pleaded the general issue, and alleged that the goods fell below the sample. The evidence of the buyer was to the effect that the goods fell below the sample, and part of them were practically worthless. *Held* that, in the absence of evidence that the seller delivered goods equal to the sample, there could be no recovery, though defendant's evidence was disregarded.**

Appeal from City Court of New York, Trial Term.

Action by Max H. Rosenstein against the Casein Manufacturing Company. From a judgment for plaintiff, and from an order denying a motion for a new trial, defendant appeals. Reversed, and new trial granted.

Argued before SCOTT, P. J., and TRUAX and BISCHOFF, JJ.

Gillespie & O'Connor (George J. Gillespie and William F. Delaney, of counsel), for appellant.

Engel, Engel & Oppenheimer (J. B. Engel, of counsel), for respondent.

SCOTT, P. J. The plaintiff sued for goods sold and delivered, alleging the sale and delivery of 39 barrels of a certain manufactured product known as "casein." The defendant, denying the contract set forth in the complaint, alleged an agreement for sale by sample; that 39 barrels were received; that they did not conform to the sample; and that

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they were for that reason rejected. A counterclaim was also pleaded for freight paid on the barrels received. At an early stage of the trial the plaintiff conceded, and, indeed, the evidence clearly showed, that the sale had been by sample, and the only point litigated was whether or not the merchandise delivered came up to the sample. The only evidence upon that point was that which was given by the defendant, and it was all to the effect that the casein in 34 out of the 39 barrels fell below the sample, and was practically worthless. The learned justice in the course of his charge instructed the jury as follows:

"The burden of proof, ordinarily, in a case for goods sold and delivered is upon the plaintiff; but in an action of this character, where the defense is that the goods are not up to sample, the burden shifts from the plaintiff to the defendant, and it becomes the duty of the defendant to satisfy you, by a fair preponderance of the evidence, that the goods were not up to sample."

This was duly excepted to, as was the court's refusal to charge that it was the duty of the plaintiff to establish that the goods delivered by him were up to sample, under which the sale was had, and the charge and refusal to charge are now called in question as reversible errors.

The charge in the particular noted was obviously erroneous, and cast upon the defendant a burden which it was not called upon to bear. Duryea, Watts & Co. v. Rayner, 20 Misc. Rep. 544, 46 N. Y. Supp. 437; Rose v. Wells, 36 App. Div. 593, 55 N. Y. Supp. 874. It is elementary that the plaintiff, in order to recover, must affirmatively establish the essential elements of his cause of action. One of the essential allegations of his complaint was that he had delivered the casein which had been the subject of sale. This allegation was put in issue by the general denial, as well as by the more specific separate defense which alleged the sale by sample. So soon as the fact was established, by concession or proof, that the sale had been by sample, the plaintiff could establish his allegation of delivery only by showing that the goods attempted to be delivered were the goods which had been the subject of the sale, i. e., goods equal to the sample. Hence, it became a part of plaintiff's affirmative case to show that the goods were equal to sample, and the burden of doing this never shifted from him to the defendant. The verdict was contrary to all the evidence in the case as to the quality of the goods attempted to be delivered, and we cannot say that the jury was not influenced to the defendant's prejudice by the erroneous charge.

We think that the trial justice might well have dismissed the complaint, or at least have set the verdict aside as against the evidence. As has been said, the only issue litigated was whether or not the goods came up to sample, and all the evidence on this point was to the effect that they did not. It is no answer to say that the jury were not bound to believe the defendant's witnesses, for, if their testimony should be entirely disregarded, the case would be left with a concession that the sale was made by sample, and with no evidence that the plaintiff ever delivered, or attempted to deliver, the goods which he sold, to wit, goods equal to the sample by which the sale was made.

The judgment must be reversed, and a new trial granted, with costs to appellant to abide the event. All concur.

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## MESSENIO v. ATCHISON, T. & S. F. RY. CO.

(Supreme Court, Appellate Term. April 24, 1906.)

MASTER AND SERVANT—CONTRACT OF EMPLOYMENT—MODIFICATION.

A person applied for a position as boiler maker, on condition that he was competent. No time was mentioned when the employment was to begin or terminate. On examination by the master mechanic, the applicant was found incompetent, and was assigned to other work for less wages, if he so desired. He entered on the duties assigned, and received the wages agreed on without protest. *Held* that, as the contract of employment as boiler maker was terminable at the will of either party, the acceptance by the applicant of other work for less wages operated as a termination thereof.

Appeal from Municipal Court, Borough of Manhattan, Second District.

Action by Joseph Messenio against the Atchison, Topeka & Santa Fé Railway Company. From a judgment for plaintiff, defendant appeals. Reversed, and new trial ordered.

Argued before SCOTT, P. J., and TRUAX and BISCHOFF, JJ.

Crocker & Wickes (Forsyth Wickes, of counsel), for appellant.

Raymond Cotte, for respondent.

TRUAX, J. The defendant advertised in this city for men to fill the places of its striking workmen in Arizona and California. The plaintiff applied for the position of boiler maker. He signed a contract, which recited that it was made upon the express understanding and condition that the answers and statements therein contained were true, and that "he was a competent boiler maker," and that "this agreement is made upon the condition of the truth of said representations." His compensation was to be not less than 34, nor more than 38, cents per hour. No time was mentioned when such employment was to begin or terminate. The plaintiff was conveyed to California by the defendant, and upon his arrival there was subjected to an examination by the defendant's master mechanic, and it is clear from the testimony in the case that the plaintiff was deficient in the qualifications necessary to fill the position of a competent boiler maker. He was informed of the result of such examination, and was told that, if he so desired, he would be assigned to work as a machinist's helper at wages of 21 cents per hour. He thereupon entered upon the duties of that position, and remained in the defendant's employ from May, 1901, until August of that year, when he voluntarily left the service of the defendant. He was paid in full at the rate of 21 cents per hour, and for every hour of overtime was paid at the rate of "time and a half," and he accepted such payment, seemingly without protest or claim for further remuneration. The time plaintiff worked and the amount paid him is not disputed. Upon the trial the plaintiff offered the written contract in evidence. Over the objections of the defendant, the plaintiff was allowed to offer oral testimony of conversations had prior to the making of the written agreement, which tended to vary it in several important particulars, but the testimony thus given does not seem to have entered into the computation by which the court below arrived at the judgment given in

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favor of the plaintiff, as such judgment only represented the difference between the sum actually paid the plaintiff and the lowest rate he would have received under the written contract.

We think, however, the plaintiff is not entitled to recover in any event upon the facts disclosed. The contract was clearly terminable at the will of either party. Martin v. Ins. Co., 148 N. Y. 117, 42 N. E. 416; Outerbridge v. Campbell, 87 App. Div. 597, 84 N. Y. Supp. 537; Byrne v. Weir, 38 Misc. Rep. 741, 78 N. Y. Supp. 1110. When the defendant, by the examination which it had a right to make, ascertained that the plaintiff was incompetent to perform the duties of the position for which he had made application, another position was offered by the defendant and accepted by the plaintiff. The original contract was thus not only by the understanding, but by the acts, of the parties terminated, and a new one entered into, the terms of which were adopted, and the benefits received by the plaintiff. He cannot now resort to the previous written contract for the purpose of enforcing a cause of action against the defendant.

The judgment must therefore be reversed, and a new trial ordered, with costs to the appellant to abide the event. All concur.

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## COSTELLO v. FORTY-SECOND ST., M. & ST. N. AVE. RY. CO.

(Supreme Court, Appellate Term. April 24, 1906.)

1. JUDGMENT—DEFAULT—SETTING ASIDE.

On a motion to open a default judgment, based not only on affidavits, but on all the proceedings and pleadings and the inquest taken by the plaintiff against the defendant, the testimony given at the inquest will be examined, and where it does not show a cause of action the judgment will not stand.

2. STREET RAILROADS—OPERATION—COLLISION WITH VEHICLE.

Where plaintiff, while standing with his cab three yards from a street car track, saw a car approaching at half speed, but turned and drove on the track, and was struck by the car, he is not entitled to recover for the injuries.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Street Railroads, § 214.]

Appeal from Municipal Court, Borough of Manhattan, Tenth District.

Action by Michael T. Costello against the Forty-Second Street, Manhattanville & St. Nicholas Avenue Railway Company. From an order denying a motion to vacate a judgment by default and for a new trial, defendant appeals. Reversed, and new trial ordered.

Argued before SCOTT, P. J., and TRUAX and BISCHOFF, JJ.

William E. Weaver, for appellant.

Harrie C. Manheim, for respondent.

TRUAX, J. From an examination of the affidavits submitted on the part of the defendant, it is clear that they do not furnish a sufficient excuse for opening the default. The motion, however, is based not only upon affidavits, but "upon all the proceedings and pleadings had here-

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in and the default and inquest taken by the plaintiff against the defendant." The testimony given at the inquest is attached to, and forms part of, the return, and, for the purpose of determining whether or not the default should be opened, we may examine such testimony, with a view of determining whether the same sets forth a cause of action against the defendant, because, unless the plaintiff from the facts shown is entitled to recover, the judgment should not stand. The plaintiff was the only witness sworn in his own behalf. He testifies that he was standing with his cab on Broadway between Forty-Fifth and Forty-Sixth streets, near the center of the block, on the east side of the street. He wanted to go south, and for that purpose started to cross the street. He was then about three yards from the car track, and saw a car at Forty-Fifth street, coming north at "half speed." It is evident that his horse was headed north, as he says: "I was in the center of the square [Long Acre Square], turning to get out." As he was crossing the north-bound track, he was hit by the car. It would appear, therefore, that after he saw the car he turned his horse towards the west, traversed the distance from where he stood to the track, and had got upon the track when struck by the car. Whether the car struck the horse or the cab is not shown. The accident occurred in the center of the block. There was no evidence that the speed of the car was accelerated, nor of any other circumstance showing negligence on the part of the motorman. The mere happening of an accident in such a case is no evidence of negligence, and, under the circumstances disclosed, if the defendant was in any way negligent, the plaintiff was equally so.

Order reversed, and new trial ordered, with costs to appellant to abide the event. All concur.

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## D'OLIER v. NEW YORK CENT. & H. R. R. CO.

**(Supreme Court, Appellate Term. April 24, 1906.)**

CARRIERS—INJURY TO SHIPMENT—DAMAGES.

Where 14 cases of yarns were shipped, of which 5 were broken and the yarns therein damaged, and the shipper made no effort to discover the condition of the yarn in the uninjured cases, but sold the whole 14 cases as damaged goods, and there was no other evidence as to the amount of the damage, the shipper is not entitled to recover the difference between the value of the yarns when shipped and the amount received at the sale.

Appeal from Municipal Court, Borough of Manhattan, Seventh District.

Action by James D'Olier against the New York Central & Hudson River Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Reversed, and new trial granted.

Argued before SCOTT, P. J., and TRUAX and BISCHOFF, JJ.

Charles C. Paulding, for appellant.

Ezra P. Prentice, for respondent.

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SCOTT, P. J. The plaintiff sues for the damage suffered by certain cases of cotton yarns while in course of transportation by defendant. No question is made as to defendant's liability, the only contest being as to the amount of the loss. The shipment consisted of 14 cases of cotton yarns on cones. Upon arrival at the place of destination, 5 of the cases were broken, and the yarns contained therein damaged. So far as appears from the evidence, the other 9 cases were intact and uninjured, and there is not the slightest evidence that the yarns contained in them were damaged at all. The plaintiff's assignors, owners of the yarns, made not the least effort to ascertain the condition of the yarn in the uninjured cases, but offered the whole shipment for sale as damaged goods, realizing but 10 cents a pound for the lot, whereas the value of the sound yarn before shipment had been 18 cents a pound. For the difference between the two prices the plaintiff has recovered judgment, the only evidence as to the value of the goods after the injury being the price at which the yarn was sold. In awarding damages as if the whole shipment had been damaged, the court followed the speculative and fanciful testimony of plaintiff's witnesses, to the effect that the fact that a few cases out of a shipment had been injured would so affect the reputation of the whole shipment in the eyes of the trade that a fair price could not be obtained even for the uninjured merchandise; a proposition which appears to be quite unreasonable. Furthermore, the evidence of selling value is most unsatisfactory. The plaintiff relies upon Parmenter v. Fitzpatrick, 135 N. Y. 190, 31 N. E. 1032, as an authority for relying upon the selling price as some evidence of value. That case is authority for the proposition that under some circumstances proof of the price obtained at a bona fide sale will tend in the direction of proving or establishing a market price, and therefore be some evidence of value. But it is essential that the sale shall be bona fide, and not in any way forced. In the present case the evidence leaves a strong impression upon the mind that the sale was not bona fide in the sense that plaintiff made no effort to realize a good price. On the contrary, the goods were offered in such a manner as to discredit them, and no effort whatever was made to ascertain the extent of the damage, or how much of the shipment was uninjured. The result is that, while only 5 cases out of the 14 were injured at all, and all of the yarns comprised in the shipment, save a very few yards, were actually used by the purchaser, the defendant has been mulcted in damges to an amount considerably greater than the whole value at the point of shipment of the 5 cases which were damaged. If the plaintiff's assignors suffered the loss for which they sue, it is because they took no pains to reduce their damages, or to obtain a fair price for so much of their shipment as was uninjured.

Judgment reversed, and new trial granted, with costs to appellant to abide the event. All concur.

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## SCHULMAN v. BUCHLER.

(Supreme Court, Appellate Term. April 24, 1906.)

GUARANTY—RELEASE OF GUARANTOR—EXTENSION OF TIME FOR PAYMENT.

Where defendant guarantied the payment by a buyer for goods sold for a period of one year, and nearly a year later the seller, without defendant's knowledge, took a long series of the buyer's notes for the price, payable at weekly intervals, there was an extension of the term of credit, releasing defendant.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Guaranty, § 67.]

Appeal from Municipal Court, Borough of Manhattan, Thirteenth District.

Action by Joseph Schulman against Louis Buchler. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Argued before SCOTT, P. J., and TRUAX and BISCHOFF, JJ.

David Goldstein, for appellant.

A. I. Gordon, for respondent.

SCOTT, P. J. The defendant, on September 18, 1903, executed the following written guaranty, upon which this action is brought:

"I, the undersigned, do guaranty the payment of all goods delivered to Mrs. Fanny Shilkin to the amount of one hundred and fifty dollars ($150) for the period of one year, beginning September 18, 1903, to the 18th of September, 1904."

Within the year plaintiff sold to Mrs. Shilkin goods to the amount of $894.96, and rendered her a bill therefor, dated August 29, 1904. The debtor was unable to pay this amount at once, and it was arranged between her and plaintiff that she should give a series of negotiable promissory notes for the amount, in sums of $15 and $25, payable at weekly intervals. The plaintiff thereupon marked upon the bill the words "Settled by notes—15—25 per week." Of this arrangement and the giving and acceptance of the notes the defendant had neither notice nor knowledge. The debtor paid some $540 of her indebtedness, but ceased making payments while she still owed $356.96, and defendant is now sued for $150 upon his guaranty. The defense is that the acceptance of the debtor's notes for the amount due was a valid and effectual extension of the time of payment, and that such extension, having been granted without the consent of the guarantor, released him.

The case as made by the proofs falls directly within the principle laid down in Shipman v. Kelley, 9 App. Div. 316, 41 N. Y. Supp. 328, a carefully considered and elaborately discussed case. It is quite true that defendant's guaranty did not specify upon what terms sales were to be made to Mrs. Shilkin, and it was therefore quite competent for plaintiff to sell her upon customary and reasonable credit, without losing the benefit of the guaranty. D., L. & W. R. R. Co. v. Burkard, 114 N. Y. 197, 21 N. E. 156. The bill rendered to Mrs. Shilkin and the testimony of plaintiff himself shows that, while the goods were sold on credit, there was no such credit extended at the time of sale, and as part of the terms thereof, as was afterwards extended by the acceptance of the long series of notes. It is this extension of the original credit which operates

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to discharge the surety. We have not overlooked the authorities relied upon by the respondent as holding that the acceptance of time notes from a debtor does not operate to extend his time of payment. Denick v. Hubbard, 27 Hun, 374; Graham v. Negus, 55 Hun, 440, 8 N. Y. Supp. 679; Fuller v. Negus (Sup.) 8 N. Y. Supp. 681. Those cases do not seem to be fully in harmony with the long established rule in this state, and, in so far as they are not in accord with Shipman v. Kelley, supra, they must be deemed to have been overruled by that case.

Judgment reversed, and new trial granted, with costs to appellant to abide the event. All concur.

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## ZAJIC v. ELIAN.

(Supreme Court, Appellate Term. April 24, 1906.)

TRIAL—DIRECTION OF VERDICT—REQUEST BY BOTH PARTIES—EFFECT.

**Where both parties request the court to direct a verdict, and after direction and entry by the clerk the defeated party excepts to the direction, he cannot subsequently insist upon his right to go to the jury upon a disputed question of fact.**

**[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 400.]**

Appeal from City Court of New York, Trial Term.

Action by John Zajic against Emil Elian, as president of the Jan Zizka Lodge. From a judgment in favor of plaintiff, and from an order denying a motion for a new trial, defendant appeals. Reversed, and new trial ordered.

Argued before SCOTT, P. J., and TRUAX and BISCHOFF, JJ.

Wheeler & Nekarda, for appellant.

Alfred & Charles Steckler, for respondent.

TRUAX, J. It was alleged in the complaint and proved on the trial that the defendant—

**"Promised and agreed for a valuable consideration with said Joseph Zajic that upon his death, he being in good standing in the order, the said Jan Zizka Lodge No. 431, I. O. O. F., would pay the sum of $230, together with funeral expenses in the sum of $50, making altogether the sum of $280, to the widow of the deceased member, provided such widow did not live separated from such deceased member for any reason during the lifetime of such deceased member, and provided, further, said widow took care of said deceased member in his sickness up to his death, in which events, and in the event that such member and such widow be not reconciled with such deceased member before his death, it was provided that such widow would not be entitled to any part of such moneys, and that in such case the said moneys should be paid by said Jan Zizka Lodge as follows, to wit: To his children, or, if there are no children, to his parents, brothers, or sisters, provided during the time of his illness and up to the time of his death they took care of him."**

It was also alleged in the complaint that the said Joseph Zajic left a widow who had separated from him during his lifetime, and was so separated from him at the time of his death, and that during his last illness, and for a long time prior thereto, the said widow did not take care of her said husband, and was not reconciled to him prior to his death, and that he left no child or children, or any issue of deceased child or children, nor parents, but only the plaintiff, his brother, who at

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the time of his illness and up to the time of his death fully attended to his wants and took care of him and paid his funeral expenses. At the close of the trial each party moved that the court direct a verdict in his favor, and the verdict was directed by the court in favor of the plaintiff, to which ruling the defendant duly excepted. The defendant's counsel then asked to go to the jury on all the evidence in the case, but did not specify any fact that he desired to have submitted to the jury. It was held in Persons v. Hawkins, 41 App. Div. 171, 58 N. Y. Supp. 831, citing Howell v. Wright, 122 N. Y. 667, 25 N. E. 912, and Adams v. Roscoe Lumber Co., 159 N. Y. 180, 53 N. E. 805, that where upon the trial of an action both parties asked the court to direct a verdict, and after the verdict has been directed and entered by the clerk, and the defeated party excepts to the direction, he cannot subsequently insist upon his right to go to the jury upon a disputed question of fact. But the defendant alleges that the complaint should have been dismissed by the court, because the plaintiff has failed to establish such a separation of the deceased from his wife as is contemplated by the by-laws of the defendant; and also upon the ground that, conceding the separation, he failed to show that they were not reconciled before the death of the husband. There is no merit in this contention. The evidence shows that the deceased had been for some years separated from his wife, was separated from her at the time of his death, and that she did not take, and had not taken, care of her husband for a long time prior to his death.

The defendant claims that certain evidence was improperly excluded. Most of this evidence, it may be presumed, would have shown, or tended to show, that in the years 1902 and 1903, while the defendant Joseph Zajic was in Iowa and his wife here in the city of New York, he communicated with her and supported her. It is conceded, however, that the said Zajic came back from Iowa in the end of 1903, and remained here for a short time; then he went to Westfield, Mass., in the spring of 1904, where he stayed, until he came back in the summer of that year. The defendant then sought to show that, if there had even been an estrangement between Joseph Zajic and his wife, they had become reconciled some time in September or October in 1904, but he was prevented from so doing by the ruling of the court in striking out certain answers that had been made by the widow of said Joseph Zajic, and by the court's excluding the letter dated October 22d, written by said Joseph Zajic to his said wife.

I am of the opinion that these last rulings of the court were erroneous, that the error was a material one, and that the judgment and order appealed from should be reversed. The evidence that was stricken out tended to show a reconciliation between the husband and the wife. The letter which was excluded also tended to show such reconciliation. The evidence excluded, while it related to transactions between third parties, in the absence of the plaintiff, nevertheless was binding upon the plaintiff. The very point at issue was whether or not Joseph Zajic and his wife had become reconciled with each other before his death; it was the fact in the case.

Judgment and order appealed from reversed, and a new trial ordered, with costs to appellant to abide the event. All concur.

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## HERRMANN v. HERRMANN.

(Supreme Court, Special Term, Kings County. July 13, 1904.)

MARRIAGE—COMMON-LAW MARRIAGE—EVIDENCE—VERDICT.

In a suit to establish a common-law marriage, evidence *held* insufficient to sustain a verdict in favor of plaintiff.

Action by Carletta Herrmann against George Herrmann to establish a common-law marriage. On motion to vacate a verdict in favor of plaintiff, and to dismiss the complaint. Motion granted.

See 98 N. Y. Supp. 655.

Gustavus A. Rogers, for the motion.

Francis B. Mullin (William W. Goodrich and Frank X. McCaffry, of counsel), opposed.

SMITH, J. The result of the trial of this cause strikingly illustrates the wisdom of the recent legislative regulation of nonceremonial marriages in the state of New York, and also the futility of expecting a verdict in matrimonial actions against a woman where the element of sympathy is involved, no matter what the merits of the case.

This case is unique in two respects: First, that there could have been gotten together, by chance, in the worldly wise city of New York, 12 men apparently as innocent and as credulous as the men who composed the jury; and, second, that the plaintiff, with a story so improbable, so inconsistent, and so unconvincing, with the affirmative evidence against her contention so overwhelming in its character, could have succeeded, by her attractive personality and rare dramatic ability, in inducing any 12 men to render a verdict that she had ever been married to the defendant. Ths story of the common-law marriage on the rear seat of a one-horse, two-seated vehicle, driven by a hackman at Ft. Lee, N. J., which was not observed by the alert driver on the front seat, the ceremonial marriage before a bogus justice of the peace in a summer house in the rear of a saloon, without a witness, and the marriage certificate then received, but subsequently lost, and to the existence of which no other person testified, might well form an appropriate plot for a comic opera, but it has no place in the realm of reality. All the circumstantial and convincing evidence in the case points not to marriage, but to the fact that there was no marriage. The introduction by the defendant of the plaintiff as Mrs. Herrmann and as his wife to third parties, and the letter of the defendant to plaintiff's mother, addressing her as "Dear Mother," are abundantly and satisfactorily explained by the evident desire of both parties to conceal their real relations to each other from the mother of the plaintiff and from strangers. In all the confidential correspondence between the parties, in which there could not be the slightest motive to play a part or to conceal the truth, there is not a hint or a suggestion that the relation of marriage existed between them. In the letters written by the plaintiff to the defendant after he had deserted her, as she said, without cause, there is no claim that there was any duty on his part to return to her or to provide for her. These letters alone should convince any reasoning mind that the writer was not a wife who had

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been wronged by an undutiful husband. If she had been married to the defendant at Ft. Lee, N. J., it was the event of her life, and she would have taken every opportunity to have exhibited her marriage certificate to her friends and to all persons interested in her. If the relations of the parties had not always been meretricious, she would never have consented after marriage to a rich husband to continue to live with him as she had previously done, under a name not his own, in an obscure apartment, not at all in keeping with his means and his station in life. She would not, if married, have failed to assert her marriage when she was asked, as I believe she was by that intelligent and honorable attorney, Mr. Heydt, a friend of the defendant's family, if she would not break off the dishonorable relations she was maintaining with the defendant. She would not, if married, have admitted, as I believe she did, to her friends, Mr. and Mrs. Dougherty, whose appearance and manner of testifying demonstrated their credibility, that she had no lawful claim to be considered the wife of the defendant, but that she intended to sue him to make him suffer. This plaintiff has the wit and the ability to construct upon the very considerable foundation of truth unwittingly placed at her disposal by the folly of the defendant the remarkable story told by her on the witness stand. She needed no aid to do this. But if her story is true, and she is a credible witness, then the defendant, or some one in his behalf, has been guilty of wholesale subornation of perjury. I do not believe it possible to frame a conspiracy so impregnable to attack, which involved the participation of so many persons so widely situated, and very many of whom were of excellent reputation, and could have had no possible interest in the result of the litigation. There never was a verdict in a court of justice which had so slight a foundation for truth. To allow it to stand would be a grave reflection on the administration of the law. It is useless to grant a new trial. After two trials, it must be that all available evidence has been presented, and no court sensible to its obligation to truth and justice can ever sanction a verdict in favor of the plaintiff. It is the duty of the court ultimately to decide the cause upon its own responsibility, for a jury trial of the issues is not a matter of right, and the findings of the jury are simply advisory. In accordance with what I deem it to be the right and duty of the court, I set aside and disregard the verdict of the jury, which finds that the plaintiff and defendant were ever married, and I find the fact to be that the parties to this action were never married, either ceremonially or otherwise, and I accordingly direct judgment in favor of the defendant against the plaintiff, dismissing her complaint upon the merits.

Judgment accordingly.

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## HERRMANN v. HERRMANN.

(Supreme Court, Appellate Division, Second Department. March 9, 1906.)

1. APPEAL—VERDICT—VACATION—REVIEW—RECORD—EVIDENCE.

Where, on appeal from an order setting aside a verdict in favor of plaintiff, and directing a decree in favor of defendant, the evidence is not returned, there can be no review on the merits.

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2. TRIAL—VERDICT—VACATION.

In a suit to establish a common-law marriage, the trial court had jurisdiction to set aside a verdict in favor of plaintiff, and hear and determine the case on the merits.

Appeal from Special Term, Westchester County.

Action by Carletta Herrmann against George Herrmann to establish a common-law marriage. From an order setting aside a verdict in favor of plaintiff, and directing the entry of a decree in favor of defendant (98 N. Y. S. 654), plaintiff appeals. Affirmed.

Argued before HIRSCHBERG, P. J., and WOODWARD, JENKS, and HOOPER, JJ.

Gustavus A. Rogers, for appellant.

Francis B. Mullin (William W. Goodrich, of counsel), for respondent.

PER CURIAM. As the evidence is not returned, there can be no review upon the merits. The trial court had jurisdiction to set aside the verdict and to hear and determine the case upon the merits.

The judgment is affirmed, with costs.

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## WALSH v. INTERURBAN ST. RY. CO.

(Supreme Court, Appellate Term. April 24, 1906.)

1. CARRIERS—INJURY TO PASSENGER—NEGLIGENCE—EVIDENCE—QUESTION FOR JURY.

In an action against a street railroad company for injuries to a passenger, who, while standing on the running board immediately after the car started, was struck by the footboard of a wagon standing in the street, evidence held to require submission to the jury of the issue of defendant's negligence.

2. SAME—CONTRIBUTORY NEGLIGENCE.

Where a passenger stepped upon the running board of a street car, and before he could leave the running board was struck by the footboard of a wagon standing near, the passenger was not guilty of contributory negligence.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1379.]

Appeal from City Court of New York, Trial Term.

Action by Thomas Walsh against the Interurban Railway Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Argued before SCOTT, P. J., and TRUAX and BISCHOFF, JJ.

G. Washbourne Smith, for appellant.

Bayard H. Ames and Anthony J. Ernest, for respondent.

BISCHOFF, J. The complaint was dismissed, at the close of the plaintiff's case, upon testimony which disclosed that the plaintiff had placed himself upon the running board of the defendant's open car, which had stopped to take on passengers, but that the car immediately started, and before he could leave the running board for a place of safety he was brought in contact with the projecting footboard of a wagon, standing in the street, and was injured. It appeared that the

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wagon had been backed to the curb, and that the footboard was "very close" to the car, the exact distance not being shown, and that the car had moved only 16 feet when the accident happened.

Under these circumstances, negligence was inferable from the act of the defendant's servant in starting the car when the passenger's position must have been one of danger, and the plaintiff was not guilty of negligence in failing to anticipate the omission of reasonable care upon the part of the persons in control of the car. To board the car at all he had to place himself upon the running board, and he was not required to look for obstructions which would become dangerous to him only through the carrier's neglect in the matter of giving him a reasonable opportunity to take passage in safety. He was not given this opportunity, and the omission was the proximate cause of the accident, according to the favorable construction of the proof to which the appellant is entitled upon review of a judgment upon a nonsuit. This is not a case in which the passenger had remained in a position of danger after a reasonable time for him to take a safe position had gone by, nor one in which the element of notice of his position to the carrier's employés was lacking, and, in our view, there was sufficient proof to take the case to the jury.

The judgment must therefore be reversed, and a new trial ordered, with costs to the appellant to abide the event. All concur.

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## QUINN v. SCHNEIDER.

**(Supreme Court, Appellate Term. April 24, 1906.)**

COURTS—MUNICIPAL COURTS—POWER TO VACATE JUDGMENTS—STATUTES.

**Under Municipal Court Act, Laws 1902, p. 1563, c. 580, § 254, authorizing a Municipal Court judge to vacate a judgment on motion made within five days from the judgment, a Municipal Court judge has no jurisdiction to set aside a judgment, not a default judgment, entered by him after he had lost jurisdiction of the cause by a lapse of time, where the motion was not made within five days from the rendition of the judgment; section 1, subd. 19, conferring power to vacate judgments, being qualified by section 254.**

Appeal from Municipal Court, Borough of Manhattan, Fourth District.

Action by William T. Quinn against George J. Schneider. From an order of the Municipal Court vacating a judgment in favor of plaintiff, he appeals. Reversed, with costs.

Argued before SCOTT, P. J., and TRUAX and BISCHOFF, JJ.

Elwin L. Garvin, for appellant.

Max Schleimer, for respondent.

BISCHOFF, J. The order appealed from, which vacated the plaintiff's judgment, was made upon the ground that the judgment was void because the decision was not rendered within 14 days from the date of the submission of the cause, or within the additional time given by consent of the parties (Municipal Court Act, Laws 1902, p. 1557, c. 580, § 230), but the application for the order was not made within five days after the judgment was rendered. The judgment was not



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rendered upon default, hence the motion did not fall within section 253 of the Municipal Court Act, and, while the justice had power to vacate the judgment upon the ground that it was void, that power existed by virtue of section 254 (Stern v. Fleck, 102 App. Div. 272, 92 N. Y. Supp. 453), limited to a case where the motion was made within the period of five days, provided by that section (Buschbaum v. Feldman, 43 Misc. Rep. 85, 86 N. Y. Supp. 747). The provisions of subdivision 19 of section 1 of the act, declaring the power to direct or set aside verdicts or to open or vacate judgments, are necessarily qualified by the particular restrictions of sections 252 to 256, which cover the whole subject, and nothing in the statute affords authority for the vacatur of a judgment not rendered upon default, where the motion is made after five days have elapsed.

The order appealed from is therefore reversed, with costs. All concur.

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## ANDREWS v. REINERS.

(Supreme Court, Appellate Division, Second Department. April 20, 1906.)

1. WITNESSES—TRANSACTION WITH DECEDENT—STOCKHOLDER OF CORPORATION.

   Under Code Civ. Proc. § 829, in an action against a corporation for the death of plaintiff's intestate, a stockholder was not competent to testify that he did not put deceased to work on the scaffold which it was claimed was furnished by defendant, and fell under the deceased from defectiveness.

2. MASTER AND SERVANT—SERVANT'S INJURIES—EVIDENCE—SUFFICIENCY.

   In an action for the death of a servant, it appeared that one end of a scaffold on which he was at work descended, and that he fell therefrom, and it was shown that the scaffold was not a stationary one, but was suspended by ropes from pulleys, and it was part of the work of deceased to unfasten the ropes from time to time, and lower the scaffold by means of the pulleys. *Held*, that the mere fact that one end descended was no proof of defectiveness.

Appeal from Trial Term, Kings County.

Action by Annie Andrews, as administrator of Joseph T. Andrews, deceased, against H. & H. Reiners. From a judgment in favor of plaintiff, and from an order denying a motion for a new trial, defendant appeals. Reversed.

See 96 N. Y. Supp. 1112.

Argued before WOODWARD, JENKS, HOOKER, RICH, and GAYNOR, JJ.

Ira Leo Bamberger, for appellant.

Frank F. Davis, for respondent.

GAYNOR, J. The witness Reiners being a stockholder of the defendant (a business corporation), the objection of the plaintiff to the questions to him concerning personal transactions between him and the deceased were properly sustained. He was not competent to testify that he did not put the deceased to work on the scaffold which it was claimed was furnished by the defendant and fell under him from

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defectiveness and caused his death, and the like. The test of interest in a witness under section 829 of the Code of Civil Procedure is the old common law rule of interest, and that rule classed stockholders of a corporation as interested witnesses in favor of the corporation in an action by or against it. Gilbert v. Manchester Co., 11 Wend. 627. Such cases as Montgomery County Bank v. Marsh, 7 N. Y. 481, and Washington v. Palmer, 2 Sandf. 686, are no longer alive or applicable. They were rendered under sections 351 and 352 of the Code of Procedure of 1848, which became sections 398 and 399 in the revision of 1849). These sections made stockholders of all corporations competent witnesses for the corporation, and that remained the rule until they were supersceded by the present Code provision. The mere reading of them in connection with the Montgomery Bank and Washington Cases suffices to show this. Section 829 by an amendment now excepts stockholders of banking corporations from the rule. This I suppose was done under the mistaken notion of making the statute conform to the Montgomery Bank Case, which was erroneously taken as expressing a rule applicable to bank stockholders only, instead of to all stockholders. There is no more reason to exempt bank stockholders than any other stockholders, and that case did not essay to do so. Nor is the common law rule of this state that the taxpayers of a municipal corporation are not incompetent as witnesses for interest in an action by or against such corporation (Pack v. Mayor, 3 N. Y. 489) applicable. The same must be said of the case of Bopple v. Supreme Tent, 18 App. Div. 488, 45 N. Y. Supp. 1096, which may not be free from doubt in classifying the members of fraternal benefit societies with taxpayers of municipal corporations on this head of interest of witnesses.

The evidence that the scaffold gave way under the deceased at all is of a very improbable character. There is none except by his son, an interested witness. He says that Reiners, a stockholder and officer of the defendant, called him and his father from painting they were doing in the defendant's distillery, and set them to work painting the rear of one of a row of tenement houses of the defendant in the rear of the distillery and fronting on the next street; that the usual painter's scaffold, about 12 feet long, was already swung with ropes and pulleys about 25 or 30 feet from the ground; that he went to work on the ground painting the lowest part of the wall, while his father went to work painting on the scaffold; that while at work he heard a scream and a crash, and looking up saw that one end of the scaffold was two feet lower than the other and resting on the coping of the roof of the adjoining extension of the distillery, and that his father was not to be seen; that he ran out to the street through the house they were painting, and thence around into the distillery and up to its roof through a scuttle, and found his father lying unconscious there; that he accompanied him down through the scuttle and the distillery to the street, took him into a room of one of the row of tenement houses and staid there with him about two hours, and then walked home with him. This was on September 27th, 1900. The father died on October 2nd following of myelitis (inflammation of the spinal cord), as is claimed, which comes of several causes besides violence. No mark of violence was noticed on him by the physician who was called in three days

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after the alleged accident and treated him until he died, or by any one, except that one of the sons says he saw a black mark behind his ear after the undertaker had laid him out. The doctor as it plainly appears from his evidence was not told of any accident and did not know he was treating such a case. The son told no one in the distillery, there being twelve or more there, or any one in the tenement houses, which were filled with tenants, and called for no assistance; and while the father was at home before he died the mother and one of the sons wrote to Mr. Reiners on two different days that the father could not come to work as he was sick abed. None of them ever suggested that he had been hurt, and Mr. Reiners nor any one connected with the defendant was told of it or ever heard of it until this action was brought two years later, viz., about August 1st, 1902. There was no evidence whatever that any part of the scaffold or its attachments broke or gave way. Moreover, the evidence of the third party from whom the scaffold was hired, and who was called by the plaintiff, is that he delivered it to the deceased at the house where the painting was done on August 21st, and that it was returned in perfect condition on September 27th (the day of the accident). The coping on the roof of the extension on which the end of the scaffold is said by the son to have been resting when he looked up seems to have been of the usual height above the roof, a foot or two; which shows the extent of the father's fall, if he fell.

But the judgment cannot be sustained as matter of law. The defendant's motion to direct a verdict at the end should have been granted. The verdict rests on nothing but the proposition that the mere fact of the descent of the end of the scaffold to the coping (if it occurred) was evidence from which alone it could be found that the scaffold fell from defectiveness. This is necessarily so, for there was no evidence of anything lacking, or of any defect or break in the scaffold or its attachments. On the contrary, there was affirmative evidence from both sides that nothing was wrong with them. In other words, the maxim "The thing speaks for itself" was applied to the case. The main charge shows this, and in addition a subsequent request of the defendant that it be charged was granted. This was erroneous. The scaffold was not stationary. On the contrary, it was suspended by ropes through pulleys, and it was part of the work of the deceased or whoever worked on it to unfasten the ropes at the scaffold from time to time as his work progressed and lower it by the pulleys with himself upon it, until in that way he had the wall all painted and reached the ground. The deceased may have been lowering the end of the scaffold where he was when it is claimed he fell (a thing he had to do continually at short intervals), and let the rope slip. There was no evidence that he was not doing so. The maxim only applies where the accident could not have happened except from defectiveness of the appliance.

The judgment and order are reversed.

**Judgment and order reserved, and new trial granted; costs to abide the event. All concur.**

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## SAN FILIPPO v. AMERICAN BILL POSTING CO.

(Supreme Court, Appellate Division, Second Department. April 20, 1906.)

NEGLIGENCE—DANGEROUS PREMISES—SIGNBOARDS—LIABILITY—EVIDENCE.

Where defendant was given full control of a signboard on the top of a building, the lease from the owner of the building giving defendant the right to maintain the sign, defendant agreeing to take the premises on the terms as therein set forth, it was bound to use reasonable care to maintain the signboard in a safe condition, and was liable to one injured as the result of its failure so to do by the falling of the sign.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Landlord and Tenant, §§ 668–672; vol. 37, Cent. Dig. Negligence, § 66.]

Appeal from Trial Term.

Action by Mary San Filippo against the American Bill Posting Company. Judgment for defendant, and plaintiff appeals. Reversed.

Appeal from a judgment in favor of the defendant upon a non-suit granted after a trial at the Kings Trial Term. The action was for damages for personal injuries to the plaintiff by the fall upon her of a large signboard from the roof of an adjoining building while she was in her yard.

The trial judge reserved until after verdict a motion to dismiss, and took a special verdict by which the jury found (1) that the signboard was not in a safe condition when it fell, (2) that the defendant knew that fact or could have known of it by reasonable care, and (3) that the signboard fell because it was not in a safe condition.

There was evidence that the wood of the signboard had become rotten, and that that was the cause of the fall. It was a large signboard, used for advertising purposes, 10 feet high and 32 feet long, and on the roof. The defendant did not put it there; it was there and was leased to the defendant by the owner of the building.

Argued before HIRSCHBERG, P. J., and HOOKER, GAYNOR, RICH, and MILLER, JJ.

Henry A. Powell, for appellant.

Clarence B. Campbell, for respondent.

GAYNOR, J. The case turned on whether it was controlled by the decision in Reynolds v. Van Beuren, 155 N. Y. 120, 49 N. E. 763, 42 L. R. A. 129, and that question depended on the written lease to the defendant, and the fact of the defendant's possession and use thereunder. I do not think it was. The prevailing opinion in that case points out that it would have been different if the defendant "maintained" the signboard. In this case the defendant did maintain it. It was given full possession and control of it, and agreed to maintain it. That was the written lease, the words thereof being that the owner of the building leased to the defendant "the right to maintain the signs now on the roof," and the defendant agreed "to take the premises on the terms as above set forth." This is very different to having only a license to paste bills on the signboard, as was the Reynolds Case. The sign was imminently dangerous if not so maintained that it could not fall. The defendant having continuous possession and use of it under an agreement that it would maintain it, it had a duty to use reasonable care to maintain it there so that it would not fall. The plaintiff does not recover under the defendant's breach of contract with the owner of the building to maintain the sign, but under its breach of

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duty to every one to safely maintain it, it being in its possession and control, and imminently dangerous. This is a very different case to that of a mechanic called in to make or repair. He has no continuous possession, use and control.

The decision in the Reynolds Case is, I suppose, understood to be one not to be extended, and no one is bound by certain illustrations in the opinion. Is it really so that an advertising company which hangs a sign overhead in a street car in so defective a manner that it is imminently dangerous and falls on the head of a passenger is not liable therefor to the injured person, as the opinion says? If one furnish to another a thing which is so defective as to be imminently dangerous, he is liable for a breach of his general duty to others in connection therewith, outside of his mere contract obligations (Devlin v. Smith, 89 N. Y. 470, 42 Am. Rep. 311); and the same rule must with the very same reason be applied to a case like the present one. The defendant had in his possession, use and control this signboard, which was imminently dangerous if not kept securely fastened, and which it had undertaken to maintain there. This carried with it a general duty to use proper care to see that the signboard did not fall from the roof upon neighbors, or upon passersby in the street. That duty was not contractual, but sprung into life by reason of the contract.

The judgment should be reversed, and the plaintiff should be given judgment on the verdict by the trial court.

**Judgment and order reversed, with costs, and judgment given to the plaintiff upon the verdict, with costs. All concur.**

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## SCANLON v. MULLER et al.

**(Supreme Court, Appellate Term. April 24, 1906.)**

CONTRACTS—COMPENSATION.

**Where an estimate by a subcontractor of the price for doing certain work included the digging of a trench, which he in fact did not dig, though the omission was excusable, the item should be deducted from the contract price, though the specifications of the contract between the general contractors and the owner placed the duty of digging the trench on the contractors.**

**[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, § 1408.]**

Appeal from Municipal Court, Borough of Manhattan, Tenth District.

Action by Thomas F. Scanlon against Edward Muller and others. From a judgment in favor of plaintiff, defendants appeal. Reversed, and new trial ordered.

Argued before SCOTT, P. J., and TRUAX and BISCHOFF, JJ.

James B. Henney, for appellants.

Frank A. Acer, for respondent.

BISCHOFF, J. It is apparent that the plaintiff's recovery of $155 was based upon the court's misconception of the extent of the agreement in suit. The contract was evidenced by a written proposal and accept-

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ance, and the proposal distinctly stated that the plaintiff included in his estimate the digging of a trench. Concededly, he did not dig the trench, and, while the omission was excusable, the defendants were entitled to a deduction of the value of this item from the contract price; the action being brought for the agreed value on the theory of substantial performance. The justice deducted only the sum testified to by the plaintiff as the value of so much of the omitted work as involved the placing of concrete in the trench when dug, and the only evidence in the case as to the value of the necessary work of excavation was disregarded, apparently upon the assumption that the digging was no part of the work which the plaintiff was to perform. It is suggested by the respondent that the specifications in evidence (the basis of the contract between the defendants, general contractors, and the owner of the premises) placed the duty of digging the trench upon the contractors; but certainly this had no bearing upon the particular agreement between the defendants and the plaintiff, their subcontractor. This agreement, as we have noted, admitted of no doubt as to what the plaintiff had undertaken to do, and the judgment has awarded him the contract price for work which he has not performed.

Judgment reversed, and a new trial ordered, with costs to the appellant to abide the event. All concur.

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## LANDESMAN v. HAUSER.

(Supreme Court, Appellate Term. April 24, 1906.)

DISMISSAL—GROUNDS—DEFECTS IN COMPLAINT—EXTRINSIC MATTER—PLEADING—SPEAKING DEMURRER.

A complaint alleged that plaintiff, on leasing premises of defendant, deposited a sum of money as security for the performance of the terms of the lease, that the lease had terminated, and that plaintiff had been in default to a certain amount, and judgment was demanded for the balance of the deposit. No terms were alleged, except the payment of a certain rental. The answer alleged that the lease contained other covenants with which plaintiff had failed to comply. *Held*, that an order dismissing the complaint for insufficiency of substance was erroneous, as the question was the same as if it had arisen on demurrer to the complaint, and the determination involved a resort to matter extrinsic to the pleading demurred to.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Dismissal and Nonsuit, § 137.]

Appeal from City Court of New York, Trial Term.

Action by William Landesman against Bella Hauser. From a judgment in favor of defendant, plaintiff appeals. Reversed, and new trial ordered.

See 91 N. Y. Supp. 6.

Argued before SCOTT, P. J., and TRUAX and BISCHOFF, JJ.

Ignace I. Apfel, for appellant.

Lynn W. Thompson, for respondent.

BISCHOFF, J. These appeals are from an order dismissing the complaint at the trial for insufficiency of substance, from the judgment for the defendant which was entered upon the dismissal, and from an

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order denying the plaintiff's motion for a new trial. Obviously, the question presented for our determination is precisely the same as if it had arisen upon a demurrer to the complaint. Sheridan v. Jackson, 72 N. Y. 170. The action was to recover the sum of $500, alleged to have been deposited with the defendant as security for the plaintiff's performance, as lessee, of the terms of a lease which was entered into between the parties, after first deducting therefrom $80 for arrears of rent, which the plaintiff admitted to be due and owing the defendant. The complaint alleges the letting by the defendant to the plaintiff of certain premises in the city of New York, in consideration of which the plaintiff had agreed to pay a yearly rental in equal monthly installments in advance, and that at the time of the making of the lease he had deposited with the defendant the sum of $500 as security of the performance upon his part of "the terms of said lease"; the defendant having agreed at the same time to repay the sum so deposited upon the expiration of "the said lease." No other conditions of the lease than such as appear from the above recital are stated. The complaint then proceeds further to allege that the lease was terminated by the issuance of a warrant upon a final order for the lessor defendant in summary proceedings to recover possession of the demised premises for nonpayment of rent (section 2253, Code Civ. Proc.), and that there was due and owing the defendant at the time $80 for arrears of rent. Then followed a demand for judgment in the sum of $420. So far as the complaint showed, the lease was complete as alleged, and the only "terms" with which the plaintiff had to comply was the payment of the rent reserved in the manner specified. In this he admitted his default, asserting the rent remaining unpaid at the time of the termination of the lease to have been $80. Prima facie, therefore, the plaintiff was entitled to repayment of the sum demanded, and so far the complaint must be deemed to have stated a cause of action. True, the answer asserted that the lease contained further covenants and conditions with which the plaintiff had agreed to comply, and for which compliance, also, the sum deposited was to be security, and we apprehend the learned justice below fell into the error of resorting to matter extrinsic to the pleading demurred to, and was thereby persuaded as to the actual text of the lease, from which he concluded that the complaint was insufficient, in that it did not allege compliance upon the plaintiff's part with terms other than such as were alleged, and upon which compliance the plaintiff's right to repayment of the deposit was dependent. The rule governing demands for insufficiency of the matter pleaded is very concisely stated in 6 Am. & Eng. Encyc. of Pl. & Prac., at page 298. "A speaking demurrer—that is, a demurrer which is founded on matter collateral to the pleading against which it is directed—is bad," and "when a pleading is demurred to, resort cannot be had to other pleadings for the purposes of supporting or resisting the demurrer, but the demurrer must prevail or fall by the face of the pleading to which it is directed."

The judgment and orders appealed from should be severally reversed, with costs to the appellant to abide the event, and a new trial ordered.

SCOTT, P. J., concurs.

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TRUAX, J. (concurring). It is alleged in the complaint that the defendant leased to the plaintiff certain premises at a certain yearly rental, payable in equal monthly installments, and that the plaintiff upon execution and delivery of the lease deposited with the defendant the sum of $500, security for the fulfillment of the terms of said lease, "said sum to be repaid to the plaintiff at the expiration of the said lease"; that the defendant instituted summary proceedings against the plaintiff; that a final order was duly made, awarding to the defendant possession of the premises described in the complaint; that the usual warrant was duly signed and issued; that the plaintiff removed from said premises, and possession of said premises was restored to the defendant, and the said lease was duly canceled; and that $80 rent was due to the defendant from plaintiff at the time said lease was canceled, and this action is brought to recover the difference between said $80 and the sum of $500, as security deposited, as aforesaid, with said defendant.

I am of the opinion that the complaint does state a cause of action. The lease expired when the defendant took possession of the premises, and all that defendant was entitled to was to retain the amount of the rent that was due from the plaintiff at the time the defendant took possession of the premises. See Scott v. Montells, 109 N. Y. 1, 15 N. E. 729. The only "terms of said lease" the complaint showed that the plaintiff was bound to fulfill was the one relating to the payment of rent, and why the rent was not paid is set forth in the complaint.

The judgment appealed from is reversed, and a new trial ordered, with costs to the appellant to abide the event.

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## ROGERS v. VILLAGE OF ATTICA.

(Supreme Court, Appellate Division, Fourth Department. May 2, 1906.)

1. MUNICIPAL CORPORATIONS—STREETS—CHANGE OF GRADE—CHARTER PROVISIONS—PROCEEDINGS.

Attica City Charter, tit. 6, § 1, as amended by Laws 1890, p. 1006, c. 560, provides that the village board of trustees shall have power to lay out and open and change the grade of, or otherwise improve, roads, avenues, streets, etc., and for that purpose may take and appropriate any land of the village, but that no road, street, etc., shall be opened and "altered" unless all claims for damages on account of such opening or altering shall be released. *Held*, that the power to "alter," as used in such section, did not cover a change in the grade, and that the village was not therefore bound to take any proceeding for the release of damages before changing the grade of a street.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 742.]

2. SAME—ABUTTING OWNERS—REMEDIES.

Where a village was authorized to change the grade of a street without limitation, it was not bound to pay damages sustained by an abutting property owner before making the change; such damages being recoverable by an action authorized by Laws 1897, p. 420, c. 414, § 159.

Appeal from Judgment on Report of Referee.

Suit by Richard J. Rogers against the village of Attica. From a judgment in favor of defendant on a referee's report, plaintiff appeals. Affirmed.

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Argued before McLENNAN, P. J., and SPRING, WILLIAMS, NASH, and KRUSE, JJ.

Russell J. Stone, for appellant.
Willis E. Hopkins and E. E. Charles, for respondent.

WILLIAMS, J. The judgment should be affirmed, with costs. The action is to restrain the village of Attica from changing the grade of the street and sidewalk in front of plaintiff's premises on Market street. The plaintiff has a drug store upon his property, adjacent to the sidewalk, and the sidewalk is from 7 to 8 or 10 feet wide. The defendant proposes to change the grade in front of the drug store by lowering the sidewalk about 2½ feet. The defendant, as a general proposition, has power to make changes in the grade of its streets. Such power is given by section 1, tit. 6, of the charter, as amended by chapter 560, p. 1006, Laws 1890. The plaintiff claims, however, that the provisions of such section as to the release of damages, or a petition of 10 freeholders and the proceedings upon the presentation of such petition, are applicable to a proposed change of grade, and the relief sought in this action, restraining the defendant from making such change of grade, is based upon the failure of the defendant to procure such release or petition, and to comply with the provisions of the section following the presentation of such a petition. The defendant claims these provisions are not applicable to a proposed change of grade, but only to the opening or altering of a street, and that "altering" means changing the location of the street in whole or in part; and it further claims the only remedy for damages the plaintiff has, if any, is under section 159 of the village law (Laws 1897, p. 420, c. 414).

There can be no doubt as to the proper construction of section 1 of defendant's charter. The word "alter" does not cover "change of grade." Matter of Grab v. New Rochelle, 31 App. Div. 610, 52 N. Y. Supp. 395; Buchholz v. N. Y., L. E. & W. R. R. Co., 71 App. Div. 452, 75 N. Y. Supp. 824, affirmed in 177 N. Y. 550, 69 N. E. 1121. In the New Rochelle Case, above, it was held that the word "grade" in the charter did not cover a "regrading" or changing of the grade of a street, and therefore the remedy for damages for change of grade was under section 159 of the village law only. In the Buchholz v. R. R. Case, above, section 58 of the charter of Port Jervis (chapter 370, p. 578, Laws 1873) gave the trustees power to lay out, open, make, improve, straighten, widen, extend, alter, repair, and discontinue streets, etc., and then section 59 provided that, before a street could be laid out, opened, extended, widened, graded, paved, macadamized, improved, or discontinued, certain proceedings must be had, and it was held the alteration of a street was not covered by the provisions of section 59; the court saying:

"An alteration of a highway, as the expression is used, generally refers to a change in the course thereof, and therefore necessarily involves, to some extent, the establishment of a new highway, and the vacation of a part of the old highway for which the substitution is made. 15 Amer. & Eng. Encyl. of Law (2d Ed.) 392, 3, notes 1, 2, 3, 4."

Under our construction of this section 1 of the charter, the defendant was not bound to take any proceedings before making the change of grade, and

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**therefore the action could not be maintained to restrain the defendant from making such change of grade.**

The defendant had a right to change the grade of the street and sidewalk, regardless of the question as to plaintiff's ownership of the fee of the street. Any damages or compensation to which plaintiff might be entitled, whether owner of the fee or not, need not be paid before the change is made, but are recoverable as provided in the village law.

The complaint was properly dismissed, and the judgment should be affirmed.

Judgment affirmed, with costs. All concur.

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## ELIAS v. WHITNEY.

(Supreme Court, Appellate Term. April 27, 1906.)

**BILLS AND NOTES—ALTERED CHECKS—HOLDER IN DUE COURSE—NEGOTIABLE INSTRUMENTS LAW.**

**Negotiable Instruments Law, Laws 1897, p. 732, c. 612, § 91, provides that a holder in due course is a holder who has taken an instrument which is complete and regular on its face. *Held* that, where a mere inspection of a check showed that it had been altered, a purchaser thereof took with notice of the infirmity, and was not a holder in due course.**

**[Ed. Note.—For cases in point, see vol. 7, Cent. Dig. Bills and Notes, § 839.]**

Appeal from Municipal Court, Borough of Manhattan, Eighth District.

Action by Joseph Elias against Leon A. Whitney. From a Municipal Court order setting aside a verdict in favor of plaintiff and ordering a new trial, plaintiff appeals. Affirmed.

Argued before SCOTT, P. J., and TRUAX and BISCHOFF, JJ.

Adolph Block, for appellant.

Smith & Bowman, for respondent.

TRUAX, J. The evidence showed that the check in suit had been changed before it reached the plaintiff, and that a mere inspection of the check showed such change. There is no evidence showing that the defendant authorized or assented to the alteration, but the appellant says that he is "a holder in due course," and not a party to the alteration, and that, under section 205 of the negotiable instruments law (Laws 1897, p. 745, c. 612), he may enforce payment on the check, according to its original tenor. Section 91, p. 732, of the negotiable instruments law, states what constitutes a holder in due course. According to that section, a holder in due course is a holder who has taken an instrument that is complete and regular on its face. This instrument was not complete and regular on its face at the time plaintiff took it. As we have stated before, a mere inspection of the instrument showed its defect, and therefore, under subdivision 41 of the negotiable instruments law, plaintiff had notice of an infirmity in the instrument at the time he took it.

The order appealed from is affirmed, with costs.

SCOTT, P. J., concurs.

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BISCHOFF, J. (concurring). The verdict for the plaintiff was wholly without support, and the state of the evidence warranted the direction of a verdict for the defendant. The action was by the indorsee against the maker upon an alleged check received from the payee, and the defense was that the check had been altered in a material respect after it was issued, in that the date was changed from September 7, 1903, to September 3, 1903, on which last-mentioned day the plaintiff claimed to have acquired the check for value.

The alteration, if made without the maker's authority, was material, and operated to defeat any recovery thereon (Crawford v. West Side Bank, 100 N. Y. 50, 2 N. E. 881, 53 Am. Rep. 152), and though there was no presumption that the alteration, which was plainly apparent, was made after it was issued (Maybee v. Sniffen, 2 E. D. Smith, 1), it remained that, after impeaching testimony for the defendant, the burden of proving that the alteration was made before the check was issued was upon the plaintiff; he asserting the execution by the defendant of the particular instrument sued upon in the form in which it was produced (Farmers' Loan & Trust Co. v. Siefke, 144 N. Y. 354, 39 N. E. 358).

For the defendant, it appeared from his own testimony and that of Dimmock, an apparently wholly disinterested witness, that at the time when the check was given to Reed, the payee, it bore date as of September 7, 1903, and as against this the plaintiff contented himself by showing no more than that when he received the check from Reed, on September 3, 1903, the date had been altered to that day. An alteration in the date was plainly apparent, and, obviously, the fact alone that the alteration had taken place before the plaintiff received the check in no wise challenged the accuracy of the testimony of the defendant's witnesses that the alteration was made after the check was issued to Reed. The question involved upon the trial was simply whether the defendant had issued the instrument sued upon, as the plaintiff asserted he did; and since there was no presumption that the alteration had occurred after the check was issued, the fact of the alteration, however apparent, did not suffice to raise any question as to whether the plaintiff was a "holder in due course," within the meaning of Negotiable Instruments Law, Laws 1897, p. 732, c. 612, § 91, in that he had notice of some infirmity in the instrument.

The order should be affirmed, with costs.

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## CAREY v. MANHATTAN RY. CO.

(Supreme Court, Appellate Term. April 24, 1906.)

**MASTER AND SERVANT—INJURIES TO SERVANT—EVIDENCE—SUFFICIENCY.**

In an action by a servant for personal injuries alleged to have been caused by defectively insulated electric wire, evidence *held* insufficient to justify submission to the jury of the issue of defendant's negligence.

Appeal from City Court of New York, Trial Term.

Action by John Carey against the Manhattan Railway Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

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Argued before SCOTT, P. J., and TRUAX and BISCHOFF, JJ.

Charles A. Gardiner (M. W. Gallaway, of counsel), for appellant.
Charles P. Rogers (J. Brownson Ker, of counsel), for respondent.

SCOTT, P. J. The plaintiff was in the employ of defendant as an iron worker on its elevated structure, and on the day of the accident from which he suffered injuries was one of a gang engaged in drilling holes directly under the top girder of the track. A foreman had previously marked the places at which the holes were to be drilled. The plaintiff had been engaged in similar work in the immediate neighborhood for several days, and for about nine months had been engaged in doing similar work on various parts of defendant's structure, during which time the road had been operated electrically through what is known as the "third rail system." At the point at which plaintiff was working at the time of the accident certain wires, four or six in number, pass under the structure, attached thereto rather loosely, so that they are movable, and serve to carry the electrical current to the third rail. In drilling the holes the plaintiff and his co-workers used a series of contrivances or tools known as a "knee," a "ratchet," and a "clamp." The knee, consisting of a piece of double-angled iron, weighing about 29 pounds, is attached to the ironwork in which the hole is to be drilled by the clamp, weighing about 25 pounds, and between the iron and the knee is inserted the ratchet, weighing about 14 pounds, into which the drill is fixed. The gang was engaged in setting up the ratchet upon an upright girder, preparatory to drilling a hole therin; plaintiff holding up the knee, which was being clamped to the structure. Plaintiff and his companions observed the feed wires in close proximity to their tools, but paid no particular attention to them, and took no precaution against touching them with their tools while engaged in clamping the knee and the ratchet. Before this work was completed, there was an explosion and blinding flash, whereby plaintiff was seriously burned and injured. There can be no doubt that this explosion was caused by contact between one of the iron tools and one of the feed wires, resulting from some break or defect in the insulation of the wire. No direct evidence of insufficient, imperfect, or defective insulation was offered; the plaintiff contenting himself with showing that the explosion could not have occurred unless there had been some break or defect in the insulation at the point of contact and at the moment of contact, and arguing therefrom that this proof, with proof of the explosion, warranted the jury in finding that the defendant had been negligent either in failing to provide properly insulated wire in the first instance, or in failing to keep it properly insulated after it had been installed. This seems to us to be an attempt unwarrantably to extend the doctrine of res ipsa loquitur, for, it implies the drawing of an inference from the mere happening of the accident, that the defect in the insulation, which concededly must have existed at the moment of the explosion, had existed previously for a sufficient time to impute notice to the defendant. The circumstances as disclosed by the evidence warrant no such inference. It was clearly shown that the insulation was originally quite sufficient for the use to which the wire was to

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be put, and that it had been in place but a comparatively short time, and that it was frequently and regularly inspected by a competent and experienced employé of the defendant; one of such inspections having taken place only a few days before the accident happened. It also appeared that it was quite possible, if, indeed, not probable, that the insulation might have been abraded by the acts of the plaintiff and his fellows in setting up their tools; in short, there was an entire lack of proof that the insulation was imperfect at any moment before the accident happened, that the wire was improperly insulated when installed, or that the defendant had failed in its duty of frequent inspection. The jury were thus left to conjecture that, owing to some negligence not specified and not disclosed by the evidence, the defendant had failed in its duty towards plaintiff. The most that can be said upon the evidence as presented is that it leaves it unexplained when the insulation became abraded, or how the abrasion occurred. This was not sufficient to justify the submission of the cause to the jury.

Judgment reversed, and new trial granted, with costs to appellant to dence as presented is that it leaves it unexplained when the insulation abide the event. All concur.

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## KOEPPEL v. KOEPPEL et al.

(Supreme Court, Appellate Term. April 24, 1906.)

APPEAL—RECORD—MATTERS REVIEWABLE.

Where the record does not show that any motion was made to set aside the verdict, an order purporting to deny such a motion must be regarded as signed inadvertently, and cannot be considered.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 2306.]

Appeal from City Court of New York, Trial Term.

Action by Fishel Koeppel against Mendel Koeppel and another. From a judgment for defendants, plaintiff appeals. Affirmed.

See 97 N. Y. Supp. 401.

Argued before SCOTT, P. J., and TRUAX and BISCHOFF, JJ.

Steuer & Hoffman, for appellants.

Abraham B. Schleimer (Max Schleimer, of counsel), for respondent.

PER CURIAM. We are driven to an affirmance of this judgment, if for no other reason, because of the lack of proper exceptions to raise the questions argued at length by the appellants. The action is upon what is termed an "account stated." The plaintiff and the defendants were engaged in a joint adventure in the purchase and sale of real estate. The property was under a contract of sale, and at plaintiff's solicitation the defendants signed a paper, agreeing to pay him his share of the profits stated to be "approximately, as above, about $1,000," on delivery of the selling deed. Above this agreement, upon the same piece of paper, was a column of figures footing up $1,008, and it was assumed, and practically conceded throughout the trial, that it was the sum which was referred to in the writing as "about $1,000." The de-

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fendants' claim was that this figure was stated upon the assumption that the prospective purchaser of the property would take it at the agreed figure, but that afterwards it became necessary to make certain reductions and allowances in the selling price, and to pay certain expenses, so that the profits were so far reduced that plaintiff's share was reduced to $665, which they alleged had been paid. They also asserted that, after the written promise had been given, plaintiff agreed that the amount to be received by him should be reduced if the profits fell below their anticipated figure. Of all these facts they were allowed to give evidence, as well as of the payment made to plaintiff. The evidence, as presented by the printed record, appears to be very vague and confused. Possibly, it was more intelligible to the jury, who had the advantage of seeing and hearing the witnesses. No motion for a dismissal or for a direction of a verdict was made at the close of the case, and no exceptions were taken to the charge, nor were any requests to charge made. The record shows that no motion was made to set aside the verdict, although an order purporting to deny such a motion appears in the case. In the absence of any record of such a motion, we must conclude that the order was signed inadvertently, and cannot consider it. Nor was any motion made to correct the verdict in so far as it included interest upon the amount sued for. Our attention is called to some alleged errors in the conduct of the case which might furnish ground for reversal, if after proper objection they had been persisted in. The attention of the court below was not, however, called to them, and all parties seem to have acquiesced in the theory upon which the cause was tried. In the absence of any exception to the charge, or any motion for a new trial, we are precluded from considering the errors now pressed upon our attention.

Judgment affirmed, with costs.

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## MALICH v. JOSEPHSON.

(Supreme Court. Appellate Term. April 24, 1906.)

MALICIOUS PROSECUTION—PROBABLE CAUSE—EVIDENCE—SUFFICIENCY.

In an action for malicious prosecution, it appeared that defendant's shop had been burglarized; that a portion of his goods stolen were traced to the possession of a brother of plaintiff; that the brother explained that he obtained them from plaintiff, who, when interrogated as to where she obtained them, gave an unsatisfactory explanation. Defendant on cross-examination stated in response to one or two questions that when he caused plaintiff's arrest he did not believe her to be guilty. *Held* to show, as a matter of law, probable cause on the part of defendant for charging plaintiff with crime.

Appeal from City Court of New York, Trial Term.

Action by Lena Malich against Hyman I. Josephson. From a judgment for plaintiff, and from an order denying a motion for a new trial, defendant appeals. Reversed, and new trial granted.

Argued before SCOTT, P. J., and TRUAX and BISCHOFF, JJ.

Abraham H. Sarasohn, for appellant.

Henry Kuntz, for respondent.

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SCOTT, P. J. It is well settled that in an action for malicious prosecution the burden is upon the plaintiff of showing want of probable cause on the part of the defendant, and that where there is no dispute as to the facts the question as to the existence of probable cause is one for the court. Anderson v. Howe, 116 N. Y. 336, 22 N. E. 695; Thaule v. Krekeler, 81 N. Y. 428. If there be a dispute as to the facts, it is for the jury to determine what the true facts are; the responsibility still resting upon the court of determining whether the facts as found amount to probable cause. Fagnan v. Knox, 66 N. Y. 527. The charge of the court is not included in the record before us, and we have therefore no means of determining what instructions were given to the jury, or what questions of fact were submitted for their determination. This is, however, unimportant, because upon the undisputed facts there was ample proof of probable cause for charging the plaintiff with the crime of which defendant accused her. There had been a burglary in defendant's shop, and a portion of the stolen goods were traced to the possession of plaintiff's brother, who was trying to sell them. He had obtained them from his sister. When interrogated as to where she obtained them, she gave a most unsatisfactory explanation. It is well settled that the possession by any person of property recently stolen, without a satisfactory explanation, raises a presumption of guilt. People v. Weldon, 111 N. Y. 569, 19 N. E. 279. The only argument offered in support of the judgment is drawn from one or two answers made by defendant on cross-examination, to the effect that he did not, when he caused plaintiff's arrest, believe her to be guilty. Of course, a belief in the guilt of a person accused is as essential as the existence of reasonable cause for the belief; but the defendant's frame of mind upon the subject of plaintiff's guilt is not to be determined by his answer to a single question, perhaps not perfectly understood, when the examination, taken as a whole, discloses an undoubted belief in the plaintiff's guilt, as well as reasonable cause for entertaining such belief.

The judgment must be reversed, and a new trial granted, with costs to appellant to abide the event. All concur.

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## STEINBACH v. LA ROCHE.

(Supreme Court, Appellate Term. April 24, 1906.)

MASTER AND SERVANT—COMPENSATION—DEDUCTION—FRAUD—ELEMENTS—EXPECTATION ON PROMISE.

A promise or prediction of the amount of sales plaintiff would be able to make within a year does not constitute fraud or misrepresentation entitling the parties employing him, by reason of the promise, under a contract which they could terminate at any time, to deduct any amount from the agreed compensation for the time they retained him in their service.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 93.]

Appeal from Municipal Court, Borough of Manhattan, First District. Action by George B. Steinbach against Edward M. La Roche and

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another. From a judgment in favor of defendants, plaintiff appeals. Reversed, and new trial granted.

Argued before SCOTT, P. J., and TRUAX and BISCHOFF, JJ.

Richard T. White (Herman B. Goodstein, of counsel), for appellant.

Charles M. Russell (Walter L. Post, of counsel), for respondents.

SCOTT, P. J. The defendants engaged plaintiff to act as their traveling salesman, at a salary of $35 per week and traveling expenses. No term of employment was specified, and plaintiff might have been discharged. He worked as salesman from April 20, 1904, to August 13, 1904, earning, according to the terms of his contract, $700, of which he was paid only $425.75. For the balance of $274.25 he now sues. The defendants, admitting the contract and the rendition of the services, defend on the ground that they were led to make the contract by false representations by plaintiff as to the character and selling qualities of the goods he was employed to sell, and as to the amount of sales of the same or similar goods he had made in the prior year. The evidence, taking the defendants' own testimony, failed to sustain the defense. It is true that it is said that the goods were not well made, and that many of them were returned as defective; but the defects appear to be those of the manufacturers, and plaintiff was not the manufacturer. The alleged representation as to the large amount sold in the prior year turns out to have been a promise or prediction as to the amount that would be sold in a year after the making of the contract. The case discloses no legal fraud or misrepresentation on plaintiff's part, but merely an over sanguine estimate of what might be expected in the future. If the results of plaintiff's employment did not come up to defendants' expectation, they could have discharged him at any time. Having failed to do so, they show no legal excuse for not paying him according to contract for the time they retained him in their service.

Judgment reversed, and new trial granted, with costs to appellant to abide the event. All concur.

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## HODGE v. ACORN BRASS MFG. CO.

(Supreme Court, Appellate Term. April 24, 1906.)

CORPORATIONS—PROCESS—SERVICE ON FOREIGN CORPORATIONS—OFFICER OR AGENT.

**Where a defendant in an action is a foreign corporation, and the summons was not served on an officer nor an agent, but on one who only had authority to sell its goods at a stated price, the court acquired no jurisdiction.**

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, § 2610.]

Appeal from Municipal Court, Borough of Manhattan, First District.

Action by Schuyler C. Hodge against the Acorn Brass Manufacturing Company. From a judgment in favor of plaintiff, defendant appeals. Reversed, and complaint dismissed.

Argued before SCOTT, P. J., and TRUAX and BISCHOFF, JJ.

Bookstaver & Norton (Harry J. Sondheim, of counsel), for appellant.



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PER CURIAM. The defendant is a foreign corporation, and, claiming never to have been served with a summons in this action, appeals, by virtue of the provisions of section 311 of the Municipal Court Act (Laws 1902, p. 1578, c. 580), from a judgment rendered in favor of the plaintiff, and upon the appeal submits affidavits in support of its contention. The affidavits are clear and explicit, and substantially uncontradicted, to the effect that service of the summons was made upon a person who was not an officer of the defendant corporation, or the cashier, director, or managing agent thereof. The person served was not an agent of the defendant in any respect, but had authority only to sell its goods in this city at a stated price. Under such circumstances, the court below acquired no jurisdiction over the defendant, and the judgment must be reversed.

Judgment reversed, with costs, and complaint dismissed.

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## SIMON v. DANZIGER et al.

(Supreme Court, Appellate Term. April 24, 1906.)

JUDGMENT—COUNTERCLAIM—EVIDENCE.

A judgment for defendant on a counterclaim for improper work cannot be sustained, in the absence of any evidence as to the amount of damages.

Appeal from Municipal Court, Borough of Manhattan, Seventh District.

Action by Gustave Simon, doing business as the Standard Novelty Company, against Charles Danziger and another. From a judgment for defendants, plaintiff appeals. Reversed.

Argued before SCOTT, P. J., and TRUAX and BISCHOFF, JJ.

Adam Wiener, for appellant.

Lester F. Dittenhoefer, for respondents.

PER CURIAM. The amount for which the plaintiff brought this action was conceded upon the trial to be due from the defendants. A counterclaim was interposed by them, which exceeded in amount the plaintiff's claim, and for the excess thereof the defendants had a judgment. This counterclaim was for damages alleged to have been sustained by the defendants by reason of improper and imperfect work done upon a quantity of shirtwaist fronts sent by the defendants to the plaintiff to be embroidered, and which were subsequently returned to the defendants. The amount of such damage was not shown, and there is no foundation for the allowance of the counterclaim. The testimony was that the defendants sent to the plaintiff a quantity of material, cut in the requisite lengths, which was worth 52½ cents per yard, but how many yards were sent does not appear. No testimony was given as to the difference in value between the goods when delivered to the plaintiff and when returned to the defendants, if any difference there was, nor was any testimony given upon the question of damage at all. Reliance, as showing damage, is placed upon what the respondents term a "credit bill" attached to the record. If by any

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legal testimony such bill could have been introduced in evidence, none was given in reference thereto, nor was such bill offered or received in evidence.

Judgment reversed, and new trial ordered, with costs to appellant to abide the event.

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## ALDEN v. ROBINSON et al.

(Supreme Court, Appellate Term. April 24, 1906.)

1. BROKERS—CONTRACTS—SALE OF REAL PROPERTY—COMMISSIONS.

Where, in an action by a real estate broker to recover from defendants one-half of commissions received by the latter on a sale of certain property, for the sale of which plaintiff was agent, the complaint alleged that plaintiff brought the property to defendants' notice, that the latter agreed to co-operate with plaintiff in a sale of the property, and, in consideration of his bringing the same to defendants' notice and of his services, defendants agreed to pay plaintiff one-half of the commissions received by them on the sale of the property, the court properly refused to charge that, if the premises in question were brought to defendants' notice prior to the plaintiff bringing notice thereof to them, he could not recover on the contract.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Brokers, § 61.]

2. APPEAL—RECORD—SUFFICIENCY.

Where, on appeal, it does not appear what plaintiff's counsel said in summing up, defendants' exception to the language employed cannot be considered.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 2896.]

Appeal from City Court of New York, Trial Term.

Action by William H. Alden against Douglas Robinson and another. From a judgment for plaintiff, and an order denying a motion for new trial, defendants appeal. Affirmed.

This action was brought by plaintiff, a real estate broker, against defendants, a firm of real estate brokers, to compel the latter to divide with plaintiff a sum received for brokerage commissions on the sale of certain real estate. The complaint alleged that plaintiff was employed by the owner of the property to sell the same, and that thereupon plaintiff entered into an agreement with defendants to co-operate in selling the property; the defendants to divide equally with plaintiff any commission paid or received by them on the sale of the property to any of defendants' customers. The ruling referred to in the opinion as appearing at folio 261 was the refusal of an instruction requested by defendants that, "if the premises in question were brought to defendants' notice prior to the plaintiff's bringing notice thereof to them, he cannot recover upon the contract pleaded in the complaint."

Argued before SCOTT, P. J., and TRUAX and BISCHOFF, JJ.

Carter, Ledyard & Milburn, for appellants.

George C. Coffin (Herbert Goldmark, of counsel), for respondent.

PER CURIAM. We are of the opinion that the verdict is not against the weight of evidence. Counsel for the appellants contend that the court erred in permitting the defense in the answer to be read to the jury, and calls our attention to folios 246, 247 and 262 of the printed papers. It does not appear from folio 247 that the answer

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was in fact read, nor does it appear that the counsel for the appellants at the time excepted to the ruling of the court, nor was the ruling which appears at folio 261 erroneous. It does not appear what counsel for plaintiff said in summing up; therefore, we cannot say whether he had a right to say it or not.

The judgment and order appealed from are affirmed, with costs to the respondent.

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## In re COONEY'S WILL.

(Supreme Court, Appellate Division, Fourth Department. May 2, 1906.)

1. WILLS—CHARITABLE PURPOSES—RESTRICTIONS—TIME OF EXECUTION.
   Laws 1848, p. 448, c. 319, § 6, providing that no devise or bequest to a corporation formed under the act for benevolent, charitable, or scientific purposes shall be valid unless made two months before the death of testator, applies only to corporations organized under such statute.

2. TRUSTS—PASSIVE TRUSTS—RIGHT OF BENEFICIARIES.
   Real Property Law, Laws 1896, p. 570, c. 547, § 78, provides that a passive trust vests no title in the trustee, and by section 77 (page 571), where the trustee is not empowered to receive the rents and profits no estate vests in him, but the estate passes directly to the heirs or devisees, subject to the execution of the power. *Held*, that a bequest of personal property to certain individuals, in trust for the use and benefit of a corporation for the purpose of having masses and prayers said for the benefit of testatrix's soul, went to the corporation, and not to the individuals.

Appeal from Surrogate's Court, Monroe County.

Judicial proceedings on the probate of the will of Johanna Cooney, deceased. Appeal from so much of the decree of the Surrogate's Court as determined the validity of the fifth paragraph of the will and overruled and dismissed on the merits the objections to the probate. Reversed, and new trial ordered.

Argued before McLENNAN, P. J., and SPRING, WILLIAMS, NASH, and KRUSE, JJ.

Ernest B. Millard, for appellant.
John B. Kiley, for respondents.

SPRING, J. Johanna Cooney, a resident of the city of Rochester, executed her last will and testament in proper form on the 26th of July, 1905, and died five days later, leaving her surviving no husband or lineal descendant, but the appellant, her brother, and a nephew as her only next of kin. The will, after three general legacies aggregating $300, proceeds as follows:

"Fifth. I give, bequeath and devise the rest, residue and remainder of my property to Rt. Rev. Thomas F. Hickey and Bernard O'Rilly, of Rochester, N. Y., in trust, however, for the use and benefit of St. Bernard's Seminary, of the town of Greece, and St. Anne's Home for the Aged, of Rochester, N. Y., for the purpose of having masses and prayers read and said for the benefit of my soul, each institution to them equally."

It then names Bishop Hickey and Mr. O'Rilly trustees and executors. The will was presented for probate by the executor O'Rilly, and an answer was filed whereby the appellant put in issue the validity of paragraph 5 of the will. Code Civ. Proc. § 2624. The testatrix left only

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personal property. Inasmuch as the testatrix died within two months after the execution of the will, it is contended that the fifth provision is within the condemnation of section 6, c. 319, p. 448, Laws 1848. The act mentioned was a general act providing for the incorporation of benevolent, charitable, scientific, and missionary societies; and by section 6 no devise or bequest to a corporation "formed under this act * * * shall be valid" unless "made and executed at least two months before the death of the testator." All of the act has been repealed except section 6, which is still in force. Matter of Lampson, 161 N. Y. 511–516, 56 N. E. 9 et seq.; chapter 559, p. 329, vol. 1, Laws 1895.

It will be noted that the limitation only affects corporations organized under this act, and this limitation has been recognized by authority. Stephenson et al. v. Short et al., 92 N. Y. 433; Matter of Lampson, 161 N. Y. 511–516, 56 N. E. 9 et seq.; Hollis v. Drew Theological Sem., 95 N. Y. 166. St. Bernard's Seminary was organized under this act. The certificate of incorporation so recites. St. Ann's Home for the Aged was incorporated in February, 1874, as the Rochester Home of Industry. In 1904, by an order of the Supreme Court, the present name was adopted. The purpose of the corporation is set forth in the certificate of incorporation as follows:

"That the object and business of such society is the protection of young females and their instruction in the ordinary branches of education, in music, and in all the trades and occupations in which women are employed, as well as in all branches of domestic economy, to the end that they may be and become useful and virtuous women."

The proof shows that old ladies are provided and cared for in the home, that prayers are said for its benefactors, and that testatrix at the time of her death and for the 14 months preceding was an inmate of the institution and daily took part in the saying of the prayers, so that the original object of the incorporation has been, in a measure, departed from. The certificate does not state under what act it was incorporated, and there is no drect proof in the record to enlighten us on the subject. The surrogate was asked to find as a fact that it was organized under chapter 319, p. 447, Laws 1848, but he declined to do so. The form of the certificate comports closely with the requirements contained in section 1 of that act. That was the general act under which corporations of this character for many years were organized. While many special acts were passed to enable corporations to be formed, there is no claim that this corporation was created by an act of that kind.

We find no general statute authorizing the formation of a corporation with a certificate like the one mentioned, except the act of 1848 referred to. The diligence of counsel has not been able to do so. The counsel for the respondents urges that it may have been organized pursuant to chapter 184, p. 354, Laws 1853. That act provides for the incorporation of colleges and academies by the regents of the University. Section 10 (page 357), referred to by counsel, relates to medical colleges, and provides that its trustees must be at least 10 in number. The purpose of that act and the scheme for the organization of corporations pursuant to it do not enable this beneficiary to be included within it. The conclusion seems reasonably clear that the Rochester Home

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of Industry was organized under chapter 319, p. 447, Laws 1848. It may be upon another trial that proof may be elicited showing that the society was created by virtue of some other act of the Legislature.

It is claimed that the bequest is not to the corporations designated, but to the individuals who are to use the fund as trustees for the purpose of procuring masses and prayers to be said for the soul of the testatrix. The language of the bequest seems to contravene this interpretation. The individuals named take the property in trust "for the use and benefit" of the two institutions, and the bequest is to "each institution to them equally." The bequest was intended to be a charitable one for the aid of the two societies, and each was charged with the obligation of performing the prescribed religious service. The trustees were to receive this money, but no active duty was imposed upon them in connection with the fulfillment of the trust; and they were not charged with the performance of the religious rite which the testatrix intended to couple with the legacy to the two corporations. The trusteeship, if such it may be dignified, is a passive one, with no authority in the trustees to invest the fund and keep it intact, or to collect the income or to pay over any portion of it, or the principal, to the two corporate beneficiaries.

No kindred question was decided in Allen v. Stevens, 161 N. Y. 122, 55 N. E. 568, cited on the brief of respondents' counsel. In that case the residuary estate was willed to the designated trustees, and they were charged with the duty "of founding, erecting, and maintaining Graves Home for the Aged." The active management of the property was intrusted to the trustees, with authority to rent or sell the real property, to employ agents, etc. Their custody of the property was complete, and their authority in its management unrestricted. The court held that the beneficiary was indefinite; but the bequest did not fail in any event, because of chapter 701, p. 1748, Laws 1893.

By section 73 of the real property law (chapter 547, p. 570, Laws 1896) a passive trust vests no title in the trustee. So by section 77, where the trustee is not "empowered to receive the rents and profits," no estate vests in him. The estate passes directly to the heirs or devisees, "subject to the execution of the power." By analogy the present bequest, if valid, would go to the beneficiary, accompanied with the responsibility of saying "masses and prayers for the soul of the testatrix." Genet et al. v. Hunt et al., 113 N. Y. 158–168, 21 N. E. 91; Bindrim v. Ullrich, 64 App. Div. 444–447, 72 N. Y. Supp. 239.

The decree should be reversed, and a new trial ordered in Surrogate's Court, with the costs and disbursements of both parties on this appeal payable out of the fund. So ordered. All concur.

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## RICH v. PENNSYLVANIA R. CO.

**(Supreme Court, Appellate Division, Fourth Department. May 2, 1906.)**

**MASTER AND SERVANT—INJURIES TO SERVANT—EVIDENCE—SUFFICIENCY.**

**In an action by a servant for injuries caused by being struck by a switch engine while working upon a track, evidence *held* insufficient to support a verdict for plaintiff.**

**McLennan, P. J., dissenting.**

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Appeal from Trial Term, Cattaraugus County.

Action by Frank Rich against the Pennsylvania Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

Argued before McLENNAN, P. J., and SPRING, WILLIAMS, NASH, and KRUSE, JJ.

A. J. Hastings, for appellant.

Henry Donnelly, for respondent.

NASH, J. The plaintiff was injured on the 10th of December, 1903. He was employed by the defendant in its yards at Olean for 14 months prior to the accident. At the time he was hurt he was engaged in digging ice from between the rails and the planks on what is known as "First Street Crossing." The passenger station is about 400 feet east of the crossing. There are switching tracks and yards on both sides of First street. Yard engines pass over the street 50 to 70 times a day in 12 hours. As stated by the plaintiff, engines were passing by all the time. "Couldn't tell how many went by while I was working there. I knew I had to look out for them. I knew I had to watch out and get out of the way. I understood that." There are three tracks crossing First street. The distance between the tracks is approximately 9 feet from center to center of the tracks. A train could be seen by a person standing on First street on the center track as it approached from the west, the direction the engine came, which hit the defendant, at a distance of about 1,000 feet, before it reached First street. The accident occurred between 3 and 4 o'clock in the afternoon. The plaintiff was working on the southerly track, which is known as the "Bradford Track." As the passenger train from Bradford came in from the west towards the station, the plaintiff stepped from that track over on to the middle track, and was struck by a yard engine going in the same direction as the passenger train. The passenger train was running from 10 to 15 miles an hour when it crossed First street, and the yard engine not over 5 or 6 miles an hour. The plaintiff says:

"When I see the Bradford train coming in, I left the Bradford track and went on the center track. I was working on the Bradford track before the train come. I had got pretty nearly through on the Bradford track. I went to the other track and started working, and watched both sides when I stepped on the other track—the center track. I did not stand on the center track looking at the Bradford train as it went by. I jumped on the center track and started to work. The Bradford train whistled and rang the bell when it came in. Pretty soon after I stepped over on the middle track the other engine struck me."

The plaintiff says the bell of the yard engine was not ringing and it was snowing pretty hard; but he could see up the track toward the engine about three rail lengths, or 90 feet. Four witnesses called by the defendant testified that the bell of the yard engine was ringing as it approached the crossing. The fireman of the yard engine says he was ringing the bell, and the engineer and one of the crew on the yard engine testify that the bell was ringing as they approached the crossing. The fireman on the Bradford engine says that when about 100 feet from the crossing he saw the plaintiff step over from the Bradford to the center track and watch the Bradford train as it passed by; that he no-

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ticed the yard engine coming, and hung his head out of the cab window, waived his hand to the plaintiff, and called to him to attract his attention; that when his engine was over the crossing about 25 or 30 feet the yard engine struck the plaintiff; and that the bell on the yard engine was ringing. As against the positive evidence of these four witnesses, we have the assertion of the plaintiff that the bell was not ringing. Upon this evidence the case did not present a question for the jury. Culhane v. N. Y. C. & H. R. R. R. Co., 60 N. Y. 133. If, when the plaintiff saw the Bradford train, he had looked to see if a car or engine was approaching on the center track from the same direction, he would have seen the yard engine, which was in plain sight and less than 90 feet from him. It is quite evident that he was watching the Bradford train as it passed, and not looking out for an engine, which he knew might be approaching on the track he was on, at any time.

The plaintiff says that it was snowing pretty hard and the wind was blowing from the west. If this obscured his vision, it required all the more care on his part. He says he could see three rail rengths—rails about 30 feet long. As the yard engine was approaching slowly 4 to 6 miles an hour, there was ample opportunity to have protected himself from injury if he had used ordinary care. Five witnesses for the defendant testified that it was not snowing or storming at the time of the accident. The engineer of the Bradford train first saw the plaintiff on his track 300 or 400 feet away. It must be held as matter of law that the plaintiff failed to show any negligence on the part of the defendant, that the plaintiff was guilty of negligence which contributed to the accident, and that the accident was a risk incident to his employment. Crowe v. N. C. & H. R. R. R. Co., 70 Hun, 37, 23 N. Y. Supp. 1100; Tomko v. Central R. R. Co., 1 App. Div. 289, 37 N. Y. Supp. 144; Moccia v. N. Y. C. & H. R. R. R. Co., 46 App. Div. 58, 61 N. Y. Supp. 338. The judgment and order should be reversed.

Judgment and order reversed, and a new trial ordered, with costs to the appellant to abide the event.

SPRING and WILLIAMS, JJ., vote for reversal on the ground that the verdict is against the weight of the evidence. KRUSE, J., votes for reversal in a separate memorandum. McLENNAN, P. J., dissents, and votes for affirmance.

KRUSE, J. (concurring). I think that the question whether the bell was rung on this engine which struck the plaintiff, as well as the contributory negligence of the plaintiff, was for the jury under the McDonald Case, but it may well be that their finding is against the weight of evidence. The serious question in the case as I view it is the defendant's negligence. It seems to have been predicated upon the failure to warn the plaintiff of the approaching engine. The plaintiff was at work at a street crossing. Section 421 of the Penal Code requires the engineer to ring the bell or sound the whistle upon his locomotive at least 80 rods from the crossing, and to continue ringing the bell or sounding the whistle at intervals until the locomotive and the train has passed the street, and for a failure to do so makes him guilty of a misdemeanor. A compliance by the engineer with this statute would have

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given the plaintiff ample warning, but the plaintiff contends this was not done. The question is therefore presented as to whether the failure upon the part of the engineer to ring the bell or sound the whistle as the statute required was such an act of negligence as is chargeable to the defendant, and for the consequences of which it is liable to the plaintiff, or whether the plaintiff and the engineer were fellow servants within the rule which exonerates the master from the consequences of a negligent act done or suffered by one through which the other is injured. The latter was held in Coon v. Syracuse & Utica R. R. Co., 5 N. Y. 492, and to the same effect is the case of McDonald v. N. Y. C. & H. R. R. Co., 63 Hun, 587, 18 N. Y. Supp. 609.

If this view is correct, it leads to the same result as the conclusion of Judge NASH, and in any event the judgment should be reversed, and a new trial ordered.

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## RUBENSTEIN v. ROSENTHAL et al.

(Supreme Court, Appellate Term. April 24, 1906.)

1. LANDLORD AND TENANT—RECOVERY OF POSSESSION—FINAL ORDER—VACATION.

   After a final order in favor of the landlord in summary proceedings, it will not be set aside in order to permit a mortgagee of the lease to come in and defend, since he was not a proper or necessary party to the proceedings originally.

2. SAME—REMEDIES OF TENANT'S CREDITORS.

   The mortgagee of a lease can pay the rent due by his mortgagor at any time before the issuance of a final order against the mortgagor in summary proceedings, in order to protect his security, and the landlord will be bound to accept the rent.

   [Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Landlord and Tenant, § 847.]

Appeal from Municipal Court, Borough of Manhattan, Fourth District.

Summary proceedings by Louis Rubenstein, as landlord, against Samuel Rosenthal, as tenant, in which Peter Doelger petitioned to set aside a final order in favor of the landlord and to be permitted to defend. From an order denying the motion to vacate the order, petitioner appeals. Affirmed.

Argued before SCOTT, P. J., and TRUAX and BISCHOFF, JJ.

Guggenheimer, Untermyer & Marshall (Adam K. Stricker, of counsel), for appellant.

SCOTT, P. J. The tenant, Rosenthal, held from Louis Rubenstein a certain house in this city, under a lease made in February, 1904, and running for five years from May 1, 1904. The appellant, Doelger, a brewer, took from Rosenthal a mortgage on the lease which was duly filed. It does not appear that the landlord had notice or knowledge of this mortgage, and it is, as we think, immaterial whether he had or not. Rosenthal failed to pay the rent due on January 1, 1906, and on the 19th of January this proceeding was begun to regain possession of the premises for the default in payment of rent. Doelger was not made a party

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to the proceeding, and, as the tenant offered no defense, a final order was made and a warrant issued. Doelger thereupon moved that the final order be vacated and that he be permitted to come in and defend. From the order denying that motion he appeals.

It is not suggested that there is any defense to the proceeding in the ordinary sense of the term, and it is apparent that Doelger's real purpose is to get into a position where he can pay the rent and save the lease. Whether or not the final order should now be set aside and the proceeding reopened to let Doelger come in depends upon whether he was a necessary or a proper party to the proceeding in the first instance, if the landlord had had knowledge of his lien upon the lease. It seems to be quite clear that he was not. Summary proceedings of this character are strictly the creation of statute, and the proceedings therein are regulated by the statute. They are merely possessory in their nature, and it is the very apparent design of the statute that only tenants, or subtenants or parties actually in possession, shall be cited as respondents. Undoubtedly Doelger might have paid the rent at any time before the issuance of the final order for the purpose of protecting his security, and if he had offered to do so we think that the landlord would have been bound to accept the rent from him. Cole v. Malcolm, 66 N. Y. 363. But he was under no obligation to pay, and the landlord would have had no right to demand payment from him. It is undoubtedly unfortunate for Doelger that he has lost his security, but that he had done so is due to the character of the property upon which he made the loan, and upon his own neglect to take any measures to protect himself. He knew the terms of the lease, the amount of the rent, and when it was payable. He also knew that for nonpayment the tenant could be dispossessed and the lease canceled. It would not have been a difficult matter for the mortgagee to assure himself, as each rent period arrived, whether the rent was promptly paid or not, and, if necessary, to provide for its payment. The landlord was under no obligation to consult either the interest or the convenience of the mortgagee of the lease, but was justified, on nonpayment of the rent, to pursue the remedies given him by statute.

The final order must be affirmed, with costs. All concur.

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## HILL v. KAHN.

(Supreme Court, Appellate Term. April 24, 1906.)

1. COSTS—AMOUNT—STATUTORY CONSTRUCTION.

Under Code Civ. Proc. § 3228, subd. 5, providing that a plaintiff in an action in the City Court, where, but for the amount claimed, the action could have been brought in the Municipal Court, can have no costs unless he recover $250 or more, and section 734, providing that, if the plaintiff proceeds in the action after accepting the tender, the sum accepted must be deducted from the recovery and judgment rendered for the residue, and that plaintiff's right to costs is determined by the amount of the residue, a sum accepted pending suit is not a recovery, and where plaintiff accepted payment of the amount claimed in, and withdrew, his first cause of action, thereby limiting his possible recovery to a sum less than $250, his right to costs was lost.

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2. SAME—TAXATION—MOTION TO VACATE.

**The failure of a party to assert the total invalidity of the taxation of costs before the taxing officer did not affect his right to move to vacate the taxation, since this was a question for the court, and not for the clerk.**

Appeal from City Court of New York, Special Term.

Action by Fred Hill against Edward Kahn. From an order denying a motion to vacate a taxation of costs, defendant appeals. Reversed.

Argued before SCOTT, P. J., and TRUAX and BISCHOFF, JJ.

Levinson & Levinson, for appellant.

Charles C. Marshall and Samuel C. Herriman, for respondent.

BISCHOFF, J. The action was brought upon two causes of action, one for $576, and the other for $200. Pending the trial the plaintiff accepted payment of the amount claimed upon the first cause of action, and the parties entered into a stipulation that "all matters relating to the said first cause of action be, and the same are, hereby eliminated from this action, without costs to either party as against the other." The cause being brought to trial, the plaintiff had a verdict for $200 upon the single cause of action litigated, and taxed his costs. Thereupon the defendant moved to vacate the taxation upon the ground that the recovery, being less than $250, carried no costs. The motion was denied and the defendant has appealed.

In our opinion the motion should have been granted. A plaintiff, in an action brought in the City Court, where, but for the amount claimed, the action could have been brought in the Municipal Court, can have no costs "unless he shall recover $250 or more." Code Civ. Proc. § 3228, subd. 5. Obviously it is the "recovery," not the amount claimed, which determines the question, and a sum accepted pending suit is not a "recovery," within the meaning of the Code. The distinction is noted in the provision relating to tenders (Code § 734):

"If the plaintiff proceeds in the action after accepting the tender the sum accepted must be deducted from the recovery and judgment rendered for the residue. * * * The plaintiff's right to recover costs and his liability to pay costs to the defendant are determined by the amount of the residue."

Here the word "recovery" is used in the sense of the award made in the action, and we are to assume that the use of the word in section 3228, relating to the same general subject, was with the same intention. It appears that there was no direct tender in the present case, because the defendant had not complied with the requirements of section 732 of the Code, and the right to costs could have been preserved, had the plaintiff refused the offer and taken his full recovery in the action. By accepting the payment and withdrawing the first cause of action, however, the plaintiff necessarily limited his possible recovery to a sum less than $250, and his right to costs was lost.

The failure to assert the total invalidity of the taxation before the taxing officer did not affect the defendant's right to make this motion to vacate the taxation, since this was a question for the court, not for the clerk. De Graff v. Hoyt, 4 Thomp. & C. 348, 351.

The order is therefore reversed, with $10 costs and disbursements, and the motion granted, with $10 costs. All concur.

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## HOFFERBERTH v. NASH.

(Supreme Court, Appellate Term. April 24, 1906.)

1. PARTNERSHIP—ACTION AGAINST PARTNERS—ENFORCEMENT OF JUDGMENT AGAINST PARTNER NOT SERVED.

Code Civ. Proc. § 1913, provides that an action on a judgment cannot be maintained between the original parties unless the court in which the action is brought has previously made an order granting leave to bring it. Section 1937 provides that after the recovery of a judgment against joint debtors an action may be maintained by the judgment creditor against a defendant not summoned in the original action to procure a judgment charging his property with the sum remaining unpaid on the original judgment. *Held* that, where an action on a judgment against partners was at the trial by tacit consent resolved into one brought to establish the liability of one of the defendants who was not served with summons, defenses that the judgment was never duly docketed and that leave of the court to bring the action had not been had were immaterial.

2. SAME.

In an action to establish defendant's liability as a defendant not summoned in a former action against partners, the identity of the name of defendant and the partner not summoned in the former action was prima facie evidence of the identity of the persons.

3. APPEAL—PRESENTATION OF QUESTION ON TRIAL—GROUNDS OF DEFENSE.

Where, in an action under Code Civ. Proc. § 1937, to establish the liability of defendant as a partner not summoned in a former action against partners, the identity of defendant and the partner not summoned was not disputed, and the trial court's attention was not directed to any such question, defendant would not be permitted to raise the question on appeal.

4. JUDGMENT—CONCLUSIVENESS—JOINT DEBTORS.

By the express provisions of Code Civ. Proc. § 1933, a judgment against joint debtors is, as against a defendant not summoned, conclusive evidence of the extent of plaintiff's demand.

5. LIMITATION OF ACTIONS—STATUTORY LIABILITY.

Code Civ. Proc. § 1937, provides that after the recovery of a judgment against joint debtors an action may be maintained by the judgment creditor against a defendant not summoned in the original action to procure a judgment charging his property with the sum remaining unpaid on the original judgment. *Held*, that in an action under the statute a defense that the action was not brought within six years after the original cause of action had accrued was not available, where it did not exist when the former action was brought.

6. SAME.

Code Civ. Proc. § 388, provides that an action, the limitation of which is not specially prescribed, must be commenced within 10 years after the cause of action accrues. *Held*, that an action under section 1937 was not barred when not commenced within 10 years after the recovery of the former judgment, since the action is not one on the judgment.

7. JUDGMENT—ACTION—CONDITIONS PRECEDENT.

Code Civ. Proc. § 1936, provides that, where a judgment is taken against joint debtors, the clerk with whom the roll is filed must write upon the docket under the name of each defendant not served the words "not summoned." Section 1937 provides that after judgment against joint debtors an action may be maintained against one of them not summoned in the original action, to procure a judgment charging his property with the amount unpaid on the judgment. *Held*, that the neglect of the clerk to make the proper entry in respect to a defendant not served does not preclude an action against him under section 1937.

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Appeal from City Court of New York, Special Term.

Action by Charles Hofferberth against George Nash. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Argued before SCOTT, P. J., and TRUAX and BISCHOFF, JJ.

Elias B. Goodman and H. C. S. Simpson, for appellant.

James A. Allen, for respondent.

BISCHOFF, J. By tacit consent upon the trial (Frear v. Sweet, 118 N. Y. 454, 23 N. E. 910), the parties resolved this action from one upon a judgment of the City Court of New York, alleged to have been recovered March 4, 1884, against George Collins and George Nash, as copartners, jointly and severally, into one brought to establish the liability of Nash, who was admittedly not served with the summons in the former action (Code Civ. Proc. §§ 1932–1941), and thus the action proceeded to judgment for the plaintiff upon a verdict directed in his favor. With the substitution of the issues, therefore, the defenses that the judgment was never duly docketed and that leave of court to the action had not been had, available under section 1913 of the Code of Civil Procedure had the action proceeded as commenced, necessarily became immaterial and irrelevant.

The identity of the names of the defendant in this action and of Collins' copartner was prima facie evidence of the identity of the persons; but, aside from that, it appears from the record of this appeal that the defendant's membership of the firm of Collins & Nash, the plaintiff's debtors for merchandise sold and delivered to them, was not only undisputed upon the trial, but that the defendant's attitude was consistent only with an admission of the fact. The trial court's attention was not directed to any question of that kind, and the action was tried by counsel for both parties, and disposed of by the court, upon the theory of such assumed or admitted identity. For the purposes of this appeal, therefore, the defendant will not be permitted to shift his position. Campbell v. Birch, 60 N. Y. 214; Wilson v. Rocke, 58 N. Y. 642. See, also, cases collated in Baylies on New Trials and Appeals (2d Ed.) p. 332, and in note on "Questions Raised in the First Instance on Appeal," 5 Silvernail, 142.

The former judgment was evidence of the extent of the plaintiff's demand (Code Civ. Proc. § 1933; Vereinigte Pinsel-Fabriken v. Rogers, 52 App. Div. 529, 65 N. Y. Supp. 478); the defendant's liability appearing from his admitted membership of the firm of Collins & Nash and the uncontroverted testimony of Charles F. Hofferberth, the plaintiff's son, to the fact of the sale to the firm of the merchandise for which the former recovery was had.

The defense that this action was not brought within six years after the original cause of action had accrued was not available to the defendant, since it did not exist when the former action was brought (Kramer v. Schatzkin, 27 Misc. Rep. 206, 57 N. Y. Supp. 803), and the contention that the plaintiff's recovery was unauthorized because this action was not commenced within 10 years (Code Civ. Proc. § 388) after the recovery of the former judgment proceeds upon counsel's erroneous assumption that the action was one upon that judgment. This action proceeded upon the defendant's original liability as a member of Collins & Nash. Morey v. Tracey, 92 N. Y. 581.

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The provision of the Code of Civil Procedure, § 1936, requiring the clerk of the court or county with whom the judgment roll is filed or docketed to "write upon the docket, opposite or under the name of each defendant, upon whom the summons was not served, the words 'not summoned,'" prescribes the duties of that official; but his omission or neglect in that respect does not have the effect of impairing the judgment creditor's right to proceed against a defendant not formerly summoned. Section 1937 authorizes the latter action immediately after the recovery of a judgment against one or more of a number of joint debtors, and the recovery takes effect when the judgment is regularly entered. Whitney v. Townsend, 67 N. Y. 40. Obviously, therefore, the entry upon the docket prescribed by section 1936 is not a condition precedent to the action authorized by section 1937.

The judgment and order appealed from should be affirmed, with costs to the respondent. All concur.

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## WIENER v. AUERBACH.

(Supreme Court, Appellate Term. April 24, 1906.)

TENDER—PLEADING—FAILURE TO PROVE—EFFECT.

Where, in an action for wages, defendant admitted a certain amount to be due, and handed this sum to the justice, but tender, while pleaded, was not proven, plaintiff was entitled to judgment for the amount admitted to be due.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Tender, § 91.]

Appeal from Municipal Court, Borough of Manhattan, Fourth District.

Action by Katie Wiener against Herman Auerbach. From a judgment for defendant, plaintiff appeals. Reversed.

Argued before SCOTT, P. J., and TRUAX and BISCHOFF, JJ.

J. S. Freedman, for appellant.

H. Auerbach, for respondent.

PER CURIAM. The plaintiff testified that the sum of $8.50 was due her as wages, while the defendant's testimony showed the amount to be $7.01, which sum he handed to the justice, who thereupon rendered judgment in his favor. Tender was pleaded, but the fact of a tender was not suggested by the proof, and upon the conceded facts the plaintiff was entitled to judgment for the amount admitted by the defendant to be due her.

The judgment must therefore be reversed, and a new trial ordered, with costs to the appellant to abide the event.

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## MANHATTAN LEASING CO. v. WEILL.

(Supreme Court, Appellate Term. April 27, 1906.)

1. JUDGMENT—CONFORMITY TO PLEADINGS—ACTION FOR RENT.

In an action for rent for the month of May, where the defendant pleaded payment to May 1st, of rent this was insufficient to justify a judgment in his favor.

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2. EVIDENCE—WEIGHT AND SUFFICIENCY—TESTIMONY OF ADVERSE PARTY.
Under Code Civ. Proc. § 838, providing that the testimony of a party taken at the instance of the adverse party may be rebutted, the testimony of a defendant was not conclusive on the plaintiff, though brought out by him.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 2440, 2441.]

3. COSTS—APPEAL.
In an action for rent for the month of May, where the defendant pleaded payment to May 1st, but on the trial insisted on misreading his answer, and judgment was rendered in his favor, on reversal costs will be imposed against him absolutely.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Costs, § 911.]

Appeal from Municipal Court, Borough of Manhattan, Eleventh District.

Action by the Manhattan Leasing Company against Henry M. Weill. From a judgment in favor of defendant, plaintiff appeals. Reversed, and new trial ordered.

Argued before SCOTT, P. J., and TRUAX and BISCHOFF, JJ

B. H. Arnold, for appellant.

S. A. Singerman, for respondent.

PER CURIAM. The action was for the rent of an apartment for the month of May, and the defendant pleaded payment of rent to May 1st, but not of the rent sued for. At the trial the justice gave judgment for the defendant, upon the ground that the defense of payment was pleaded, and that it was established by the testimony of the defendant; further, that the plaintiff, having brought out the testimony, was concluded by the defendant's statement.

Obviously, the judgment must be reversed. Payment was not pleaded, and the plaintiff was not concluded by the testimony of the adverse party upon a fact material to the issue. Code Civ. Proc. § 838. The attitude of the defendant's counsel at the trial, in insisting upon a misreading of the answer and in moving for judgment upon this frivolous ground, calls for the imposition of costs absolutely.

Judgment reversed, with costs, and a new trial ordered.

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## AUERFELD v. FEUER et al. (two cases).

(Supreme Court, Appellate Term. April 27, 1906.)

APPEAL—MATTERS NOT IN RECORD—JUDICIAL NOTICE—PRELIMINARY MOTION.
On appeal, the court will not take judicial notice of the truth of statements made on a preliminary motion raising objection to the trial of an action before the justice then holding court.

Appeals from Municipal Court, Borough of Manhattan, Fourth District.

Actions by Michael Auerfeld against Abraham Feuer and another. From judgments in favor of plaintiff, defendants appeal. Affirmed.

Argued before SCOTT, P. J., and TRUAX and BISCHOFF, JJ.

Joseph Winkelfeld, for appellant.

Benjamin Reass, for respondent.

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PER CURIAM. Notwithstanding the objections made by the defendants' attorney, that attorney remained in court and took part in the trial, so that there was a trial in a court of competent jurisdiction before a justice who was at least a de facto justice. We cannot take judicial notice of the truth of all the statements made on the preliminary motion, when the defendants objected to the trials of the actions before the justice who was then holding court.

The judgments appealed from are affirmed, with costs.

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## WILMERDING et al. v. FELDMAN et al.

(Supreme Court, Appellate Term. April 30, 1906.)

SALES—BREACH OF CONTRACT—ACTION BY SELLER.

In an action for breach of contract to purchase goods, stipulating that the order for the goods was placed on condition that the seller should not sell to the competitors of the buyer any of the samples of the goods covered by the order, the seller could not recover if the condition had been broken by him, no matter how unsubstantial the violation might appear.

Truax, J., dissenting.

Appeal from City Court of New York, Trial Term.

Action by John C. Wilmerding and others against Joseph Feldman and another. From a judgment for plaintiffs, defendants appeal. Reversed, and new trial ordered.

Argued before SCOTT, P. J., and TRUAX and BISCHOFF, JJ.

Sol. G. Strock and Frank Gardner, for appellants.

Emanuel Blumensteil, for respondent.

BISCHOFF, J. The issue was whether the plaintiffs' assignor, Akawo, had observed the condition of the contract in suit, whereby he agreed not to sell to competitors of the defendants any of the samples of matting covered by the contract and ordered by the defendants. There was a conflict of fact upon the question; the defendants having given evidence to show that certain of their local competitors had received some small amount of the matting for sale, and the testimony for the plaintiffs being to the effect that their assignor had made no sale or delivery of such goods to persons other than the defendants. The matter involved simply the identity of the samples of goods exhibited to the jury, and, in the absence of this real evidence, we cannot say that the jury should have found the samples to be identical. The stipulation contained in the case on appeal is, not that the samples were identical, but only that a witness had so testified; and it may well be that the jury found the fact otherwise, and accepted the testimony of Akawo that no sales were made of the goods ordered by the defendants.

In view of an instruction given the jury, however, the verdict may well have been reached upon an erroneous theory of law, and there must be a new trial. At the request of the defendants the court charged "that, if the jury find from the evidence that, if Akamo sold any of the patterns selected by the defendants to any of their Philadelphia competitors, they must find for the defendants, even though only a small quan-

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tity of such rolls were sold"; but, at the plaintiffs' request, this was immediately followed by the instruction that "in order to so find there must have been a substantial violation of the contract," to which modification the defendants excepted. This was, in effect, an instruction that the plaintiffs' assignor, the seller, could violate an absolute condition of the contract of sale, and still recover for the defendants' subsequent refusal to accept deliveries, if the breach of the condition were deemed by the jury to be less than a substantial violation of the contract. The parties had made the violation substantial by inserting this condition in the agreement, and the character of the condition could not be changed by a ruling of the court or by the opinion of the jury. There was no room for an issue upon this point, and the defendants were entitled to a verdict if the condition had been broken as a matter of fact, no matter how unsubstantial the violation might appear to be in the view of the jury. The rule of substantial performance does not apply to an unequivocal condition of this nature (Wiles v. Provost, 6 App. Div. 1, 39 N. Y. Supp. 461), and it cannot be said that the error noted was harmless in its operation upon the close question of fact involved.

Judgment reversed, and a new trial ordered, with costs to the appellant to abide the event.

SCOTT, P. J., concurs.

TRUAX, J. (dissenting). Plaintiffs' assignor entered into a written contract with the defendants on March 14, 1903, by the terms of which the defendants purchased of plaintiffs' assignor 2,500 rolls of matting, to be delivered in quantities of 500 rolls per month, beginning in the following December. Of these rolls 500 were delivered in December, 500 in January, and 430 in February, all of which were accepted and paid for by the defendants. Acceptance of the balance was refused. The contract contained the following clause:

"This order is placed 'on' condition not to sell any of the samples we have selected to any of our Philadelphia customers."

Upon the trial the only substantial contention made by the defendants was that such condition had been violated. The trial judge charged the jury that, if they should find from the evidence that any of the patterns selected by the defendants had been sold by plaintiffs' assignor to any of the Philadelphia competitors of the defendants, they must find for the defendants, "even though only a small quantity of such rolls were sold." At the request of the plaintiffs this charge was modified by charging that the jury must find that there had been a "substantial violation of the contract." To this latter charge an exception was taken by the defendants, and a reversal of the judgment is asked for upon the ground that such charge was substantial error. To determine this question it must be ascertained whether or not there was any evidence showing, or from which the jury would be justified in finding, that plaintiff's assignor had sold any similar patterns to the defendants' competitors.

The contract between the parties contained the number of each pattern of matting to be furnished to the defendants. One of the defendants testified that in May, 1904, he purchased matting from the firms of



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Waldman & Fastman and Kramer & Kan, and that the pattern of such matting so purchased was similar to the patterns agreed to be furnished by plaintiffs' assignor and specified in the contract. This matting was billed by the said firms to the defendants by numbers, and was in numbered wrappers, and aggregated the sum of $20 only in amount. Neither the numbers of the matting contained in the bill nor upon the wrappers correspond with those named in the contract, and, although the color of the matting is also specified in the contract, it was not shown that any of the matting so purchased was of similar color. Three bills of matting from the firm of Wilmerding, Morris & Mitchell, under dates of April 23d and 25th, respectively, to said firms of Waldman & Fastman and Kramer & Kan, were received in evidence. One of these bills was for 2 rolls of No. 50 and 16 rolls of No. 8,647 matting, and the other two bills were for 3 rolls of No. 9,032 and 5 rolls of No. 9,017 matting. None of these numbers are contained in the contract. These bills contained the statement that they were from the "department of G. C. Akawo" (plaintiffs' assignor). The purchase of a trivial amount of matting in May, 1904, which is not identified by number, color, or in any other way, except by the general statement of the witness that it is of like pattern, accompanied by proof of a sale to defendants' vendors of matting in April, 1904, from the department of the plaintiffs' assignor, this last sale again unidentified in any way as being similar to the matting purchased by the defendants in May or to the matting named in the contract, is no evidence that plaintiffs' assignor violated the terms of his contract by selling to defendants' competitors in business mattings of like pattern to that named in the contract. Non constat but that the mattings purchased by defendants in May, 1904, may have been a portion of the 1,430 rolls delivered to the defendants by plaintiffs' assignor in December, 1903, and January and February, 1904, which in due course of business reached the firms from whom defendants purchased.

This defense was evidently an afterthought, as in none of the several oral or written communications between the parties leading up to the absolute refusal on the part of the defendants to complete the contract was this reason urged as a ground for defendants' refusal to fulfill its terms. There being no evidence of a violation of the contract on the part of plaintiffs' assignor, the court would have been justified in directing a verdict for the plaintiff, and the request of the plaintiffs' counsel to charge, which was complied with by the court, does not constitute error.

Judgment should be affirmed, with costs.

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## SPENCER v. BUSCH.

(Supreme Court, Appellate Term. April 24, 1906.)

1. EVIDENCE—PRESUMPTIONS—LAWS OF OTHER STATES.

The law of a foreign state is presumed to be the same as the common law of this state, and not the same as the common law of England.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 101, 102.]

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2. ATTORNEY AND CLIENT—COMPENSATION OF ATTORNEY—RIGHT OF ACTION. Under the common law of this state, a lawyer may recover by action just compensation for his services.

[Ed. Note.—For cases in point, see vol. 5, Cent. Dig. Attorney and Client, §§ 292, 293.]

Appeal from Municipal Court, Borough of Manhattan, Twelfth District.

Action by Selden P. Spencer against Clarence M. Busch. From a judgment in favor of defendant, plaintiff appeals. Reversed, and new trial granted.

Argued before SCOTT, P. J., and TRUAX and BISCHOFF, JJ.

Holden & Rogers (Clarence W. W. Rogers, of counsel), for appellant.

W. Russell Osborn, for respondent.

SCOTT, P. J. The plaintiff, a St. Louis lawyer, sues for the value of professional services rendered to defendant in the state of Missouri. At the close of plaintiff's case, after the employment, rendition of services, and value had been proven, the defendant moved to dismiss upon the ground that it had not been shown that the law of the state of Missouri permitted an action to be maintained by an attorney against his client; that the courts of this state, in the absence of proof of the law of the state of Missouri, will presume that the common law is in force in that state; and that at common law an attorney could not recover for professional services. The court adopted this view, and dismissed the complaint.

It is made clear that what the defendant meant by reference to the common law was the common law of England, as contradistinguished from the common law in this state. The proposition urged upon the court by the defendant was wholly erroneous, and based upon an inadvertent dictum contained in a decision announced from the bench and quite unnecessary to the disposition of the case under consideration. Williams v. Dodge, 8 Misc. Rep. 317, 28 N. Y. Supp. 729. The rule as to presumptions concerning the law of foreign states, which has long obtained in this state, is that, in the absence of proof as to the actual law of the foreign state, it will be presumed to be the same as the common law of the state in which the action is pending. Cheney v. Arnold, 15 N. Y. 345, 69 Am. Dec. 609. The rule which has for centuries obtained in England, that advocates and barristers might not, by action, compel payment for their services, is peculiar to that country, and has never obtained in this state (Stevens & Cagger v. Adams, 23 Wend. 57, affirmed 26 Wend. 451), and the common law of this state is that a lawyer may recover by action just compensation for his services, whether those services were such as in England would be performed by an attorney or solicitor, or those which would be rendered by a barrister or advocate. It is this common law that is to be presumed to obtain in Missouri, in the absence of evidence to the contrary.

Nor was the defendant's counsel accurate in his statement as to the common law of England. As he made it, his statement was that "at common law an attorney could not recover for professional services." This is not, and never has been, the common law, either in England or

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in this state. In England, as is known to every lawyer, legal practitioners are divided into two classes, denominated "solicitors," or "attorneys," and "barristers," and their respective duties and functions are well defined and understood. It is only to the barristers that the rule cited by the defendant applies or ever has applied. Attorneys or solicitors have always been permitted to recover at law for their services. Reg. v. Dountre, Law Rep. 9 App. 752. An examination of the plaintiff's bill of particulars shows that the services for which he sues are those which, in a jurisdiction wherein the English classification of lawyers obtains, would properly be performed by an attorney, and for which compensation would be recoverable at law. The plaintiff describes himself as an attorney and counselor at law, indicating that in Missouri, as in this state, the distinction between an attorney and counselor no longer obtains. As an attorney he certainly may sue under the common law, both of this state and of England, for services performed in that capacity.

The judgment must be reversed, and a new trial granted, with costs to appellant to abide the event. All concur.

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## McSWEGAN et al. v. GATTI-McQUADE CO.

(Supreme Court, Appellate Term. April 24, 1906.)

1. SALES—WARRANTY—WHAT CONSTITUTES.

An agreement by a seller of a machine to set it up and put it in good working order does not amount to a warranty that the machine, when put in order, will do the particular work for which the buyers require it.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 786.]

2. SAME—RESCISSION OF CONTRACT—RECOVERY OF PRICE PAID.

The failure of a seller of a machine to fulfill a promise to put it in good working order would not justify a rescission of the sale and recovery of the purchase price, but merely damages for failure to fulfill the contract.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 290, 293.]

Appeal from Municipal Court, Borough of Manhattan, Seventh District.

Action by Frank McSwegan and another against the Gatti-McQuade Company. From a judgment in favor of defendant, plaintiffs appeal. Reversed, and new trial granted.

Argued before SCOTT, P. J., and TRUAX and BISCHOFF, JJ.

Bigham & Wagner (Oscar Wagner, of counsel), for appellants.

Peck & McCann (Rollin Tracy, of counsel), for respondent.

SCOTT, P. J. It is difficult to understand upon what theory the court awarded the judgment which was rendered in this case. The action was for the balance claimed to be due upon a pressing machine sold by plaintiffs to defendant, and for certain other materials furnished and work done. The defendant pleaded a general denial, and a breach of warranty counterclaiming for the amount already paid for the machine. The court awarded defendant the full amount of its

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counterclaim, and refused any recovery to the plaintiffs, although it is conceded that plaintiffs were entitled to recover all or a considerable part of their claim, outside of the claim for the balance of the purchase price of the machine.

Of any warranty there is not the slightest evidence. The machine was apparently a second-hand one, and defendant sent its foreman to examine it before purchasing, and made the purchase on his report. The nearest and only approach to any agreement as to the manner in which the machine would work is contained in the evidence of one of the defendants, who stated in effect that one of the plaintiffs agreed to set the machine up and put it in good working order, and this agreement is denied by the plaintiff who is said to have made it. At the most, however, this would not amount to a warranty that the machine, when put in order, would do the particular work for which the defendant required it; and even if the plaintiffs promised to put the machine in good working order, and failed to do so, this would not justify a rescission of the sale and a recovery of the purchase price, but merely damages for the failure to fulfill the particular contract as to setting up the machine. The judgment as rendered finds no support in the evidence, and justice requires that it be reversed.

Judgment reversed, and new trial granted, with costs to appellants to abide the event. All concur.

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## TEPIDINO v. CITY OF NEW YORK.

(Supreme Court, Appellate Term. April 24, 1906.)

1. MUNICIPAL CORPORATIONS—EMPLOYÉS—LEAVE OF ABSENCE—WAIVING COMPENSATION.

   A member of the uniformed force of the street cleaning department of New York City, being a laborer rather than an officer, and as such competent to take a leave of absence and waive his compensation for the time, is estopped by his application for leave of absence without pay, which was granted, from recovering compensation for the time of his absence.

2. COURTS—EQUITY JURISDICTION—MUNICIPAL COURT.

   The Municipal Court, having no equity jurisdiction, cannot, because of the applicant's ignorance of the language, hold invalid the clause waiving compensation in an application on which a city employé was granted a leave of absence.

Appeal from Municipal Court, Borough of Manhattan, Tenth District.

Action by Antonio Tepidino against the city of New York. From a judgment for plaintiff, defendant appeals. Reversed, and complaint dismissed.

Argued before SCOTT, P. J., and TRUAX and BISCHOFF, JJ.

John J. Delany (Terence Farley, of counsel), for appellant.

Frank A. Acer (J. C. Toole, of counsel), for respondent.

SCOTT, P. J. The plaintiff, a driver in the department of street cleaning, had a leg broken by the kick of a horse which he was driv-

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ing in the pursuit of his employment on January 26, 1905. Whether the accident was or was not due to any fault of his does not appear and is not relevant. A report of the injury was duly made on a department blank by the stable foreman and one of the medical examiners, and the plaintiff, upon the same blank, applied for a leave of absence without pay until June 1st, which was granted. He actually returned to duty on April 24th, and now sues and has recovered judgment for full pay from January 26th to April 24th a period of 88 days.

The status and rights of members of the uniformed force of the stret cleaning department are fixed by the charter, and have been construed by the courts in several cases. They are not officers in any sense of the term. They are regarded as laborers rather than officials. People ex rel. McCloskey v. Andrews, 9 Misc. Rep. 569, 30 N. Y. Supp. 398. As such they are competent to take a leave of absence and waive all or a part of their compensation for the time; the consideration for such waiver being their retention in the service without the performance of any duty. Downs v. City of New York, 75 App. Div. 423, 78 N. Y. Supp. 442, affirmed 173 N. Y. 651, 66 N. E. 1107; Driscoll v. City of New York, 78 App. Div. 52, 79 N. Y. Supp. 479. The plaintiff is therefore estopped, by his application for leave, from recovering pay for the period for which he now sues.

It is intimated in appellants brief that he was unaware, owing to his ignorance of the language, of the full purport of the paper signed by him. No foundation for this claim appears in the case, and, if it did, the plea would be unavailing in this action. The application, so long as it is not set aside in an appropriate action, stands as a bar to recovery; and the Municipal Court, being vested with no equity jurisdiction, could not pass upon the question as to the supposed invalidity of the leave upon the ground suggested by counsel.

The judgment must be reversed, and the complaint dismissed, with costs to appellant in this court and the court below. All concur.

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## DICKINSON v. BROWN.

(Supreme Court, Appellate Term. April 24, 1906.)

1. LANDLORD AND TENANT—SUMMARY PROCEEDINGS—APPEAL.

Under Municipal Court Act, Laws 1902, p. 1488, c. 580, § 1, subd. 12, conferring on Municipal Courts jurisdiction to entertain summary proceedings by a landlord against a tenant, and providing that such proceedings shall be instituted under Code Civ. Proc. c. 17, tit. 2, section 2249 of which chapter provides for the final determination of a summary proceeding by a final order, and section 2260 thereof providing for an appeal from such order, an appeal, where no such final order has been made, is premature, and must be dismissed.

2. SAME—RECORD—SUFFICIENCY.

Under such sections a record on appeal from a summary proceeding instituted to obtain possession of premises occupied by defendant as tenant, showing a dismissal of the proceedings at the close of the case on defendant's motion; an indorsement on the petition as follows: "Motion to dismiss petition granted. Judgment for tenant"—the return, reciting that "the proceeding here closed, and the justice thereupon, to wit, on the 14th day of March, 1906, rendered judgment in favor of the

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**tenant on motion to dismiss, and against the landlord," and the notice of appeal being from a "judgment in favor of the above-named tenant," etc., did not show a final order, as provided by said section 2249, Code Civ. Proc.**

Appeal from Municipal Court, Borough of Manhattan, Eleventh District.

Action by Patrick F. Dickinson against John J. Brown. Judgment for defendant, and plaintiff appeals. Appeal dismissed.

Argued before SCOTT, P. J., and TRUAX and BISCHOFF, JJ.

David McClure (Joseph Garrison, of counsel), for appellant.

J. J. Karbey O'Kennedy, for respondent.

TRUAX, J. This is a summary proceeding, instituted to obtain possession of certain premises occupied by the defendant. Issue was joined by verified petition and verified answer, and at the close of the case the tenant's attorney moved for a dismissal of the proceedings, which was granted. Upon the petition was indorsed: "Motion to dismiss petition granted. Judgment for tenant." The return also recites that: "The proceeding here closed, and the justice thereupon, to wit, on the 14th day of March, 1906, rendered judgment in favor of the tenant on motion to dismiss, and against the landlord." The notice of appeal is from a "judgment in favor of the above-named tenant," etc.

Jurisdiction is conferred upon Municipal Courts to entertain summary proceedings by subdivision 12 of section 1 of the Municipal Court Act (Laws 1902, p. 1488, c. 580), which provides that such proceedings shall be instituted under "title 2 of chapter 17 of the Code of Civil Procedure," which begins with section 2231 and ends with section 2265, inclusive. Section 2249 of that chapter provides for the final determination of a summary proceeding by a final order, and section 2260 provides for an appeal from such an order. The record in this case contains no such order, nor does it appear therein that any such order was ever made. The appeal was, therefore, permaturely taken, and must be dismissed. See Lewis v. Hoffman, 5 Civ. Proc. R. 141; Wulff v. Cilento, 28 Misc. Rep. 551, 59 N. Y. Supp. 525.

Appeal dismissed, with costs, and case remitted to the lower court for such further action as counsel may advise. All concur.

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## LEFKOWITZ v. REICH.

**(Supreme Court, Appellate Term. April 24, 1906.)**

1. MONEY RECEIVED—PAYMENTS TO AGENT—RECOVERY.

**Plaintiff's assignors, being desirous of fitting up a saloon and dance hall, and being without sufficient funds, applied through defendant to a brewing company for assistance. Defendant was the salesman and collector for the company, and he procured the latter to agree to advance the greater part of the cost of fitting up the place desired, under an arrangement by which plaintiff's assignors agreed to pay $1,500 and the brewing company the balance. Plaintiff's assignors paid $1,500 to the brewing company, and thereafter paid $500 more to defendant on his representation that the brewing company required that amount additional, which sum defendant never paid to the latter. Defendant sub-**

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sequently stated to the brewing company that plaintiff's assignors desired the return of the $1,500 to use until it became necessary to apply it to the work for which it was designed, whereupon it was paid to defendant, and he deposited the entire $2,000 to his own bank account and never applied any part thereof to the purpose indicated. *Held*, that neither defendant nor the brewing company ever acquired any title to the money, except to apply it to the purpose intended, and that plaintiff's assignors could therefore ratify defendant's act in receiving the money and recover the same in an action for money had and received.

2. WITNESSES—CROSS-EXAMINATION.

Where, in an action for money received, plaintiff's assignors claimed that defendant had acknowledged his indebtedness within the period limited for the bringing of an action to recover the debt, and had paid $50 thereon, which defendant denied, claiming that the debt was barred by limitations, and in various pleadings and affidavits filed plaintiff had alleged that the amount due was the total amount of the original claim, it was error for the court to refuse to permit defendant to cross-examine plaintiff's assignors with reference to why they had uniformly omitted to previously assert such partial payment.

Appeal from City Court of New York, Trial Term.

Action by Aaron Lefkowitz against Bernard Reich. From a City Court judgment in favor of plaintiff, and from an order denying defendant's motion for a new trial, he appeals. Reversed.

Argued before SCOTT, P. J., and TRUAX and BISCHOFF, JJ.

Leonard Bronner (Benjamin N. Cardozo, of counsel), for appellant.
Wales F. Severance (Max D. Steuer, of counsel), for respondent.

SCOTT, P. J. The plaintiff sues as assignee of the firm of Schneider Bros. upon a state of facts which must be deemed to have been established by the verdict as follows: In 1897 that firm were desirous of fitting up and running a beer saloon and dance hall. They had not sufficient money themselves, and through the mediation of defendant made an arrangement with the Malcolm Brewing Company, for whom defendant was salesman and collector, whereby the company agreed to advance the greater part of the cost of fitting the place up. Under this arrangement it was agreed that Schneider Bros. should pay in cash $1,500, and that the brewing company should pay the balance of the expense, taking a chattel mortgage to secure themselves. Schneider Bros. paid the $1,500 to the brewing company, and subsequently paid a further sum of $500 to defendant, on his representation that the brewing company required that that additional amount should be put up. This sum, however, defendant never paid to the company. The fitting up took longer than had been anticipated, and defendant stated to the brewing company that Schneider Bros. desired the return of the $1,500, as they could use it until it should become necessary to apply it to the payment for the fitting up of the place. Defendant admits the receipt of the $1,500 from the brewing company and of the $500 from Schneider Bros., and it appears that both amounts were deposited in his own bank account. He asserts, however, that it was all expended by him in fitting up the place. On this issue the jury found against him, and we must assume from their verdict that defendant appropriated the money to his own purposes.

Under these circumstances may the plaintiff maintain an action as for money had and received? We think that he may. It is undoubted-

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ly true that it had been held that in the case of a mere agency for the transmission of money the party for whom the money was designed cannot maintain an action against the agent as for money had and received to his use, and the reason for the rule has been said to be that the law will not imply a promise to one person upon a consideration moving entirely from another and where there is no privity of contract between the parties. Bigelow v. Davis, 16 Barb. 561. As we consider it, however, the plaintiff's right to recover rests upon the broader principle that money in the hands of one person to which another is equitably entitled may be recovered in a common-law action by the equitable owner upon an implied promise arising from the duty of the person in possession to account for and pay over the same to the person beneficially entitled thereto. Roberts v. Ely, 113 N. Y. 129, 20 N. E. 606; Mason v. Prendergast, 120 N. Y. 537, 24 N. E. 806. In the case at bar Schneider Bros. had never lost their beneficial ownership and interest in the money. They had paid the $1,500 and the $500, as they supposed, to the brewing company, not as absolute payments as for a debt due, but as advances to be expended by the brewing company for the benefit of Schneider Bros. The brewing company obtained no title to it, except as a deposit to be applied to fitting up the saloon. In a very important sense, therefore, Schneider Bros. remained the owners of the money, which could not, without their consent, be diverted from the purpose to which they had appropriated it. With all the facts defendant was fully cognizant, and he must therefore be deemed to have known that both the $1,500 and the $500 remained the property of Schneider Bros. until used for the special purpose to which they had appropriated it. He knew, therefore, when it came into his hands, that neither he nor the brewing company had any right to use the money otherwise than in fitting up the saloon, or any right whatever to retain it, if it was not so used. The jury have found that it was not used for the purpose for which Schneider Bros. paid it. It follows that in equity and in good conscience it was defendant's duty to repay it, not to the brewing company, who had no claim to it if it was not used in fitting up the saloon, but to Schneider Bros., whose money it was. It is no answer to say that Schneider Bros. might have sued the brewing company on the theory that defendant acted for them and as their agent. He also undertook or assumed to act as Schneider Bros.' agent, and although they were unaware of the fact at the time and for a long time thereafter, it was competent for them, when they ascertained the facts, to ratify defendant's assumption of agency and sue upon that theory. Dechen v. Dechen, 59 App. Div. 166, 68 N. Y. Supp. 1043. If, therefore, there were no question in the case, except as to the right of plaintiff to sue upon the state of facts above detailed, we should find no difficulty in affirming the judgment.

There is, however, another and a serious question to consider. The transaction by which defendant, as it is said, became possessed of Schneider Bros.' money, took place in 1897, and plaintiff's claim would therefore have been barred by the statute of limitations, unless some fact appeared to take the case out of the statute, which was duly pleaded as a defense to the action. To avoid the effect of the statute plaintiff's assignors testified that in 1904, some months before the commencement

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of this action, the defendant, who up to that time had vigorously denied liability for the money, came to the Schneiders and voluntarily confessed that he owed the money, and paid $50 in bills on account, promising to pay the balance later. This payment is relied upon to take the case out of the statute. The defendant denies this story in toto, and, as evidence of its improbability, points to the fact that the assignment to plaintiff, although made after the alleged payment, was for a claim of $2,000 instead of $1,950; that in the complaint $2,000 is claimed, and it is asserted that no part of it has been paid; that in affidavits made for various purposes during the litigation the assertion is uniformly made in form or in substance that the whole sum of $2,000 is due, and no hint or suggestion is made as to any payment having been received on account thereof. It may be that these circumstances, apparently contradictory of the story that defendant had paid $50 on account, were susceptible of satisfactory explanation; but they certainly presented a situation which entitled the defendant to cross-examine the plaintiff's assignors with considerable particularity. An attempt was made to so cross-examine them; but the court, upon the objection of immateriality, excluded many pertinent and relevant questions as to why the witnesses had uniformly omitted to mention a fact so material and important to the maintenance of the action, and, after refusing to permit the plaintiff's assignors to be cross-examined upon the subject, the court, against defendant's objection, permitted the plaintiff's attorney to make the explanation which it had been forbidden to ask of the witnesses themselves. It is impossible to say that these rulings may not have affected the conclusion of the jury upon the question whether or not the $50 had been paid, and thus practically defeated a defense which defendant was entitled to interpose.

For this error, the judgment must be reversed, and a new trial ordered, with costs to appellant to abide the event. All concur.

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## JONES v. RICHARDS et al.

(Supreme Court, Appellate Term. April 24, 1906.)

1. PRINCIPAL AND AGENT—AUTHORITY OF AGENT—EXCHANGE OF PROPERTY.
   An agent for the sale of property has no implied authority to exchange the same for other property.
   [Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Agent, § 84.]

2. SAME—NOTICE OF AUTHORITY—EVIDENCE.
   Plaintiff delivered horses to an agent for purposes of sale, and while boarded at a livery stable they were charged to plaintiff, of which fact one to whom the agent traded them for other horses had notice, as well as notice of the agency. He made no inquiries as to whether the agent had authority to exchange the property or not. *Held* to show knowledge on his part that the agent was not authorized to make the trade.

3. REPLEVIN—PARTIES—ONE PARTING WITH POSSESSION OF PROPERTY.
   In replevin against an agent for the sale of plaintiff's horses and another, to whom, without authority, such agent had traded the horses, it was error to dismiss the complaint as against defendant agent, although it appeared on the trial that he had parted with possession of the property in suit.
   [Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Replevin, § 81.]

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Appeal from City Court of New York, Trial Term.

Action by Samuel W. Jones against Robert Richards and another. From a judgment dismissing the complaint, plaintiff appeals. Reversed.

This was an action of replevin for certain horses, which belonged to plaintiff and which, while in possession of defendant Leighton, as plaintiff's agent for purposes of sale, were traded by him to defendant Richards. The horses were kept at the stable of one Harrison, on whose books plaintiff was charged with their keep.

Argued before SCOTT, P. J., and TRUAX and BISCHOFF, JJ.

Albert I. Sire, for appellant.

Wentworth, Lowenstein & Stern and Wales F. Severance, for respondents.

TRUAX, J. The material issue was did the defendant Leighton have authority to trade the property mentioned and described in the complaint? If he did, the ruling of the court was right. If he did not, such ruling was wrong. I am of the opinion that the defendant Leighton did not have the right to trade the property mentioned and described in the complaint, and that the defendant Richards knew that Leighton did not have the right to trade such property. Richards testified that he knew that Leighton was not the owner of the property. He knew that Leighton was acting as agent for Jones. He did not ask whether Leighton had authority to exchange the property or not. He knew to whom the property was billed on the books of Mr. Harrison, the stable keeper. It is well settled that under such circumstances an agent has not the power to pledge or mortgage his principal's property to a third party. Am. Ency. (2d Ed.) vol. 1, p. 1174; Beck v. Donohue, 27 Misc. Rep. 230, 57 N. Y. Supp. 741; Block v. Dundon, 83 App. Div. 539, 81 N. Y. Supp. 1114; Edwards v. Dooley, 120 N. Y. 540, 24 N. E. 827.

I am also of the opinion that it was error for the court to dismiss the complaint as against the defendant Leighton, although it appeared on the trial that Leighton had parted with possession of the property in suit. Nichols v. Michael, 23 N. Y. 264, 80 Am. Dec. 259, cited with approval in Sinnott v. Feiock, 165 N. Y. 447, 59 N. E. 265, 80 Am. St. Rep. 736, 53 L. R. A. 565. See, also, Barnett v. Selling, 70 N. Y. 492, and Dunham v. Troy Union Ry. Co., *42 N. Y. 543.

Judgment is reversed, and a new trial ordered, with costs to the appellant to abide the event. All concur.

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## GUTFREUND v. STANDARD LIFE & ACCIDENT INS. CO.

(Supreme Court, Appellate Term. April 24, 1906.)

1. JUDGMENT—RES JUDICATA—MATTERS CONCLUDED.

In an action on an accident policy insuring plaintiff against loss by reason of liability for damages resulting from plaintiff's negligence in the use of horses and vehicles, a judgment against plaintiff and others in an action against them as partners, by one sustaining injuries through negligence in the management of a horse and vehicle, was not res judi-

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cata on the question of plaintiff's copartnership with his codefendants in such action.

2. SAME.

Nor was such judgment res judicata as between the parties to the present action on the question whether or not the horses belonged to plaintiff or to him and his codefendants in the action for negligence.

Appeal from City Court of New York, Trial Term.

Action on an accident policy by Sigmund Gutfreund against the Standard Life & Accident Insurance Company. Judgment for defendant, and plaintiff appeals. Reversed.

Plaintiff was sued by one Henry Basserman for damages alleged to have been sustained by him on May 2, 1899, at which time the policy was admittedly in force, through plaintiff's negligence in the management of the horse and vehicle used in his business. In that action Basserman sued the plaintiff and Hugo Gutfreund and Arnold Gutfreund jointly as copartners, and obtained a judgment against them jointly for $1,138.62. Notice of the bringing of that suit against the plaintiff and the other codefendants was given by the plaintiff to this defendant, as provided by the terms of the policy, and this defendant by its own counsel defended that suit.

Argued before SCOTT, P. J., and TRUAX and BISCHOFF, JJ.

Samuel P. Goldman, for appellant.

William A. Jones, Jr., for respondent.

SCOTT, P. J. I do not think that the judgment in the action of Basserman v. Gutfreund was res adjudicata upon the question of this plaintiff's copartnership with his brothers. Certainly that judgment can have no more binding force between Sigmund Gutfreund and the present defendant than it would have between Sigmund Gutfreund and his brothers, who were codefendants in the Basserman action, and it seems to be well settled that the Basserman judgment would not be res adjudicata between the defendants therein on the question of their liability, as between themselves, to pay the judgment. Neither is it, in my opinion, res adjudicata as between the parties to this action on the question whether or not the horse belonged to plaintiff or to him and his brothers as partners. The plaintiff should therefore have been allowed to show that it was his horse that injured Basserman, and that he alone was liable for the judgment, which he alone paid.

The judgment should be reversed, and a new trial granted, with costs to appellant to abide the event. All concur.

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(49 Misc. Rep. 146.)

## PRATT v. CLARK et al.

(Supreme Court, Special Term, New York County. January, 1906.)

SPECIFIC PERFORMANCE—DEFAULT OF PLAINTIFF.

Plaintiff had entered into three contracts as to the leasing and furnishing of a hotel; the first being conditioned on plaintiff's obtaining approvals from parties to one of the other contracts which he was unable to obtain because of objections raised to their authority to make one of the leases involved. *Held* that, the first contract not being enforceable against plaintiff until he had secured such approvals, and the performance

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of the second contract being based on the carrying out of the first one, and there being insuperable objections to the enforcement of a decree of specific performance, if granted, it would not be allowed.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Specific Performance, § 82.]

Action by Tracy W. Pratt against William Irving Clark and others. Judgment for defendants.

Samuel Untermyer and Clarence F. Birdseye, for plaintiff.
Albert Stickney, for defendant executors.
Albert Stickney, guardian ad litem, for infant defendants.
Charles I. McBurney, for defendant Sweeny-Tierney Hotel Co.
Arnold & Greene, for defendant Todd.

DAVIS, J. This action is brought to enforce specific performance of three contracts relating to the leases and furnishings of premises known as the "Marlborough Hotel," on the westerly side of Broadway, between Thirty-Sixth and Thirty-Seventh streets in the city of New York. The first contract in question, dated July 16, 1904, was made between the defendant Louis H. Todd and the plaintiff, Tracy W. Pratt. The second contract, dated September 29, 1904, was made between the defendants W. Irving Clark and Caroline L. Iselin, as executors and trustees under the last will and testament of Charlotte M. Goodridge, deceased, of the first part, Matilda G. Cornochan, Charlotte G. Wyeth, Caroline L. Iselin, and Frederic G. Goodridge, only children and heirs at law of said Charlotte M. Goodridge, of the second part, and the plaintiff, Tracy W. Pratt, of the third part. The third contract, dated October 26, 1904, was made between the parties who made the second contract. At the meeting for the making of the first contract (July 16, 1904), the defendant Todd, or parties under his control, was the lessee of the Marlborough Hotel property. He held under three separate lessors; the hotel being situated upon three separate parcels. The leases under which he held are referred to in this action as the Bradley lease, covering the northermost parcel, the Everhart lease, covering the parcel immediately to the south of the Bradley property, and the Goodridge executors' lease, covering the remainder of the block extending to Thirty-Sixth street. Each of these leases extended to May 1, 1907, but the Goodridge executors' lease contained covenants for two renewals of 21 years each. The Goodridge executors' lease was made May 1, 1902, between the defendants William Irving Clark and Caroline L. Iselin, as executors and trustees under the will of Charlotte M. Goodridge, deceased, and others, and Louis L. Todd. Prior to the making of the executors' lease, Todd held the Goodridge parcel under a lease made January 27, 1898, by Mrs. Charlotte M. Goodridge, the testatrix of defendants Clark and Iselin. Mrs. Goodridge having died March 3, 1902, her executors and trustees united with her children in making the lease to Todd of May 1, 1902, above referred to. This latter lease is substantially the same as the lease of January 27, 1898. On the trial it was claimed by the plaintiff that the record of the transactions between Todd and the executors, relating to these various leases, showed that the lease made by Mrs. Goodridge January 27, 1898, had been canceled and annulled by an agreement between Todd and the

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executors dated May 23, 1902 (Exhibit 9), and that the executors' lease of May 1, 1902, was the only one outstanding, and that therefore, presumptively, the executors and trustees had no power to enter into that covenant of the executors' lease which provided for a renewal which would extend the term beyond the time when their trust must terminate. The executors' lease in question, with the renewals, would run until 1949, and the trustees' estate could not possibly last longer than September, 1923, and might be divested before that time.

The first question presented is whether or not the plaintiff is entitled to specific performance of the Todd contract, of July 16, 1904. At the time of the making of this contract, Todd owed large sums of money for arrearages of rent, taxes and assessments, etc. He also owed $200,000 to the Goodridge estate, for which indebtedness he had given a mortgage on his interest under the Goodridge leases at the time of the making of the executors' lease of May 1, 1902. Under this contract, Todd agrees to sell, or cause to be sold, to Pratt, for $400,000, the Goodridge, Everhart, and Bradley leases, and all of his interest in the hotel property, including the buildings erected on the Goodridge property, and all the fixtures and furnishings of the entire hotel, "free and clear and discharged from any right or claim of the said Marlborough Hotel Company, or of any other person, firm, or corporation whatever, otherwise than as stated and contained in said Goodridge, Everhart, and Bradley leases, and excepting the $200,000 mortgage above mentioned." In payment of the purchase price of $400,000, Pratt, on his part, agrees as follows: First, to assume or cause to be assumed, by parties satisfactory to the parties interested in the Goodridge property, the mortgage indebtedness of $200,000 to the Goodridge estate; second, to take over the hotel, leases, property, and business in the name of a corporation to be duly formed, which corporation shall be satisfactory to the said William Irving Clark and Caroline L. Iselin; third, that this corporation shall issue bonds (not exceeding $200,000) and a mortgage upon the properties so taken over, and $50,000 of these bonds shall be given to Todd as part of the purchase price of his interest; fourth, to assume, to the satisfaction of the holders of the Goodridge, Everhart, and Bradley leases, any rentals, taxes, assessments, water rates, interest, or other sums that may be due under or on such leases, or any of them, or interest on mortgages at the time of the actual closing, with any interest charges thereon on the date of such closing; fifth, to obtain from each of the lessors a release and discharge of Todd of any sum or sums so assumed and unpaid; sixth, to obtain from the Goodridge estate a release of Todd from all his obligations under his lease, and the bond and mortgage made by him; seventh, to secure releases of Todd from the Everhart and Bradley leases; eighth, to pay the balance of the purchase money, in cash, at the time of the actual transfer and delivery of the properties. Under article 4, Todd's right to enforce this agreement is made dependent upon Pratt's obtaining from the owners of the Goodridge property a lease, or an agreement for a lease, beginning May 1, 1907, and to extend for 21 years, with a renewal of 21 years. The time for executing the instruments to carry out this agreement was fixed for September 8, 1904.

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It will be observed that the carrying out of the Todd contract was made to depend upon Pratt's ability to satisfy the Goodridge executors upon many important points, and upon Pratt's getting from them a lease to begin May 1, 1907, or an agreement for such a lease. On September 29, 1904, he got an agreement for such a lease. This agreement is one of the three sought to be enforced. A copy of the proposed lease was annexed to this agreement, and was therein declared to be satisfactory to all the parties thereto as to its covenants and conditions. Under this executors' agreement the acceptance of Pratt as tenant in place of Todd, and the actual giving of the new lease to Pratt, and the release of Todd are made to depend upon certain things first to be done by Todd and Pratt. For instance, Todd and Pratt are to pay to the executors all sums due under the executors' lease to Todd, as well as interest on mortgages up to October 17, 1904. Again Pratt is to pay, or assume and secure in a manner satisfactory to the executors, all sums due for taxes, assessments, and water rates, etc.; also, Todd or Pratt is to pay all sums due on account of the principal of the $200,000 mortgage, with interest. Upon the fulfillment by Pratt and Todd of these and certain other conditions, Todd is to be released by the executors, Pratt is to be accepted in Todd's place, and a new lease is to be given by the executors to Pratt. The time for closing this contract was fixed for October 17, 1904. The closing of the Todd contract and the delivery of the assignment by Todd to Pratt were by arrangement changed to this date.

The contract with the executors having been signed, Pratt submitted the proposed lease to the Title Guarantee Company with a view of having the company guaranty the $200,000 of bonds called for under the Todd contract so far as the title was concerned. The company refused to make the guaranty on the ground that the record showed that the executors had no power to make the proposed lease, which extended the term beyond the duration of the trust estate. This objection was communicated to the defendants, and the day of closing was adjourned, by the agreement of October 26, 1904, to November 1, 1904. Todd was not a party to this agreement, but it appears that he assented to the adjournment. Under the terms of this agreement the contract of September 29, 1904, is reaffirmed, as the complete contract between the parties, "although certain details as to the performance of such contract need hereafter to be adjusted." The plaintiff claims that the "details" referred to were understood by all parties to mean the bringing of legal proceedings to remove the apparent cloud upon the title under the lease. In other words, the plaintiff claims that the defendant executors agreed to bring those legal proceedings and failed to do so; and he asks that, upon the proofs and pleadings in this suit, this cloud be declared removed and that the defendants be directed to perform their respective contracts. The closing of this contract was further adjourned to and including November 3, 1904.

The closing did not take place on November 3, 1904, and thereafter the defendants, representing the Goodridge estate, served a notice on Pratt requiring him to perform on or before November 22, 1904, in default of which the contract was to be deemed abandoned by Pratt. This time was thereafter extended to November 23, 1904, but there

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was no performance. On November 23, 1904, the parties met at the office of the attorneys for the executors, where plaintiff's attorney served written notices upon Todd and upon the attorneys of the executors, asserting therein the plaintiff's readiness and ability to perform and the inability of Todd and the executors to perform their respective contracts. The plaintiff also claims that he made a good tender of performance at this meeting, but I think the evidence fails to establish this claim. He certainly was not in a position to perform the Todd contract, his ability to perform which depended so largely upon the approval of the executors. Upon the service of these notices, all of the defendants, including Todd, treated the contracts as abandoned by Pratt, and finally made an agreement with the defendant the Sweeny-Tierney Hotel Company, under which, on or about December 16, 1904, the latter became the owners of the interest of Todd in the hotel property and lease upon terms satisfactory to the Goodridge estate. The Sweeny-Tierney Hotel Company are now in possession of the hotel property.

If the plaintiff fails to establish his right to specific performance of the Todd contract, he cannot succeed on the executors' contract, because the obligation of the executors to perform their agreement with Pratt was made to depend upon Todd and Pratt performing their contract with each other. Under the Todd contract, Pratt's performance thereof was conditioned upon his "obtaining from the owners of the Goodridge property such a lease, or agreement for such a lease, to commence May 1, 1907, and to extend for 21 years, at the annual rental of $45,000, payable monthly in advance, with the taxes, assessments, and water rates that may be imposed upon the said premises to be paid by the tenant; such new lease to be in such form, and with such covenants and agreements, as shall be agreed upon by the Goodridge executors and the said party of the second part [Pratt]." Thereafter, on September 29, 1904, Pratt got an agreement for "such a lease" from the executors (Plaintiff's Exhibit 16). A copy of the lease is annexed to the agreement, in which there appears that statement that the lease is satisfactory to the parties thereto as to the covenants and conditions therein contained. The obtaining of this agreement thus fulfilled the conditions upon which Pratt's obligation to perform the Todd contract depended, and Todd's right to enforce his contract with Pratt was thus fixed.

But just at this time Pratt fell into a position of peculiar helplessness. The Guarantee Company refused his application to guaranty a proposed issue of bonds, so far as the title under the executor's lease was concerned, on the ground that the executors had no power to make the lease. Pratt, therefore, refused to perform his contract with the executors until, by legal proceedings, they had established their right to make the proposed lease. Of course, the raising of this objection prevented Pratt from performing his part of the Todd contract, because it prevented him from getting the various approvals and consents of the executors provided for in the Todd contract. On the other hand, Todd's rights were not affected by this objection to the title. It was immaterial to him whether or not that objection was sound. He had not agreed to make the lease. He had merely agreed to sell what lease he had and without any guaranty as to the terms and conditions of that

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lease. In fact, Todd, up to the time of the raising of the objection to title by Pratt, was himself in a position to perform, but Pratt was not. It then became necessary for Pratt to postpone the closing of the Todd contract. The evidence shows that Todd assented to this in order to give Pratt time to settle his controversy with the executors. In the meantime Pratt endeavored to get Todd to modify his contract. Todd refused to do this unless Pratt paid him something on account of the purchase price. Pratt refused to pay, and so the contract remained unmodified, Pratt and the executors having failed to agree by November 23, 1904, Pratt was thus rendered unable to perform his part of the Todd contract. He was then in default with Todd. The notice served upon Todd by Pratt on November 23, 1904 (Exhibit S), with a view of putting Todd in default, was clearly ineffective for that purpose. Todd was, therefore, in a position to dispose of his lease and hotel property to other parties. He did so dispose of it, on or about December 16, 1904, to the defendant the Sweeny-Tierney Hotel Company.

In view of the fact that Pratt was in default with Todd, the court cannot now decree a specific performance of the Todd contract. The equity of this conclusion becomes more apparent from the fact that Todd could not succeed in a suit to compel performance by Pratt, because it would involve the necessity of Pratt's getting from the trustees the various approvals and consents mentioned in the Todd contract. If, under such a decree, Pratt should fail to get these consents and approvals, the decree would be useless because of the impossibility of executing it in case the trustees refused their consent and approval as provided for in the Todd contract. It follows, therefore, that if Pratt is not entitled to a specific performance of the Todd contract, the court will not decree performance of the executors' contract. Assuming, though not here deciding, that the proofs and pleadings herein establish the executors' right to make the lease called for in the executors' contract, the granting of the decree asked for would be futile, because it would require the executors to treat Todd as the owner of the lease and hotel property, when, in fact, he has lawfully parted with those properties and has no further interest therein. Such a decree would also involve compelling Pratt to obtain from the executors their consent and approval to various propositions of the Todd contract, which consents and approvals they might withhold, and now probably would withhold. Obviously, there are insuperable obstacles to the executing of such a decree, and the granting of it would be a vain proceeding.

For the reasons above referred, as well as for others not necessary to specify, the decree for specific performance as prayed for in the complaint must be refused, and judgment rendered in favor of the defendants dismissing the complaint, with costs.

Judgment for defendants, dismissing the complaint, with costs.



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(49 Misc. Rep. 157.)

## HOFFMAN v. STEUBING et al.

(Supreme Court, Special Term, New York County. January, 1906.)

1. WILLS—DEVISE OF REALTY—REVOCATION.

Where, after execution of a will devising real estate, the land is sold, the devise is revoked.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, §§ 1015, 1986.]

2. SAME—RIGHTS OF DEVISEE.

Where testator devised real estate to his wife free of incumbrance, and directed his executors to pay any mortgage thereon and to pay his wife $10,000, which provisions were in lieu of dower, and after the execution of the will testator conveyed the real estate, the bequest of $10,000 was in lieu of all claim for dower, and it was for the widow to elect whether to assert her right of dower or to accept under the will, and she was not entitled to a proportionate share of the proceeds of a sale of the real estate, nor to a bequest of the amount of the mortgage on the land which the executors were authorized to pay.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 2027.]

3. SAME—CONSTRUCTION.

Testator devised certain real estate to the support of any child of his daughter's marriage, of which there was none, and in case such child should not reach majority, gave the real estate or the proceeds derived from the same to his daughter, and provided that, in the event of the sale hereafter had of said premises, on the death of the daughter the proceeds should be paid over to a granddaughter. Testator in his lifetime sold the premises, taking back a mortgage for the price. *Held*, that as the fee of the property was devised, should testator die possessed, the proceeds from the premises meant the proceeds from the sale of the premises.

Action by William Hoffman against Katherine Steubing and others to construe a will. Judgment rendered.

Guggenheimer, Untermyer & Marshall, for plaintiff.
Hugo Ritterbusch, for defendants.

McCALL, J. The decedent, Henry Steubing, in his lifetime executed a last will and testament by the terms and conditions of which he specifically devised several pieces of property. By reason of his conveying the title to these properties after the execution of his will, some dubiety has been occasioned as to the rights of his surviving widow; and an expression of the court is sought in this action in the sense of construing the several clauses containing the said devise. The will was executed on the 21st day of July, 1902. The testator died on December 31, 1904, and the will was admitted to probate on the 21st of January, 1905. The clauses or paragraphs which are to be subjects of our consideration are numbered respectively third, fourth, fifth, and sixth, and read as follows:

"I give and devise unto my beloved wife, Katherine Steubing, the premises now commonly known and designate as No. 5 West One Hundred and Thirty-Fourth street of Manhattan, city of New York, free and clear of all incumbrances. If the said premises No. 5 West One Hundred and Thirty-Fourth street should at the time of my decease be incumbered by a mortgage, then I direct my executors, hereinbefore named, to cause said mortgage to be paid out of my estate, so that my said wife shall receive the title to the said premises free from all incumbrances. I further direct my executors, hereinbefore

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named, to pay to my said wife, Katherine Steubing, the sum of ten thousand dollars ($10,000), these provisions for my said wife being in lieu of dower.

"Fourth. All the furniture, ornaments, silverware, jewelry, and other personal effects which shall be contained in the house occupied by me at the time of my death, with the exception of three pieces, viz., a bedstead, wardrobe, and dressing case, contained at the date hereof in the second parlor of my present residence, I give and bequeath to my said wife Katherine Steubing. The aforesaid three pieces of furniture I give and bequeath to my daughter, Wilhelmina Elizabeth Hoffman, and, in the event of her not surviving me, then to my granddaughter, Henrietta W. A. Hoffman.

"Fifth. I give, devise, and bequeath unto my executors, hereinbefore mentioned, the premises known at the present time as No. 900 Third avenue, situated in the borough of Manhattan, city of New York, and, in addition thereto, the sum of ten thousand dollars ($10,000) in cash, in trust, nevertheless, to collect and receive the rents, issues, and profits thereof, and to apply the same to the support, education, and maintenance of such child as shall be born to me by my present wife, Katherine Steubing, until such child shall attain the age of twenty-one years. * * * (In the event of such child of my said wife, Katherine Steubing, not arriving at the age of twenty-one years, then and in that event I give and devise the said premises No. 900 Third avenue, together with the principal sum of ten thousand dollars [$10,000], hereinbefore mentioned, or the proceeds derived from the premises No. 900 Third avenue, unto my daughter, Wilhelmina Elizabeth Hoffman. In the event that my said daughter, Wilhelmina Elizabeth Hoffman, should not then be living, then I direct that the title to the said property 900 Third avenue and the trust fund of said ten thousand dollars, or, in the event of the sale hereinafter had of said premises, then the proceeds derived from same shall be paid over unto my grandchild, Henrietta W. A. Hoffman.)

"Sixth. All the rest, residue, and remainder of my estate, both real and personal, of which I shall die seised or possessed, or in or to which I shall have any right, title, or interest, wheresoever the same may be situated, I give, devise, and bequeath unto my executors and trustees, hereinbefore named, or to the survivor of them, in trust, to collect and receive the income of said rest, residue, and remainder of my estate, and, after payment of all expenses, charges, and outlay from said income, to pay the balance of said income unto my daughter, Wilhelmina Elizabeth Hoffman, during her natural life, and, upon her decease, to pay over the rest, residue, and remainder of my said residuary estate unto my grandchild, Henrietta W. A. Hoffman."

On April 15, 1904, testator sold the premises No. 5 West 134th street, his wife joining in the conveyance, and at the time of the transfer the title was burdened with a mortgage of $8,000, and, by direction of the testator at the time of the transfer, a purchase-money mortgage was executed by the grantee to testator's daughter, Wilhelmina S. Hoffman, for $6,000. On January 20, 1903, testator transferred premises No. 900 Third avenue, receiving as a consideration therefor $56,000, of which $12,000 was paid in cash and the balance, $44,000, by taking purchase-money mortgage therefor. The deceased and Katherine Steubing were married July 30, 1901, and no issue was born of the marriage. At the time of his death he was seised of two pieces of real estate, which are conceded to be worth $48,500. The total cash assets which came into the hands of the plaintiff, as executor, amounted to $127,151.32. It must be accepted as admitting of little cavil or dispute that the sale or alienation by the testator in his lifetime of the premises No. 5 West 134th street, and No. 900 Third avenue revoke the specific devise of same, as shown by his will. In the one instance (the 134th street property), the revocation was absolute and, at the time of testator's death, this particular piece was converted into a different estate, and the devise as originally provided for by testator's will lapsed. McNaughton v. McNaughton, 34 N. Y. 201;

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Gray v. Gray, 5 App. Div. 132, 39 N. Y. Supp. 57. In the instance of No. 900 Third avenue, while the same doctrine, that by reason of the sale by testator during his life of this particular piece there has been wrought a revocation of the devise, is applicable, still by reason of the fact that testator has specifically provided in this case what is to be done with proceeds of sale under certain contingencies, if one is had, call is made for a rendering of that particular portion of the fifth clause of said will, and a following to an ultimate disposition of this part of the estate, so that there may be thorough conformity to the will of testator. Of course, the primary intention of testator, by the creation of the estate provided in this clause, was the care, maintenance, support, and education of any child that might be born of his marriage with Katherine Steubing. No child was ever born of such marriage, and expressly providing against the contingency of such child, if born, not arriving at majority, he passes the property, with the $10,000, or, in event of sale, the proceeds derived therefrom, to his daughter, Wilhelmina Elizabeth Hoffman, if she be then alive. I know that the language employed is, "or proceeds from the premises No. 900 Third avenue"; but, inasmuch as he absolutely devises the fee of the property, should he die possessed and such contingency arise, it must of necessity follow that, if he has disposed of the property, "the proceeds from the premises" means proceeds from sale of the premises. And this, too, whether such sale occurred before or after testator's death. On the question of the widow's position and the attitude to be assumed by her as to her dower rights, in my judgment she is practically in the position where she is bequeathed $10,000 in lieu of all claim for dower, and she must elect whether she will accept the same, or, in the alternative, assert her right of dower in the real estate of which decedent died seised. She is not entitled to the equivalent of the proceeds of the sale of the 134th street property, nor can there be spelled out in her favor a bequest of $8,000 by implication, because, in keeping with his original intention to give her that house, he desired it should go to her free of a mortgage incumbrance of that amount. His subsequent alienation of that property, the widow, then wife, joining in the execution of that instrument, absolutely disposes of that question; and, if further light of testator's intention was needed, the taking back of a purchase-money mortgage not in wife's name, but daughter's, speaks too plainly on that score.

Judgment accordingly. Submit findings.

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(49 Misc. Rep. 154.)

## FORBES v. REYNARD.

(Supreme Court, Special Term, New York County. January, 1906.)

MORTGAGES—SATISFACTION—PAYMENT TO ATTORNEY IN FACT.

A certificate of satisfaction of a mortgage executed under a power of attorney given to receive moneys that may become due "to me as guardian and trustee of said minors, including all principal and interest of any mortgages," and to execute certificates to discharge the mortgages when paid of record, is a valid discharge, though the power of attorney purports to give certain other powers which a guardian could not delegate; and,

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when a mortgagor pays the mortgage to the person authorized to receive it under such power, he is not bound to see that the application made by the guardian of the amount so paid was properly made, under Real Property Law, Laws 1896, p. 559, c. 547, § 88.

Action by George Forbes against Katharine F. Reynard to recover damages on a contract for the sale of real estate because of the vendor's alleged breach of contract. Judgment for defendant.

See 98 N. Y. Supp. 710.

The contract provided that, on receiving from the vendee the sum of $31,000, defendant should execute a warranty deed conveying the said premises to the said vendee or his assigns, free from all incumbrances except a mortgage of $20,000. The plaintiff claimed that the defendant, on the day fixed for closing title, August 31, 1904, could not convey the premises in accordance with contract; the premises being incumbered, not only by the said mortgage of $20,000, but also by a mortgage to secure the payment of $14,500. On or about April 4, 1883, the said Louis P. Siebert, as guardian of the certain infants and assignee of the second mortgage, made and executed to Edward Oothout a power of attorney authorizing the said Edward Oothout, among other things, to "receive all sums of money * * * now due or hereafter at any time to become due to me as guardian and trustee of said minors, including all principal and interest of any bonds and mortgages, * * * and upon payment of any mortgage * * * to execute and acknowledge sufficient certificates to discharge the same of record." The power of attorney and the mortgage and assignment were duly recorded in the registrar's office of New York county. On March 30, 1889, there was duly recorded in the registrar's office of New York county a certificate of satisfaction of the said mortgage for $14,500, executed by the said Edward Oothout, attorney in fact. The plaintiff claimed that, because the guardian by the power of attorney attempted to delegate to the attorney certain duties which could not be lawfully delegated, the power of attorney was void, and that therefore the lien of the mortgage was not discharged of record.

Leon Kronfeld, for plaintiff.

Thomas F. Keogh and Francis W. Judge, for defendant.

LEVENTRITT, J. The receipt of the principal of an overdue mortgage and the execution of a certificate of satisfaction thereof are mere mechanical or ministerial acts, and the rule is that a guardian or other trustee may delegate the performance of such acts to others. Gates v. Dudgeon, 173 N. Y. 426, 66 N. E. 116, 93 Am. St. Rep. 608; Myers v. Mutual Life Ins. Co., 99 N. Y. 1, 1 N. E. 33; Perry Trusts, § 409. The power of attorney given by Louis P. Siebert as guardian and trustee to Edward Oothout delegates express authority to "receive all sums of money * * * now due or hereafter at any time to become due to me as guardian and trustee of said minors, including all principal and interest of any bonds and mortgages * * * and upon payment of any mortgage * * * to execute and acknowledge sufficient certificates to discharge the same of record." The fact that the power of attorney attempts to confer certain other powers and duties, which the guardian could not delegate, does not invalidate the entire instrument. The principal of the mortgage in question having been paid to a person authorized to receive it, the mortgagor was not bound to see to the application made by the guardian of the sum paid. Real Prop. Law, Laws 1896, p. 559, c. 547, § 88. It is obvious, therefore, that the certificate of satisfaction executed by Edward Oothout as attorney in fact of Louis P. Siebert, guardian, operated as a valid

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discharge of this mortgage. The plaintiff not only did not discharge the burden which rested upon him to establish the claim that, in the collection of the mortgage, the attorney in fact exercised certain discretionary powers which no one but the guardian could exercise (Greenblatt v. Hermann, 144 N. Y. 13, 18, 38 N. E. 966; Moser v. Cochrane, 107 N. Y. 35, 13 N. E. 442; Maupin, Mark. Tit. Real Est. 317), but he presented no evidence to that end.

There must be judgment for the defendant.

Judgment for defendant.

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## FORBES v. REYNARD.

(Supreme Court, Appellate Division, First Department. May 11, 1906.)

1. GUARDIAN AND WARD—COLLECTION OF ASSETS—MORTGAGES—SATISFACTION—DELEGATION OF POWER.

   The guardian of infants, who as such had received an assignment of a mortgage when the same was overdue, executed a power of attorney authorizing the attorney to receive all money due on mortgages and to acknowledge certificates of satisfaction, and such a certificate was executed by the attorney and properly recorded. *Held*, that a vendee's objection to the land on the ground that the guardian could not delegate his powers was untenable.

2. VENDOR AND PURCHASER—PERFORMANCE OF CONTRACT—TITLE OF VENDOR—INCUMBRANCES.

   Code Civ. Proc. § 381, in relation to limitations, provides that an action upon a sealed instrument must be brought within 20 years. *Held*, that a vendee's objection to the vendor's title on the ground that a certain mortgage was not properly satisfied of record, was insufficient, where more than 21 years had elapsed after the mortgage became due, and there was no evidence that there had been any payment of either principal or interest during that time, and the vendor gave evidence that the mortgage had in fact been satisfied.

   [Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, § 247.]

3. SAME.

   A vendee's objection to the vendor's title on the ground that a mortgage to a guardian as such had been given on the premises, and that it did not appear that the guardian had ever accounted in court after payment of the mortgage, was untenable as the guardian might have accounted out of court after the ward arrived at majority.

Appeal from Trial Term, New York County.

Suit by George Forbes against Katharine F. Reynard. From a judgment dismissing the complaint (98 N. Y. Supp. 708), plaintiff appeals. Affirmed.

See 93 N. Y. Supp. 1097.

Argued before O'BRIEN, P. J., and PATTERSON, McLAUGHLIN, LAUGHLIN, and HOUGHTON, JJ.

Leon Kronfeld, for appellant.

Thomas F. Keogh, for respondent.

McLAUGHLIN, J. The parties to this action entered into a contract by which the defendant agreed to sell and the plaintiff to purchase certain real estate in the city of New York for $52,000, $1,000 of which was paid at the time the contract was executed, $31,000 agreed to be

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paid at the time fixed for the closing of the contract, when title was to pass, and the balance to be paid by the purchaser assuming a mortgage for $20,000 upon the premises. At the time fixed for the closing of the title, August 31, 1904, the plaintiff refused to perform, upon the ground that the premises were not only incumbered by the $20,000 mortgage which he had agreed to assume, but by another mortgage for $14,500, and he subsequently brought this action to recover the $1,000 paid and $500 expenses incurred in searching the title. The answer denied the material allegation of the complaint. At the trial the question litigated simply related to the validity of the $14,500 mortgage. The trial court found that the mortgage had been satisfied and was not a lien upon the premises in question, and dismissed the complaint upon the merits, and plaintiff appeals.

I am of the opinion that the complaint was properly dismissed. There was no dispute as to the facts relating to the alleged mortgage. It was given on the 11th of February, 1876, to secure the payment of $14,500, within five years thereafter, recorded in the proper clerk's office two days later, and on the 19th of March, 1883, assigned by the mortgagee to one Siebert, as the guardian of certain infant children, and the assignment recorded the day following. Siebert, as such guardian, on the 4th of April, 1883, executed a power of attorney to one Oothout, which provided, among other things, that the attorney was authorized to "receive all sums of money * * * now due or hereafter at any time to become due to me as guardian and trustee of said minors, including all principal and interest of any bonds and mortgages, * * * and upon payment of any mortgage * * * to execute and acknowledge sufficient certificate to discharge the same of record." The power of attorney was also recorded, and on the 28th of March, 1889, Oothout, as such attorney, gave a certificate of the satisfaction of the mortgage, which was also recorded. The appellant contends that, inasmuch as the power of attorney attempted to confer powers upon the attorney which the guardian could not delegate, that invalidated the entire instrument.

If it be assumed that the instrument is subject to the criticism that certain powers which the guardian could not delegate were attempted to be given to the attorney, this does not aid the appellant. The guardian not only had the right, but it was his duty, to collect debts due to and enforce claims in favor of his ward (Chapman v. Tibbits, 33 N. Y. 289), and for this purpose he had the power by virtue of his appointment to employ an attorney (Am. & Eng. Enc. of Law [2d Ed.] p. 56). He could employ an attorney to foreclose the mortgage, and such employment would necessarily carry with it the power on the part of the attorney to receive the amount due and satisfy the mortgage if paid before judgment, or, if judgment were taken, to satisfy that, if paid before sale. Here the guardian appointed an attorney to receive the principal of an overdue mortgage, and on receipt of the amount due to give a certificate of satisfaction. This, at most, was but the delegation of a ministerial act, and as such could be delegated by the guardian to the attorney. Gates v. Dudgeon, 173 N. Y. 426, 66 N. E. 116, 93 Am. St. Rep. 608; Myers v. Mutual Life Ins. Co., 99 N. Y. 1, 1 N. E. 33; Perry on Trusts, § 409. On the other hand, the mortgagor (the mort-

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gage being past due) had a right to pay it, and, if he did so to a person authorized to receive payment, he thereupon became entitled, as a matter of right, to have the mortgage satisfied, and there was no obligation resting upon him to see that a proper application was made of the money.

In addition to what has already been stated, there was no proof that the mortgage, if not satisfied of record, was a lien upon the premises at the time fixed for the closing of the title; on the contrary, it appeared from plaintiff's proof that the debt, to secure payment of which the mortgage was given, became due and payable more than 20 years prior to the time fixed for closing the title. The mortgage was given February 11, 1878, to secure the payment of $14,500 within five years thereafter, or February 11, 1883. The time fixed for closing the title was August 31, 1904, more than 21 years after the mortgage became due. There was, therefore, a presumption, the debt having been more than 20 years past due, that it had been paid; and this was sufficient, in the absence of any other evidence bearing on the subject, to show that the mortgage had ceased to be a lien on the real estate. It was a rule of the common law that the payment of a bond or other specialty would be presumed after the lapse of 20 years from the time when it became due, in the absence of evidence explaining the delay, and this rule has frequently been applied in this state. Clark's Ex'rs v. Hopkins, 7 Johns. (N. Y.) 536; Jackson v. Pratt, 10 Johns. (N. Y.) 381; Bean v. Tonnele, 94 N. Y. 381, 46 Am. Rep. 153; Rosenstock v. Dessar, 109 App. Div. 10, 95 N. Y. Supp. 1064. The debt, to secure payment of which the mortgage was given, as already indicated, was more than 20 years past due, and an action could not, therefore, have been maintained either upon the bond accompanying the mortgage or to foreclose the mortgage itself (Code Civ. Proc. § 381), unless within that time there had been a payment of either principal or interest. Plaintiff gave no proof of such payment. On the contrary, the only evidence bearing on the subject is that given by the defendant that the mortgage had been in fact satisfied. Under such circumstances the mortgage did not constitute a valid objection to the title. Belmont v. O'Brien, 12 N. Y. 394; Martin v. Stoddard, 127 N. Y. 61, 27 N. E. 285; Katz v. Kaiser, 10 App. Div. 137, 41 N. Y. Supp. 776, affirmed 154 N. Y. 294, 48 N. E. 532; Knapp v. Crane, 14 App. Div. 120, 43 N. Y. Supp. 513; Paget v. Melcher, 42 App. Div. 76, 58 N. Y. Supp. 913.

The fact that the guardian has, so far as the record shows, not accounted in court, is of no importance. A guardian is not absolutely bound to account in court for the property of his ward. He may account out of court when the ward arrives at the age of 21 years, and if such accounting be fairly and honestly made, and no advantage taken of the ward, a release given by him to the guardian is just as effective as a decree entered in court. Matter of Wagner's Estate, 119 N. Y. 28, 23 N. E. 200; Matter of Pruyn, 141 N. Y. 544, 36 N. E. 595.

The judgment appealed from, therefore, should be affirmed, with costs. All concur.

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(49 Misc. Rep. 136.)

## PEOPLE v. HUMMEL.

(Supreme Court, Special Term, New York County. January, 1906.)

1. CRIMINAL LAW—APPEAL—CERTIFICATE OF REASONABLE DOUBT.

On conviction of crime, where accused has appealed, a justice of the Supreme Court should grant a certificate of reasonable doubt where any question of law is raised sufficient for the consideration of the appellate tribunal.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 2729, 2730.]

2. SAME—GROUNDS.

Where a confessed perjurer and accomplice testified to the commission of the crime with which defendant was charged, and the question in dispute was whether he was corroborated by other evidence connecting defendant with the crime, and the court charged that there was other evidence to corroborate if the jury believed it to be true, thereby limiting the province of the jury to determine, not the weight of the corroboration, but the truth of the testimony, a question of law was raised sufficient to justify a certificate of reasonable doubt.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 2729, 2730.]

3. SAME.

Witnesses called by the people, and who had been intimately connected with the defendant, refused to testify, on the ground that their answers might tend to incriminate themselves. In summing up, the district attorney called the attention of the jury to such fact, and to the fact that defendant called no witnesses, and the court refused to charge that their refusal to testify created no presumption against the defendant. *Held* to authorize the granting of a certificate of reasonable doubt.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 2729, 2730.]

Abraham H. Hummel was convicted of crime, and applies for certificate of reasonable doubt. Application granted.

See 96 N. Y. Supp. 878.

John B. Stanchfield, for application.

Howard S. Gans, opposed.

WOODWARD, J. The defendant stands convicted, by the verdict of a jury, of the crime or crimes defined by subdivisions 1, 3, and 6 of section 168 of the Penal Code, and of section 148 of the Penal Code, and he asks for a certificate of reasonable doubt as to the lawfulness of his conviction, under the provisions of section 527 of the Code of Criminal Procedure. The purpose of this certificate is to stay the execution of the judgment of conviction pending an appeal, where it shall be made to appear to a justice of the Supreme Court that "there is reasonable doubt whether the judgment should stand, but not otherwise"; and it is clearly the policy of the state to save convicted persons from incarceration, so long as there is any such reasonable doubt of the lawfulness of their conviction. Our system of jurisprudence contemplates, not only a trial of the accused by a jury of his peers, after an indictment by a grand jury, but a fair and impartial trial. People v. McLaughlin, 150 N. Y. 365, 379, 44 N. E. 1017; People v. Mull, 167 N. Y. 247, 253, 60 N. E. 629, and authority there cited. It demands

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that, before any man shall be deprived of his liberty, he shall have had a trial by jury, and that the trial shall be free from errors prejudicial to the rights of the defendant; and to this end the provision of the Code of Criminal Procedure permits a justice of the Supreme Court, in the exercise of a judicial discretion, to postpone the execution of judgment while questions of fact or law, going to the merits of the question, are being reviewed before the proper tribunals. If the defendant is finally adjudged to be guilty of the crime as charged, his term of imprisonment is not lessened; while, if he is not lawfully adjudged guilty, he is saved the humiliation of an imprisonment, for which there is no redress. As has been well said by Mr. Justice Truax:

"On an application for a stay of proceedings in a criminal case, it is not necessary that the judge to whon the application is made should be satisfied that the judgment will be reversed. It is enough that he is satisfied that a question of law is raised sufficient for the consideration of the appellate tribunal. On such application it is not required that the judge to whom the application is made should determine whether the error complained of warrants the granting of a new trial, for the granting or refusing of a new trial is vested in the appellate court, which may 'order a new trial if it be satisfied that the verdict against the prisoner was against the weight of evidence or against law, or that justice requires a new trial, whether any exception shall have been taken or not in the court below.'"

Viewed from this standpoint, and without assuming to say that the questions raised are such as to compel reversal on the part of an appellate court, I am of the opinion that there are at least two questions of law which are deserving of consideration, and that they present that reasonable doubt which the statute contemplates. Under the provisions of section 399 of the Code of Criminal Procedure, a "conviction cannot be had upon the testimony of an accomplice unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime." The principal question in dispute upon the trial was whether the testimony of Dodge, a confessed perjurer and accomplice, if the crime charged was in fact committed, was corroborated by "such other evidence as tends to connect the defendant with the commissinon of the crime." Without going into an analysis of the evidence, or undertaking to pass upon that question, it seems to me that the learned justice presiding at the trial came dangerously near to usurping one of the prerogatives of the jury when in his charge he declared:

"Now, as a matter of law, I charge you that there is other evidence which tends to corroborate him if you shall believe it to be true. Its truth is for you to determine, and not for me. But if you find it to be true, then you may find that there was evidence tending to corroborate him. If you find it to be untrue, then it is without corroboration, and there can be no conviction."

Practically the charge directed the jury that, if they believed the testimony produced on the part of the people, and alleged to be in corroboration of Dodge, they were to find that there was such corroboration, or at least that they might find such corroboration; thus, in effect, limiting the province of the jury to determining, not the weight and sufficiency of the corroboration, but the truth of the testimony offered in that behalf. In considering a somewhat similar charge, the Court of Appeals say:

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"Their attention is thus directed to the evidence of inculpation merely. Its weight is stated to them as sufficient in law to sustain a conviction for the graver offense, so that the question of fact to which their minds are turned relates to the credibility of certain witnesses, and not to the weight or measure of their testimony or the existence of the intent. How far that testimony was modified or neutralized by that produced by the defendant, or what inferences should be drawn from any of it, is virtually excluded from their inquiry. If you believe certain witnesses, say the court, the verdict follows. This was overstepping the province of the judge. * * * It is true the question was not taken absolutely from the jury by the court; this was beyond its power (Howell v. People, 5 Hun, 620, affirmed People v. Howell, 69 N. Y. 607): but the opinion of the judge, considered as an opinion on the weight of evidence, was stated much stronger than it ought to have been, and was calculated to make an erroneous impression upon the minds of the jurors, and with that impression, carrying into the juryroom the weight of the opinion, it cannot be said that the prisoner had, at the outset of their deliberations, an even chance that the conclusion of the jury would be unbiased."

Where is the distinction in principle between these cases? To charge, as a matter of law, that there was evidence to corroborate Dodge, leaving the jury to determine merely the credibility of the witnesses, was to take from them, in effect, the question of the sufficiency of the corroboration. It might very well be that the jury, left to its own deliberations, might conclude that the evidence in corroboration was entirely insufficient to tend to connect the defendant with the crime; and while as suggested by the Court of Appeals in People v. Flack, 125 N. Y. 324, 334, 26 N. E. 267, 270, 11 L. R. A. 807:

"Jurors may be perverse, the ends of justice may be defeated by unrighteous verdicts; but so long as the functions of the judge and jury are distinct—the one responding to the law, the other to the facts—neither can invade the province of the other without destroying the significance of trial by court and jury."

The rule appears to be well settled that, where the trial judge is satisfied that there is testimony fairly tending to connect the defendant with the commission of the crime, he is bound to submit the case to the jury, who are the sole judges whether the evidence relied upon to corroborate the accomplice is sufficient. People v. Mayhew, 150 N. Y. 346, 353, 44 N. E. 971, and authorities there cited.

It seems to me that there is a reasonable doubt whether the learned trial justice did not take from the jury a very essential question of fact, to the substantial prejudice of the rights of the defendant; and I do not think the error, if it be error, was corrected by the charge as finally made to the jury. The defendant was entitled to have the law clearly and concisely stated.

I am equally persuaded that the defendant has a right to a review of the ruling of the learned court upon the question of the witnesses Kaffenburgh and Cohen. These witnesses were called by the people, and refused to answer certain questions, on the ground that it would tend to incriminate them. They were intimately connected with the defendant, having been clerks or employés in his office, and the court was asked to charge:

"The fact that the witnesses Kaffenburgh and Cohen declined to testify upon the ground that their answers might tend to incriminate them creates no presumption against them, and in particular none against the defendant."

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The learned district attorney, in his summing up to the jury, commented upon the fact that the defendant called no witnesses, and pointed out that these particular witnesses refused to answer, though apparently in a position where they might have known of the facts; and the refusal of the court to charge as requested, if error, could not have failed to be prejudicial to the defendant. Why should the fact that a witness, for his own protection, refuses to answer a question under his constitutional privilege, be permitted to prejudice the defendant? It might be that the answer, if fully and truly given, would show that the witness, rather than the defendant, had been guilty of the very crime charged in the indictment. The United States Supreme Court, in commenting upon a similar provision in the federal Constitution, say:

"The reason given by Counselman for his refusal to answer the questions was that his answers might tend to criminate him, and showed that his apprehension was that, if he answered the questions truly and fully, as he was bound to do if he should answer them at all, the answers might show that he had committed a crime against the interstate commerce act, for which he might be prosecuted. His answers, therefore, would be testimony against himself, and he would be compelled to give them in a criminal case. * * * It is impossible [continue the court in the same case(Counselman v. Hitchcock, 142 U. S. 547, 562, 12 Sup. Ct. 195, 198, 35 L. Ed. 1110)] that the meaning of the constitutional provision can only be that a person shall not be compelled to be a witness against himself in a criminal prosecution against himself. It would doubtless cover such cases, but it is not limited to them. The object was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime. The privilege is limited to criminal matters, but it is as broad as the mischief against which it seeks to guard."

If the people call witnesses who demand their privilege, can it be that the defendant is to be prejudiced by this fact? It is the duty of the people in a criminal charge to establish all of the facts going to make the crime, and to fasten it upon the defendant, and the fact that a witness refuses to answer questions because they are likely to criminate him is hardly evidence that some one else has committed a crime. The defendant is not obliged to defend; he may rely upon the weakness of the people's case, and in such a case he is at a disadvantage if he must be presumed to be guilty because some witness called by the people is afraid to answer questions. In Brown v. Walker, 161 U. S. 591, 600, 16 Sup. Ct. 644, 648, 40 L. Ed. 819, the court, while not questioning the doctrine of the Counselman Case, supra, say:

"The danger of extending the principle announced in Counselman v. Hitchcock is that the privilege may be put forward for a sentimental reason, or for a purely fanciful protection of the witness against an imaginary danger, and for the real purpose of securing immunity to some third person who is interested in concealing the facts to which he would testify."

Obviously, if the jury might presume, from the fact that a witness refused to testify under his constitutional privilege, that he would give testimony adverse to the defendant if he spoke, the discussion of the court is without force. I have very grave doubts of the correctness of the ruling upon this request to charge. It is not entirely free from doubt in my mind whether, under all the circumstances of this case, the refusal to charge was error; but I have such doubts upon the question that I think I would be justified in granting the certificate in this

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case upon this particular point. In the somewhat hasty examination which I have been able to make, I do not find a direct and conclusive authority upon the point; and if it was error, it is certain that the defendant has not had the fair and impartial trial which the law demands for every man charged with a crime.

Various other questions have been raised and urged before me, but I do not feel that there is occasion for discussing them. The questions will no doubt be presented on appeal, and the Appellate Division has the power to grant any relief to which the defendant may be entitled. On this application I am only called upon to determine whether there is a reasonable doubt as to whether the judgment should stand, and I am convinced that there is such a doubt.

The application for a certificate of reasonable doubt will be granted.

Application granted.

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## FIRST NAT. BANK OF WATERLOO v. BACON et al.

(Supreme Court, Appellate Division, Fourth Department. May 2, 1906.)

1. REFORMATION OF INSTRUMENTS—CONTRACT OF PLEDGE—OMISSION OF WORDS—MUTUAL MISTAKE.

Where, in a contract pledging certain corporate stock, the words "are transferred to" were omitted before the words "may be held by," etc., relative to the stock, and the words "now existing or" before the words "that may hereafter exist," relating to the indebtedness for which stock was pledged were omitted by mutual mistake, the contract was subject to reformation in equity by the insertion of such words.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Reformation of Instruments, §§ 69, 70.]

2. PLEDGES—CORPORATE STOCK—MANUAL DELIVERY.

Corporate stock not being capable of manual delivery, a pledge thereof may be created by a written transfer thereof independent of a delivery of the scrip.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Pledges, § 40; vol. 12, Cent. Dig. Corporations, § 507.]

3. SAME.

Where certain corporate stock was pledged to a bank and the certificates delivered to it, and later the stock was pledged to plaintiff subject to the lien of the original pledgee, the possession of the certificates by the latter might be properly regarded as the possession of plaintiff through the agency of such pledgee.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Pledges, § 34.]

4. APPEAL—ADMISSION OF EVIDENCE—HARMLESS ERROR.

Where a contract pledging corporate stock showed a pledge for present and future indebtedness, it was not reversible error, in an action to reform the contract of pledge, for the court to permit proof of the consideration, though no consideration was alleged in the complaint.

5. REFORMATION OF INSTRUMENTS—NECESSITY OF DEMAND.

Where a pledgor had become a bankrupt, a demand for reformation of the contract of pledge was not required to be made either on the pledgor or his trustee in bankruptcy prior to the institution of a suit for such relief.

6. BANKRUPTCY—RIGHTS OF TRUSTEE.

A bankrupt's trustee takes the bankrupt's property in the same condition and subject to the same liens as it was held by the bankrupt.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bankruptcy, § 193.]

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7. SAME—BONA FIDE PURCHASER.
A bankrupt's trustee is not a bona fide purchaser of the bankrupt's property for value.

8. REFORMATION OF INSTRUMENTS—BANKRUPT PLEDGOR.
The fact that a pledgor became a bankrupt prior to the institution of a suit for the reformation of the contract of pledge did not prevent the granting of such relief in a suit against the bankrupt and his trustee.

Appeal from Special Term, Seneca County.

Action by the First National Bank of Waterloo, N. Y., against Francis Bacon and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Argued before McLENNAN, P. J., and SPRING, WILLIAMS, NASH, and KRUSE, JJ.

Frederick L. Manning and George E. Zartman, for appellants.
Hammond & Hammond, for respondent.

WILLIAMS, J. The judgment should be affirmed, with costs.

The action was to procure the reformation of a written contract made by the plaintiff and the defendant Bacon February 15, 1902. Before the contract was made Bacon was president of the plaintiff and also of the Waterloo Wagon Company. He was active in the office of the wagon company. The business of the plaintiff was looked after by the cashier, Becker. The plaintiff had extended credit to the wagon company and to Bacon individually, discounting paper and taking notes. The Exchange National Bank of Seneca Falls held, by assignment from Bacon, 461 shares stock of the wagon company, and 253 shares stock of the plaintiff bank as continuing collateral security for any existing or future indebtedness of Bacon or the wagon company. The contract between Bacon and the plaintiff as executed did not contain the words "are transferred to" before the words "may be held by," etc., relating to these shares of stock, nor the words "now existing or" before the words "that may hereafter exist," relating to the indebtedness to the plaintiff. The court, by its decision, reformed the contract by inserting these words. The evidence was undisputed that these were mutual mistakes made in preparing and executing the contract. In the meantime, however, Bacon had become a bankrupt, having been so adjudicated May 4, 1904, and defendant Zartman had been appointed trustee. This action was begun October 17, 1904. The trustee alone defends, and appeals. Several objections are made to the decision of the court, which we consider.

1. It is said there was no valid pledge of the stock to the plaintiff, because possession of the scrip was in the Seneca Falls Bank. Delivery of possession of property is ordinarily essential to the making of a pledge, but in the case of stock there can be no delivery of possession thereof. The scrip is not the stock itself, and as to property not capable of manual delivery a pledge may be created by a written transfer thereof. Wilson v. Little, 2 N. Y. 443, 51 Am. Dec. 307. By the contract here, as reformed, there was such written transfer, and not merely an agreement to make such transfer in the future. Even if delivery of the scrip to the Seneca Falls Bank, and the possession thereof by it, could be regarded as possession in that bank of the stock, still, when the

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stock was subsequently pledged to the plaintiff, subject to the lien of the Seneca Falls Bank, the possession by the first pledgee might be regarded as the possession of the second pledgee through the agency of the former. Jones on Pledges and Collat. (2d Ed.) pp. 81, 82, § 83.

2. It is said that no consideration for the contract was alleged in the complaint, and it was improper to permit any consideration to be proven on the trial. The contract itself showed a pledge for present and future indebtedness, and it might fairly be assumed, therefore, that there was some indebtedness then existing. We do not see that any reversible error was committed in aiding such assumption by some evidence of such indebtedness. This action, it will be remembered, was merely to reform the contract, and not to establish any indebtedness thereunder. That will be determined in another action, if there is controversy with reference thereto.

3. It is said the court was powerless to afford the relief sought. While very likely Bacon could not, after he was adjudged a bankrupt, have corrected the contract, because the rights of creditors had intervened, and they were represented by the trustee, who alone had power to act, for the debtor as well as the creditors, yet, when both Bacon and the trustee were brought into court, we see no reason why the relief asked for could not be afforded.

4. It is said no demand was made before suit. No demand was necessary. Bacon could not comply with the demand, and the trustee would not have been justified in doing so. The demand could have served no useful purpose. No costs were allowed plaintiff by the trial court.

5. It is said that the bankruptcy of Bacon constituted a bar to the relief granted in this action. This cannot be true. The trustee took the bankrupt's property in the same condition and subject to the same liens as the bankrupt himself held it. The trustee is in no sense a bona fide purchaser for value, and entitled to protection as such. No new lien was created by the decision and judgment appealed from. The original lien was adjudicated and determined.

We conclude that the judgment is right, and should be affirmed.

**Judgment affirmed, with costs. All concur.**

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## PEOPLE ex rel. CITY OF GENEVA v. GENEVA, W., S. F. & C. L. TRACTION CO.

(Supreme Court, Appellate Division, Fourth Department. May 2, 1906.)

1. STREET RAILROADS—FRANCHISES—POLICE REGULATIONS—POWER OF CITY.

Where a city granted a franchise to a street railway company, authorizing it to construct, maintain, and operate a street surface railroad in the streets of the city, such franchise, though a contract between the city and street car company, was subject to the police power of the city to regulate the manner in which the street should be used.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Street Railroads, § 28]

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2. CONSTITUTIONAL LAW—CITY CHARTER—RELOCATION OF STREET RAILROADS —VALIDITY—IMPAIRMENT OF CONTRACT.

Geneva City Charter, Laws 1897, p. 444, c. 360, § 65, as amended by Laws 1905, p. 1032, c. 462, provides that if any street in which a street surface railroad is now or shall hereafter be operated shall be paved, repaired, or altered, etc., the board of public works shall have power to require the railroad corporation operating such street surface railroad to change its grade and line to conform to such alteration or improvement in such manner as the board shall designate, at the expense of such railroad company. *Held*, that such provision was not unconstitutional, as an impairment of the contract rights of a street railroad operating its line on the north side of a street under a franchise acquired from the city, though the required change of location would necessitate a large expenditure on the part of the railroad company.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Constitutional Law, § 344.]

3. MANDAMUS—SCOPE OF REMEDY—STREET RAILROADS—CHANGE OF LOCATION.

Where a street railroad was under a legal obligation to change the location of its line on the demand of the city's board of public works, preliminary to the improvement of the street, the city was entitled to compel such change by mandamus.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Mandamus, § 267.]

Appeal from Special Term, Ontario County.

Mandamus by the people on relation of the city of Geneva, against the Geneva, Waterloo, Seneca Falls & Cayuga Lake Traction Company, to compel defendant to remove its railroad track from its present location on the north side of North street, in the city of Geneva, N. Y., to practically the center of such street, and to change the line and grade of its railroad in the street, as required by the city's board of public works, according to plans adopted by the board. A peremptory writ was granted, from which defendant appeals. Affirmed.

The proceeding was commenced on the 24th day of July, 1905, by the service of notice of motion and accompanying affidavits, returnable on the 31st day of July, 1905, but was not heard until the 9th day of September, 1905, when the motion was argued upon the moving papers and opposing affidavits presented by the defendant, and the motion was submitted to the court on that day. As appears by the order appealed from, the absence of consents of abutting owners on the south side of North street was urged as a defense to the motion, and counsel for the relator thereupon offered to procure and furnish to the defendant such consents. It is recited that such consents were duly procured and served upon the defendant on the 20th day of January, 1906, and an affidavit by relator's attorney was submitted to the court on the 22d day of January, 1906, stating that they had been so served. Thereupon and on the same day the order appealed from was made, and entered on the following day.

Argued before McLENNAN, P. J., and SPRING, WILLIAMS, NASH, and KRUSE, JJ.

Charles A. Hawley, for appellant.
W. Smith O'Brien, for respondent.

McLENNAN, P. J. It is alleged in the moving affidavits in substance: That the relator is a municipal corporation created under and by virtue of chapter 360, p. 422, of the Laws of 1897 and the acts amendatory thereof. That by title 5 (page 440) of said act a department of public works was created in and for said city of Geneva, composed of five commissioners, constituting the board of public works

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of said city, and vested with "the charge, management, control and maintenance of the streets and bridges within the corporate limits of said city, including the right to repair, grade, pave, improve and establish the grade line of the same." That the defendant is a street surface railroad corporation, and since 1895 has been the owner of and engaged in operating a street surface railroad upon certain streets in said city, among others upon North street for a distance of upwards of 4,000 feet; its tracks being located on the northerly side of said street. That on the 23d day of March, 1905, at a regular meeting, the board of public works, by the adoption of a proper resolution, determined to pave and improve North street at an estimated cost of $48,000, in accordance with plans and specifications showing the grade, location, and lines of such pavement. Thereafter, and on the 25th day of May, 1905, by suitable resolution, the board determined that, in order to pave and improve North street in accordance with its previous determination, it would be necessary for the defendant to change the grade and line of its tracks, and it was directed and required to remove its tracks from the side of North street, and place them in the center of the space determined to be paved by the relator's board of public works. That such resolution was served upon the defendant, and it refused and still refuses to comply with the same. It is alleged:

"That in order to complete said improvement it will be necessary to materially change the grade of said street, and, as has been determined by said board, it will also be necessary to change the location of the tracks of said street surface railroad. That the tracks of said railroad as now located are between the center and north line of said street, and at different points in said street the whole or some portion of the roadbed of said street railroad as now located is south of the line of the north curb of said pavement as said pavement is proposed to be constructed. * * * That before said street can be paved it will be necessary that the work of changing the location of said tracks be performed in whole or in part, and it is not possible for the board of public works of said city to pave and improve said street as proposed, or perform any considerable part of such work, until the location of said street railroad tracks shall have been changed as directed by said board."

It is also alleged that:

"The owners of property abutting on said North street, by way of preparing for said proposed improvement, have at large expense made excavations in said street and put in lateral connections to sewer and water mains in said street, resulting in making the surface of said street irregular and uneven, so that it is important to the interest of the public and residents of said street that the work of paving and improving the same be done as soon as possible."

The moving papers contain other allegations, the details of which need not be recited, but are to the effect that the defendant's rights in the premises are dependent upon certain franchises given to or agreements made with it or its predecessors and the relator or its predecessor, the village of Geneva, all of which, however, it is claimed, are subject to any and all reasonable regulations and modifications which might thereafter be prescribed by the Legislature of the state or by the municipality under authority delegated to it; that among the powers so reserved by the Legislature and delegated by it to the relator are the following, as expressed in section 65 (as amended by Laws 1905, p. 1032, c. 462) of the charter of said city:



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"If any street, section of a street, public place, or square in which a street surface railroad is now, or shall be hereafter operated, shall be paved, repaired or macadamized, or any such street straightened, widened or altered, the board of public works shall have power to require the railroad corporation operating such street surface railroad to change its grade and line to conform to such alteration or improvement in such manner as said board shall designate, and the corporation operating such street railroad shall, at its own expense, change its line and grade to conform to such direction as the board of public works shall make. Nothing herein shall be held to relieve any such railroad corporation from paying its share of the cost of such improvements, as provided by this act."

The opposing affidavits do not in any manner controvert the material facts stated in the moving papers, viz.: That the relator has determined to pave and improve North street, and for that purpose has changed the grade and line of the portion of the street to be paved; that the line so established is interfered with by the tracks of the defendant as at present located. It is not claimed that the determination of the relator's board of public works to make the change and improvement in question was not made in good faith; but it is claimed by the defendant that such determination is unwise and ill-advised, because, as alleged, defendant's railroad can be operated on the northerly side of said street, practically as now located, with less inconvenience and greater safety to the public than in the center of the paved portion of such street, and that said street can be paved with equal advantage to the relator and to the public without materially interfering with the railroad tracks of the defendant; that the proposed change of its tracks will necessitate an expenditure of practically $20,000 on the part of the defendant, which, it is alleged, is unnecessary and will result in serious injury to the property rights and interests of the defendant. We consider that the statements contained in the moving and opposing affidavits do not raise a material issue of fact. We therefore need only inquire whether the relator as matter of law had the power or authority to compel the defendant to change the grade and line of its tracks as required by its board of public works and in accordance with the resolution adverted to. Such power and authority is given to the relator in express language by section 65 of its charter above quoted, and, unless its provisions contravene the Constitution of the state, the discretion of the board of public works of the relator, assumed to be exercised pursuant thereto, is not subject to review by this court.

We will assume the fact to be, as claimed by the defendant, that its right to construct, maintain, and operate a street surface railroad in North street, in the city of Geneva, N. Y., was acquired under and by virtue of a franchise granted by the board of trustees of the village of Geneva, relator's predecessor, to the Geneva & Waterloo Railway Company, defendant's predecessor in interest, on the 16th day of May, 1893, and a contract made as required thereby, dated May 17, 1893, and a resolution of such board of trustees fixing the location of the tracks of said railroad upon such street, which were constructed in accordance therewith; that such proceeding constituted a contract binding alike upon the relator and the defendant, under which the defendant acquired a property right (People v. O'Brien, 111 N. Y. 1, 18 N. E. 692, 2 L. R. A. 255, 7 Am. St. Rep. 684); and that such contract or

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grant is within the protection of the provision of the Constitution which prohibits the impairment of obligations or contracts. The defendant accepted the grant to it from the relator, proceeded in good faith and according to the terms of its charter to exercise the right and enjoy the privileges thereby conferred, and there was no reservation of the right to revoke or recall the privileges so granted to it; and it is beyond dispute that to make the change in the grade and line of its railroad as required by the relator will cause inconvenience and great expense to the defendant. But, giving full recognition to the above facts and to the provision of the Constitution which prevents the impairment of contract, we think it was entirely competent for the relator to compel the defendant to change the grade and line of its railroad, so as to conform to the grade and line of the street determined by the relator to be paved and as required by it.

Concededly under its charter the relator had the right, through its board of public works, to improve, and for that purpose to change and establish the grade line of, any street; and by section 65 of its charter it is specifically authorized to compel a street surface railroad occupying a portion of any street to change its grade or location to conform to the grade or alteration determined upon by said board. And it is evident from the facts disclosed by the record that the improvement contemplated by the relator cannot be made unless the defendant complies with the writ granted herein. By the grant given to the defendant or the contract made by it, the municipality could not divest itself of the right to make such reasonable changes in the grade and line of its streets as were needful and necessary in order to protect and promote the interests of the traveling public therein. That was a governmental power, inherent in the Legislature and in this case delegated by it to the municipality. As stated by Mr. Elliott, in his work on Roads and Streets (section 742):

"No contract can be made which assumes to surrender or alienate a strictly governmental power which is required to continue in existence for the welfare of the public. This is especially true of the police power, for it is incapable of alienation. It cannot be doubted that a company which secures a right to use the streets of a municipal corporation takes it subject to the police power resident in the state as an inalienable attribute of sovereignty."

Giving full recognition to the principle contended for by the appellant, that the franchise which it obtained from the relator constituted a contract which was under the protection of the provisions of the Constitution, we consider it well settled by authority that such contract was accepted by defendant subject to the police power of the municipality to regulate the manner in which it should use the streets of such municipality. Davis v. Mayor, etc., of New York, 14 N. Y. 506, 67 Am. Dec. 186; Davis v. Read, 65 N. Y. 566. In Indianapolis v. State, 37 Ind. 489, it was held that a railroad company might be compelled to adjust the grade of its tracks to correspond to the grade of intersecting streets of a municipality. Mr. Elliott (section 75) states the rule to be that the railroad acquires its rights "subject to the higher and dominant right of public necessity, and whenever public safety or necessity requires a change in the grade of a turnpike at points where it crosses the streets of a city or town the company must make it. This is substantial-

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ly the rule with respect to railroads. * * *" In People ex rel. Kimball v. B. & A. R. R. Co., 70 N. Y. 569, the court said, per Earl, J.:

"Railroad corporations hold their property and exercise their functions for the public benefit, and they are therefore subject to legislative control. The Legislature which has created them may regulate the mode in which they shall transact their business, the price which they shall charge for the transportation of freight and passengers, the speed at which they may run their trains, and the way in which they may cross or run upon highways and turnpikes used for public travel. It may make all such regulations as are appropriate to protect the lives of persons carried upon railroads or passing upon highways crossed by railroads. All this is within the domain of legislative power, although the power to alter and amend the charters of such corporations has not been reserved."

The right contended for by the respondent in this case to compel the defendant to change the location of its tracks is not different in principle from an act requiring a corporation to remove wires from poles overhead and place them in conduits under the surface of the ground; yet such acts have been held to be constitutional. People ex rel. N. Y. Electric Lines Co. v. Squire, 107 N. Y. 593, 14 N. E. 820, 1 Am. St. Rep. 893. The same principle is involved in the acts of the Legislature requiring railroad companies to abolish grade crossings, which acts have also been held to be constitutional. The precise question involved in the case at bar was decided adversely to appellant's contention in West Philadelphia Passenger Ry. Co. v. City of Philadelphia, 10 Phila. (Pa.) 70, where it was held that a street railway might be compelled by the municipality to change the track of its railway from one part of the street to another. See, also, Binninger v. City of New York, 177 N. Y. 199, 69 N. E. 390; Village of Mechanicville v. S. & M. St. Ry. Co., 174 N. Y. 507, 66 N. E. 1117.

We think the cases cited are authority for the proposition that the constituional provision forbidding the impairment of contract was in no sense violated by requiring the defendant to change the grade and line of its tracks in North street to conform to the grade and line of such street as established by the relator's board of public works. We think, also, it is well settled that mandamus was the proper remedy by which to enforce the performance of such duty by the railroad company. Bayard v. U. S., 127 U. S. 246, 8 Sup. Ct. 1223, 32 L. Ed. 116; People ex rel. Third Ave. Ry. Co. v. Newton, 112 N. Y. 399, 19 N. E. 831, 3 L. R. A. 174. Mandamus has been held to be the proper remedy to compel a railroad to build a fence on each side of its road (People ex rel. Garbutt v. R. & S. L. R. R. Co., 76 N. Y. 294); to compel a railroad to build a bridge (People ex rel. Kimball v. B. & A. R. R. Co., 70 N. Y. 569); to compel a railroad to grade its tracks so as to make crossings convenient and useful (People ex rel. Green v. D. & C. Ry. Co., 58 N .Y. 152); and many other cases of like character might be cited.

The proposition is intolerable that a street surface railroad company, or other corporation which may be given a license to occupy the streets of a municipality in a particular manner, may not be compelled, when the conditions and locality change, when public convenience and necessity require, to make such changes in its grade or line as the public necessity may demand. Any other rule would make it possible for a railroad company to forever prevent improvements and develop-

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ment in a particular section of the municipality—would make it the arbiter as to what might or ought to be done for the improvement or benefit of any particular locality. Notwithstanding the learned counsel for the appellant argues with great earnestness the proposition that by the proposed action of the relator the rights of his client are being seriously impaired and that the provisions of the Constitution in that regard are being violated, we think there is absolutely nothing new or novel in the proposition, but that by an unbroken line of decisions extending over a period of nearly a century it has been held that under just such circumstances a corporation authorized to occupy a street or a municipality may be compelled to change its grade and location and the manner of its use, if necessary to meet the new conditions and requirements of the locality.

We think the order appealed from is right, and that it should be affirmed, with costs.

Order affirmed, with costs. All concur.

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## In re BAILEY.

(Supreme Court, Appellate Division, Fourth Department. January 10, 1906.)

1. WITNESSES—RIGHT TO CONTRADICT ONE'S OWN WITNESS.
   Though a party may not impeach his own witness, he is not precluded from contradicting the witness by other witnesses.
   [Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 1268–1270.]

2. EVIDENCE—CREDIBILITY OF WITNESSES.
   Where the only person who could directly dispute the testimony of a witness is dead, close scrutiny should be given to it, and the question of improbability should be taken into consideration in determining its credibility.

3. GIFTS—CAUSA MORTIS—EVIDENCE—SUFFICIENCY.
   Evidence on the issue whether a decedent made a gift causa mortis examined, and *held*, that the testimony of a witness testifying to facts showing a gift was not sufficiently reliable to justify the finding that decedent made a gift.

4. SAME—DEGREE OF PROOF.
   A donee under a gift causa mortis must furnish clear and convincing proof of the gift, and where, on the whole case, the matter is left in doubt, the claim of the donee fails.
   [Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Gifts, §§ 152, 154, 155.]

Appeal from Surrogate's Court, Orleans County.

In the matter of the final settlement of the accounts of Sarah M. Bailey, as administratrix of the estate of Octavia R. Warner, deceased. From a judgment in favor of James G. Warner and others, seeking to surcharge the accounts, the administratrix appeals. Affirmed.

The opinion of Surrogate Simonds is as follows:

Octavia Warner died in the town of Shelby, April 2, 1902, leaving her surviving James G. Warner of Shelby, a brother; Francis E. Warner, a brother living in the West; Antoinette Howland, a sister living in Alabama, Genesee county; a sister, Mrs. Parker, who subsequently died, leaving two sons who are contestants herein; William Warner, a brother also residing in the West;

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and infant children of George S. Warner, a brother; besides Sarah M. Bailey, her sister. Letters of administration were issued to Sarah M. Bailey December 12, 1902, and on April 3, 1903, an inventory was filed by the administratrix, showing an estate consisting mainly of wearing apparel of the value of $34.15, and this sum is accounted for in this settlement proceeding. The contestants seek to surcharge the accounts of the administratrix to the extent of three notes, which were owned by Octavia Warner in her lifetime, one for $1,600, made by George A. Newell, and two others by a Mr. and Mrs. Boots, for $150—and about $92 in money. It appears that the cause of death of the decedent was pneumonia, and that she was dangerously ill with it for several days before her death, and that at the time of her death she was 75 years of age; that for the last five years of her life she had been living with her brother, James G. Warner, on a farm in the town of Shelby, and that his family consisted of himself and his 12-year old son; that for several years previous to her going to live at the home of her brother she had lived in the family of George A. Newell at Medina, N. Y., where she had accumulated some money, for which Mr. Newell had given her a note for $1,600. She had also acquired the Boots notes and some money, and it is these notes and the money which contestants ask should be brought in and accounted for by the administratrix as part of her estate. Octavia Warner was taken ill on Thursday, and on the following day Sarah M. Bailey, her sister, went to the home of James G. Warner to care for her. She died on the Wednesday following. It was claimed by the administratrix that on the Monday preceding the death of Octavia Warner a gift of the notes and money was made by the decedent to her.

The contestants to prove the existence of the property called for a witness, Nellie M. Bailey, a daughter of the alleged donee, who also testified to a transaction and a conversation between Octavia Warner and Sarah M. Bailey, the purport of which would be to establish a gift of these notes and the money by Octavia Warner to Sarah M. Bailey, and made in apprehension of death. Considerable latitude was granted the contestants in the examination of this witness, as it was stated to the court by them that she was an adverse witness The witness undertook several different times to accurately relate what did occur on this occasion of the alleged gift of this property, and in response to requests of counsel of both sides she was permitted to repeat what was said and done on that occasion five or six different times. There was some variation of the words claimed to have been used by the decedent on this occasion in each recurring repetition of the alleged transaction, the substance of which is detailed by the witness finally in these words: "She says, 'Sarah, my pocketbook is in my room between the trunk and the wall, did up in a cloth, will you fetch it to me.' Mother left the room, came back, auntie raised up in bed, mother handed her the pocketbook, she took it, opened it, raised up a roll of bills and a paper, and says: 'My money and notes are in here. I want you to give me a good, decent burial, pay my funeral expenses and doctor bill, get me a good, decent gravestone, and the rest I want you to have and keep it. Keep it where no one else will get it. And then she gave some little details about her burial clothes." The counsel for contestants asked witness how many times she had repeated what Octavia said to her mother before she came on the witness stand, and her answer was, "I do not remember." But she afterwards testified that she had tried to repeat it over so that she would be able to tell it on the witness stand. She also said that she would swear that she had repeated the words just as near as she could remember them. Later in this trial witness testified to going to see George Newell two or three times with her mother, to see if there was a will which had been left by Octavia in his possession, and that she and her mother hunted to see if they could find a will; and when interrogated by counsel as to how long after the death of Octavia it was that she and her mother went to see George Newell, she testified that she could not remember, and, although interrogated regarding it very closely by the counsel, she exhibited a remarkable frailty of memory. The witness also stated that the next day after the alleged transaction of the gift, being the day before Octavia's death, she and her mother opened the pocketbook, counted the money, and read over the notes.

It appears that the family relation existing between the decedent and her brothers and sisters was friendly and cordial, and that there had never been

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any trouble between them; that on this Monday, the occasion of this alleged gift, James G. Warner and his son were about the house, presumably in the kitchen; that a day or two before the death of decedent a letter was written to the sister Antoinette, informing her of Octavia's illness, but which did not reach her until after the death of Octavia. The next day after the death of Octavia this sister went to the home of James G. Warner, and there had a talk with Sarah M. Bailey about decedent's property, which witness details, when asked to relate as near as possible what was said by Mrs. Bailey to her on that occasion concerning this matter, as follows: "She said that Octavia handed her her pocketbook just before she died, and I asked her what was in the pocketbook. She says: 'I do not know. I felt so bad I have never opened it.'" The Sunday following the witness relates that she asked Sarah if she cared if she saw what was in her (Octavia's) purse; and Sarah said she had sent it home by her husband, and "I says: 'If Octavia made a will, it will have to go the way she wills it. If not, it will have to be divided.' She says: 'I will go to see George Newell, to see if there is a will.' She asked me if Octavia had ever talked her business over with me, and I said, 'No,' and then I asked her if she had with her, and she said she never mentioned her business to her." Subsequently, and on the 7th day of April following this conversation, a letter was written by Florence Bailey, another daughter of the alleged donee, and addresed to the sister Antoinette. This letter was dictated by Sarah M. Bailey, and in it she said: "Sister Nett: Have been to see George Newell today. Thought if Tay had left a will he would be the most apt to know it. He said there is no will that he knows of. Her purse contained a note against him for $1,600, and notes to the amount of $150, given by Mr. and Mrs. Boots, and $92.10 in money. Yours in haste, Sarah." It appears that "Tay" was a sort of a nickname for Octavia. It further appears that not until several days after the death of Octavia, and not until considerable search and investigation had been made to discover if a will had been left by this decedent, was there any claim made on the part of the alleged donee, or by Nellie M. Bailey, to any of the other next of kin of decedent, as to anything concerning the transaction of the gift alleged to have been made on the Monday preceding the death of Octavia.

While fragmentary evidence has been given on the trial of the case, affording to a certain extent side lights on the situation, yet the foregoing facts are in substance all that appears on the trial; and it is claimed by the contestants that the status of the matter is such that the administratrix should be required to bring this property into this court as a part of the estate, and have it distributed according to law. The administratrix, on the other hand, contends that the testimony of Nellie M. Bailey establishes a good gift causa mortis, and that she as the donee of Octavia Warner is the absolute owner of those notes and the money, and that they are no part of the estate of Octavia Warner, deceased. If it be true, and be accepted as a fact, that the transaction between Octavia Warner and Sarah M. Bailey occurred as detailed by Nellie M. Bailey, the daughter of the alleged donee, then those notes and the money are the property of Sarah M. Bailey and are no part of the estate of Octavia Warner, deceased. The alleged donee contends that the testimony of Nellie M. Bailey is uncontradicted and uncontradictable, and that, inasmuch as the contestants call her as a witness, they vouch for her credibility and are bound by her testimony. There is little doubt as to the rule of law that a party calling a witness may not impeach or assail him; that he vouches for his credibility. Pollock v. Pollock, 71 N. Y. 137; Hankinson v. Vantine, 152 N. Y. 20–27, 46 N. E. 292; Fall Brook Coal Co. v. Hewson, 158 N. Y. 152, 52 N. E. 1905, 43 L. R. A. 676, 70 Am. St. Rep. 466. But the party calling a witness is not precluded from proving facts and circumstances that dispute his witness and show that he was mistaken. Fordham v. Smith, 46 N. Y. 684; Hankinson v. Vantine, 152 N. Y. 27, 46 N. E. 292. And this right of a party to contradict his own witness, by calling other witnesses to prove a fact material to the issue to be otherwise than as sworn to by him, exists even when the necessary effect is to impeach him. Becker v. Koch, 104 N. Y. 403, 10 N. E. 701, 58 Am. Rep. 515. And it is the right of the court to take into consideration all the facts and circumstances in the case, to pass upon the credibility of the witness, to believe a portion of the testimony, or to dis-

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believe it, just as in its judgment, intelligently and honestly exercised, it might determine; but I do not wish by this to be understood as saying that, when there are no facts or circumstances that in any wise contradict the testimony of such a witness, a court may entirely disregard his testimony, but, when the only person who could directly dispute it is dead, close scrutiny should be given to it, and the question of improbability should be taken into consideration. Hughes v. Davenport (Sup.) 37 N. Y. Supp. 243.

Is the testimony of Nellie M. Bailey uncontradicted, and is it uncontradictable? When Sarah M. Bailey, the alleged donee, in conversation with Mrs. Howland the next day after the death of Octavia, said that Octavia handed her her pocketbook just before she died, but that she did not know what was in it, that she felt so bad that she had never opened it, and on the Sunday following she said that Octavia had never mentioned her business to her, and when in that conversation she in effect assented to the declaration of Mrs. Howland that "if Octavia made a will, it [meaning her property] will have to go the way she wills it; if not, it will have to be divided"—and Mrs. Bailey replied, "I will go to see George Newell, and see if there is a will," and then she and the daughter Nellie both began a search for a will, and after they had been to see George Newell to learn if he knew of the existence of a will made by Octavia, she caused that letter to be written by her daughter to Mrs. Howland, and made no claim of gift or of ownership to this property, leads to a suspicion, at least, that the transaction as detailed by Nellie M. Bailey could not have occurred. Mrs. Bailey was present in court and heard Mrs. Howland testify, and she does not go upon the witness stand to deny that the conversation between her and Mrs. Howland took place as Mrs. Howland testifies. With this proof of the declarations, admissions, and actions of Sarah M. Bailey immediately following the death of Octavia Warner, and before any claim of ownership was made to this property, it is substantially a contradiction of the testimony of Nellie M. Bailey, and the evidence of a gift causa mortis in this case is not so clear, so strong, and so convincing as the law contemplates and requires in sustaining an alleged gift made in apprehension of death, as claimed in this matter.

We may well inquire into the probabilities or likelihood of Octavia making a gift of substantially her entire estate to one sister, when she for more than five years had lived in the home of her brother, James G. Warner, and when the relations between them and between decedent and the others of her brothers and sisters were friendly and cordial. The testimony of Nellie M. Bailey, upon which alone the alleged donee undertakes to establish a valid gift causa mortis, if not contradicted by the declarations and the actions of the alleged donee herself, might be sufficient to sustain such a gift; but, with this testimony of the declarations and admissions of the alleged donee in the case undisputed and entitled to be taken as true, I cannot help being impressed with the belief that Nellie M. Bailey is mistaken in many of the details of her testimony. This may be accounted for to some extent from the fact that she appeared to be of highly nervous temperament, her recollection of recent occurrences not clear and strong, she had repeated over the story that she told upon the witness stand many times before, and possibly, under the strain of attempting to remember what did occur and in repeating it over as she testified she had done, it may have caused her mind to be impressed with the belief of the story as she told it, when the facts of the occurrence of the transmission of the pocketbook from Octavia Warner to Sarah M. Bailey, from the admissions and declarations of Sarah M. Bailey and the surrounding circumstances, must have been different.

I have viewed the testimony in this matter from all standpoints. I have taken into consideration that Nellie M. Bailey and Sarah M. Bailey, mother and daughter, were in that room with Octavia; that Octavia did in fact hand Mrs. Bailey that pocketbook in which were those notes and the money, substantially all her property; and it was possible that Octavia spoke concerning it as Nellie M. Bailey states that she did, which would make a good gift causa mortis. But when I consider the fact that Nellie testified that the pocketbook was handed over two days before Octavia died, that she and her mother counted over the money and read over the notes the day before Octavia died, and then the next day after Octavia's death Mrs. Bailey declares to Mrs.

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Howland that Octavia handed her her pocketbook just before she died, and the following Sunday she stated she did not know what was in the pocketbook and that she had sent it home by her husband, and she assented to the proposition of Mrs. Howland that "if Octavia has made a will, the property would have to go as Octavia wills it; if not, then it would have to be divided"—and stated to Mrs. Howland that she would go and see George Newell "to see if there is a will," and that Octavia had never mentioned her business to her, and that she did go with her daughter Nellie to see George Newell to learn if there was a will, and after learning the fact that there was probably no will she wrote to Mrs. Howland the result of her search for a will, and then for the first time stated to her what the pocketbook contained, and made no pretense of ownership of it, all the facts and circumstances, the actions of Mrs. Bailey and her daughter subsequent to Octavia's death, and the improbability that Octavia, who had lived the last five years of her life in her brother's family, made such a gift, and that feeling between them and between the various members of the relationship were cordial and friendly, lead me to be unconvinced that a gift of all this property was in fact made and intended. I understand the rule of law to be that in a case of this character it is the duty of the claimant of the alleged gift to furnish the most clear and convincing proof of it, and that, when upon the whole case the matter is left in doubt, the claim of the alleged donee must fail. Doty v. Willson, 47 N. Y. 580; Matter of Rogers, 10 App. Div. 593–595, 42 N. Y. Supp. 133.

With this view of the facts, and understanding and application of the rules of law, I must conclude that these notes and the money were and are a part of Octavia Warner's estate, and must be brought in and accounted for as such by the administratrix.

Argued before McLENNAN, P. J., and SPRING, WILLIAMS, HISCOCK, and NASH, JJ.

Safford E. North, for appellant.
Filkin & Coe, for respondent.

PER CURIAM. Decree of Surrogate's Court affirmed, with costs, on the opinion of Surrogate Simonds.

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## ROWE v. WHITE,

(Supreme Court, Appellate Division, Fourth Department. May 2, 1906.)

1. CORPORATIONS—STOCK—DIVIDENDS—SELLER AND BUYER OF STOCK.

Where the owner of corporate stock gave an option agreeing to sell it to defendant or to a corporation he might indicate, and at defendant's request delivered it to a corporation, a dividend declared after the option was given, but before the sale was consummated, belongs to the original owner, and not to defendant, notwithstanding a transfer of the stock by the corporation to defendant by indorsement dated back, at defendant's direction, to a day prior to the declaration of the dividend.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, § 569.]

2. SAME.

Where the owner of corporate stock gave an option by which he agreed to sell it within six months at defendant's request to defendant or to a corporation he might name, and the defendant made a written request that it be sold to a corporation, but with the understanding that he should not assume any responsibility for the purchase price till certain conditions were complied with, and this request was accompanied by a request for a commision, it was not in pursuance of the option, so as to deprive the seller of his right to a dividend declared in the meantime by relating the sale back to the date of the option.

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Appeal from Trial Term, Wyoming County.

Action by Elmer E. Rowe against Archibald S. White. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Argued before McLENNAN, P. J., and SPRING, WILLIAMS, NASH, and KRUSE, JJ.

R. Floyd Clarke, for appellant.

Frank W. Brown, for respondent.

NASH, J. The plaintiff brings the action as the assignee of Edward D. Gardiner to recover money had and received by the defendant as a dividend upon 120 shares of stock of the Empire Dairy Salt Company, which it is claimed by the plaintiff was owned by his assignor at the time the dividend was declared. The defendant claims that he was at that time the owner of the stock, having purchased it of Gardiner. The facts are undisputed. In the early part of the year 1899 the defendant was engaged in the purchase of the stock and properties of certain salt companies, for the purpose of forming a corporation embracing the properties of the companies entering into the combination, to be known as the National Salt Company. In furtherance of that purpose, the plaintiff in the month of February, 1899, entered into a contract in writing with Gardiner, who was the owner of 120 shares of stock of the Empire Dairy Salt Company, in the form of an option, by the terms of which, for the consideration therein expressed, Gardiner agreed as follows:

"To sell, transfer, and convey, at any time within six months from the date hereof, when said party of the second part shall in writing request the party of the first part to do so, to said party of the second part, or to such corporation as said party of the second part shall indicate in said request, which corporation is hereinafter referred to as 'said corporation,' one hundred and twenty shares of the capital stock of the Empire Dairy Salt Company."

The "option" further provided that, in the event that the party of the second part should make the request in writing, as provided, the consideration to be received by the party of the first part for such sale and transfer of said stock should be $6,000 in cash, $6,000 in 7 per cent. preferred stock, and $6,000 in common stock of "said corporation." As a further consideration for such sale, it was provided that:

"At the time of said transfer, if made, there shall be an inventory made of the merchandise and materials on hand at the works of the Empire Dairy Salt Company, and the value thereof determined in the following manner: The salt on hand in warehouse to be computed at the rate of one dollar and forty cents per ton of two thousand pounds, and all coal, cooperage stock, bag stock, and supplies and materials on hand at cost, and all tools on hand at fifty per cent. of their cost. Upon determination of such value, the party of the first part shall receive an amount of seven per cent. preferred stock of said corporation, at par, equal to twelve per cent. of the value of such merchandise and materials on hand. (3) The above specified amount of preferred and common stock and cash shall be delivered to and received by the party of the first part, at the time when the transfer and conveyance above mentioned is made, as full payment and satisfaction for the said one hundred and twenty shares of the capital stock of the Empire Dairy Salt Company, and for his interest in the business, property, and assets of the said Empire Dairy Salt Company. (4) It is further understood and agreed that if such sale, transfer, and conveyance of property is made, then the party of the first part shall, in view of such sale, agree not to engage for a period of five years from the

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first day of January, 1899, in the business of manufacturing or selling salt within the states of New York, Ohio and Michigan. (5) * * * It is understood and agreed, however, that if and when such request is made this agreement is thenceforth to be regarded as a contract of sale of the stock described."

March 28, 1899, the defendant sent the following telegram from New York to Gardiner at Toledo, Ohio:

"Ready close deal. Manufacturers propose pay me commission for work done year ago and now. Is it agreeable to you to pay me 10% on what you receive?"

The telegram was followed by a letter from the defendant, dated New York, March 31, 1899, addressed Dr. E. D. Gardiner, Toledo, Ohio, as follows:

"Dear Doc: I inclose you herewith formal notice of acceptance. If you do not wish to come to New York, kindly send me your certificates of stock indorsed in blank, and I will put the trade through for you, and send you the consideration agreed upon. I have no reply from you to my telegram about commission. I did not undertake this work with a view of getting any compensation, but, inasmuch as the manufacturers suggested it, it seemed but proper that I should present the subject to you. I have decided to take 5% instead of 10%, as mentioned in my telegram. If this does not meet with your approval, I should be glad to know it.

"Yours truly, A. S. White, Prest."

The papers inclosed were a printed unsigned request, as follows:

"To E. D. Gardiner, Esq.—Dear Sir: Pursuant to the terms of the certain contract between you and the undersigned, dated February 16, 1899, you are hereby requested to sell, transfer, and convey the property stated, covered by said agreement, to the National Salt Company, incorporated under the laws of the state of New Jersey, and to make delivery of the certificates therefor at the office of Davies, Stone & Auerbach, 32 Nassau street, New York City, on Monday, April 3, 1899, at 10:30 a. m. It is also understood that by making this request the undersigned does not assume any responsibility for the payment of the purchase price, to be paid pursuant to the terms of said agreement, unless and until said good will, plant, patents, trade-marks, and visible and tangible real and personal property are so sold, conveyed, transferred, and assigned, and the conveyance, transfer, and assignment thereof accepted by said National Salt Company, and such responsibility is limited only to the payment of the purchase price specified in said agreement to be paid when and as I receive from said National Salt Company the consideration to be paid by it. Also, that satisfactory service contracts relating to the United States east of the meridian passing through Denver, Colorado, will be entered into by you.

"New York, March 28th, 1899.

"Yours, very truly."

The other inclosures were an unsigned printed request for information as to the manner in which Gardiner could receive the consideration, and a blank form of contract, to be entered into by Gardiner with the National Salt Company, the execution of which was to be part of the consideration of the sale of Gardiner's stock to that company.

Upon receipt of defendant's telegram, letter, and papers, Gardiner sent his certificates of stock, as stated, in a letter to the defendant, under date of April 2, 1899, in which Gardiner stated:

"Your telegram regarding 10% commission was awaiting my return from the east. I am now in receipt of a formal notice of acceptance of option, with direction to deliver certificates to you. I send them inclosed—what I

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have in Toledo. The balance I have telegraphed Mr. F. J. Humphrey, cashier of the Wyoming County National Bank, to send to Davis, Stone and Auerbach."

—With directions as to the payment of the consideration and in regard to commissions. After stating his reasons therefor, he said:

"I want to do the right thing, and it is needless to say what I thought of 10%, and I don't want to write you what I think of 5%, but I will write you this, that after the deal is closed I will send you $250."

Under date of April 3, 1899, the defendant wrote to Gardiner, acknowledging the receipt of his letter of April 2d and inclosures, stating that he would see that the consideration for the stock was sent as directed, and in regard to commissions said: "I presume whatever action the salt manufacturers take will appeal to you as fair." April 11, 1899, the defendant telegraphed Gardiner at Toledo, as follows:

"Please telegraph S. B. Whitlock, Secretary, care me, New York, that you waive notice of directors' meeting, Empire. This is necessary to conclude deal. A. S. White."

To this message Gardiner telegraphed the following reply:

"To Mr. S. B. Whitlock: Use your judgment for my interest in Empire. I waive notice of directors' meeting if you think best. E. D. Gardner."

The directors of the Empire Company at this time were five—Messrs Beardslee, Whitlock, Barnum, Bristol, and Gardiner. On the 13th day of April, 1899, Beardslee, Whitlock, Bristol, and the defendant met at the defendant's office in New York, and proceeded to hold a director's meeting of the Empire Company. At the meeting Beardslee presented the resignation of Barnum as a director, which was accepted, and White was elected in his place; the minutes of the meeting reciting, "he holding five shares of stock, certificate No. 26." White then moved that a dividend of 31½ per cent. be declared, which was carried. The meeting then adjourned.

The defendant's contention is that the special contract of sale, provided the option was closed and consummated within the time allowed, effected an equitable assignment by Gardiner to White of Gardiner's interest in the dividend in question, upon the principle that an agreement to sell stock at a specified price, deliverable and payable in futuro, conveys all dividends between the date of the agreement and date of closing to the purchaser. Currie v. White, 45 N. Y. 822. It may be so assumed, provided White had exercised the option as purchaser. If White had become the owner of the stock by the exercise in his own behalf of the right to purchase, his title would have related back to the date of the option contract. The contract was in the alternative. Gardiner agreed, if the conditions were complied with, to sell upon request to White, or to such corporation as he should indicate. The conditions were that the consideration expressed in the agreement should be delivered to and received by Gardiner at the time when the sale, transfer, and conveyance should be made to the purchaser. The request, unsigned, was not to sell to White, and not upon the terms and conditions of the option. It was expressly stated that White in making the request did not assume any responsibility for the payment of the purchase price until certain conditions therein stated were complied with, not

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by Gardiner, but conditions which impliedly were imposed by some other or different agreement than that made by Gardiner and White. Indeed, the request cannot be regarded as made pursuant to their contract, the terms of which contemplated that the payment and delivery were to be simultaneous. Kelley v. Upton, 5 Duer. 336. The request was to sell, transfer, and convey the property covered by the agreement to the National Salt Company, and to make delivery of the certificates therefor on April 3, 1899, at the place named; the purchase price not to be paid until "said good will, plant," etc., "are so sold, conveyed, transferred, and assigned, and the conveyance, transfer, and assignment thereof accepted by said National Salt Company."

It is apparent that this unsigned printed paper sent by White to Gardiner as a formal request was a form of request used for the purpose of the transfer of properties of the several companies entering into the combination by which the National Salt Company was formed. It was not in any view of it a request made in pursuance of the agreement made by White with Gardiner, as appears from the context and by the conduct of White in regard to it. Throughout the transaction White acted as organizer and as an intermediary, without any purpose or intention of acquiring title himself to the property purchased or to be purchased of Gardiner. He acted merely in the capacity of agent. His telegram, which preceded the sending of the papers to Gardiner, stated that the manufacturers proposed to pay him a commission for work he had done and was doing, i. e., work of forming the combination, for which he suggested a commission to be paid on what was received by Gardiner for his property. His letter to Gardiner accompanying the papers was that of an intermediary. He characterized the blank request as a formal notice of acceptance, suggested to Gardiner to send certificates of stock indorsed in blank, stating that he would put the trade through; that he did not undertake the work with a view of getting any commission, but, inasmuch as the manufacturers suggested it, he had decided to take 5 per cent. instead of 10 per cent., as mentioned in his telegram. Commission for what? Certainly not upon the purchase price of property bought by him of Gardiner. If the trade had been put through on the 3d of April, or immediately upon receipt of the certificates, without anything further being done with them, the National Salt Company would have been entitled to the interest in the Empire Company represented by the certificates. But they were first used by White for the purpose of declaring a dividend upon the stock at a time when the certificates were the property of Gardiner. Upon the pretense that it was necessary to conclude the deal, he telegraphed Gardiner to waive notice of a directors' meeting of the Empire Company, which Gardiner did. The meeting was held, at which White procured himself to be elected a director, and then with the three other directors present declared the dividened of 31½ per cent. It was after this that the certificates indorsed in blank were delivered to the National Salt Company, and the consideration therefor paid by it, whereby the certificates became the property of that company. It was after the sale to the National Salt Company and the certificates had become its property that the blank indorsement was filled in by the direction of White with his name, and the transfers dated back to a day prior to

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the directors' meeting, at which the dividend was declared. By what authority does not appear. If White acquired title to the certificates by that transaction, it was after the sale to the National Salt Company, and too late to entitle him to the dividend declared during the ownership of Gardiner.

The judgment should be affirmed.

Judgment and order affirmed, with costs. All concur.

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## TRUST CO. OF AMERICA v. NASH.

(Supreme Court, Appellate Term. May 2, 1906.)

CONTRACTS—HUSBAND AND WIFE—SEPARATION AGREEMENT—VALIDITY.

A separation agreement required the husband to pay the wife $50 per month so long as she did not remarry, and provided that, in case the wife should obtain an absolute divorce, the provisions should continue, notwithstanding any alimony awarded to the wife, provided that the decree of divorce should provide for no greater alimony than $150 per month, terminable upon the happenings of the same events. *Held*, that the separation agreement was not invalid on the theory that it offered the wife a premium to procure a divorce, since, aside from the agreement, the wife might have obtained a larger sum than $150 a month alimony, and might have continued to receive it notwithstanding a remarriage.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, § 517.]

Appeal from Municipal Court, Borough of Manhattan, First District.

Action by the Trust Company of America, as guardian of the estate of Nadine Nash, against Henry P. Nash. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Argued before SCOTT, P. J., and TRUAX and BISCHOFF, JJ.

Clarence De Witt Rogers, for appellant.

Hurry & Dutton (John A. Dutton, of counsel), for respondent.

SCOTT, P. J. In February, 1903, the defendant and Clara Louise Nash, his wife, had separated by mutual agreement, and were living apart. At that time they entered into an agreement whereby, through the intervention of a trustee, the defendant undertook to make provision for his said wife and their infant child, Nadine Nash. By this agreement the defendant agreed to pay to the trustee, for the benefit of the wife and the infant daughter, the sum of $100 per month. It was stipulated that, if the wife should marry again, the monthly payment should be reduced to $50 a month, which was to be devoted exclusively to the benefit of the child, the payments to continue during her minority. If the child died or attained her majority, and the wife had not remarried, the payments were likewise to be reduced to $50 per month, to be applied to the benefit of the wife. It was further provided that if in the future the wife should apply for and obtain a decree of absolute divorce from the defendant, then the latter would execute a bond obligating himself to pay directly to said wife the sums provided to be paid to the trustee, and upon the same terms and conditions. Certain of the contingencies provided for in the agreement happened. The defendant's wife did sue him for an absolute divorce, which she obtained, and de-

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fendant executed the bond which he agreed to execute, which was assigned by the wife to the plaintiff herein as general guardian of the infant Nadine Nash, and to enforce which this action is brought. Since her divorce the wife has remarried, and the defendant is consequently released from any obligation to her arising from the agreement or the bond; the only remaining beneficiary being the aforesaid infant. The defense to the action is based upon the supposed invalidity of the original agreement of February, 1903, which, as is quite rightly urged, constitutes the only basis and consideration for the bond attempted to be enforced by this action. This supposed invalidity is found in a clause which, as the appellant insists, offers a premium to the wife to procure a divorce from her husband. The clause for which this effect is claimed reads as follows:

"And it is further agreed that, in the event that the party of the second part [Clara Louise R. Nash] shall obtain an absolute divorce from the party of the first part [the defendant herein], the provisions herein shall continue and the payments herein provided for to be made by the party of the first part shall continue to be paid, notwithstanding any alimony that may be awarded to the party of the second part in any decree of absolute divorce, it being expressly understood that the provisions herein contained for such payments shall be in addition to any payment provided for in such decree; provided, however, that said decree of divorce shall provide for no greater sum of alimony than $150 per month, payable in the same manner, at the same times, and for the same periods as the sum of $100 per month above agreed to be paid, and for the same purposes, and terminable in the same proportions, upon the happening of the same events; and provided, further, that no application shall be made by the party of the second part for alimony or counsel fee pendente lite."

If this agreement could fairly and reasonably be construed as offering an inducement and advantage to the wife if she would procure a divorce from her husband, it would clearly be contrary to public policy and void. France v. France, 79 App. Div. 291, 79 N. Y. Supp. 579; Train v. Davidson, 20 App. Div. 577, 47 N. Y. Supp. 289. In my opinion, however, it cannot be so construed. It is true that the agreement throughout contains provisions from which it may be inferred that the parties contemplated the possibility of an action for divorce in which the wife would be plaintiff, and provision was made for certain contingencies which might result from such an action if successful. This, however, was not in itself unlawful, so long as no premium was put by the agreement upon the procuring of such a divorce. It was not a premium to provide that the payments contemplated by the agreement should continue to be made, notwithstanding any alimony that might be awarded, for that provision affected not the alimony, but the sums provided for by the agreement itself, and only expressed what the law itself would have decreed, to wit, that an award of alimony would not supersede the separation agreement, so far as concerns the sums agreed to be paid by that agreement. Chamberlain v. Cuming, 99 App. Div. 563, 91 N. Y. Supp. 105; Hughes v. Cuming, 36 App. Div. 302, 55 N. Y. Supp. 256. Otherwise the clause in question is purely restrictive, and confines the wife to less than she might have obtained in her divorce decree if the agreement had been silent upon the subject. It does not provide, as the appellant argues more ingeniously than ingenuously, that she shall be awarded alimony at the rate

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of $150 per month, but distinctly provides that she shall not receive more than that sum, which is a very different matter, and left it quite open to the defendant to persuade the court that his wife should be awarded less than the sum named. We know nothing, of course, as to the defendant's means, but it is not impossible, or even improbable, that without this restrictive clause the court might have awarded much greater alimony than the wife could claim under her agreement. So, also, in providing that whatever alimony was awarded should be terminable in the same proportion upon the happening of the same events as was provided respecting the money to be paid under the separation agreement, the wife was required to stipulate that, as concerned alimony which might be awarded, her beneficial interest therein should cease upon her remarriage; a provision which is not usually inserted in decrees of divorce. In short, under the clause now claimed to invalidate the agreement, the wife could in no event ask for more than $150 per month alimony, and might receive any less sum that the court thought proper to award; no restriction being placed upon any efforts the husband chose to make in that direction, and of whatever alimony was awarded the wife could enjoy the benefit only while she remained unmarried, while if the separation agreement had been silent as to the amount of alimony to be awarded the wife might have obtained a much larger sum than $150 per month, and might have continued to receive it notwithstanding her remarriage. It seems to me that in every aspect the clause can be considered only as restrictive upon the wife, limiting her in the event of a divorce to less than she might otherwise have received, and imposing no restrictions upon any efforts the husband might see fit to make to lessen the alimony. While we may not and will not lend our aid to the enforcement of contracts holding out inducements to the seeking of a divorce, we are not called upon to give a forced and strained construction to a contract which on its face and according to its plain language offers no such inducements. The separation agreement is not a contract so framed as to take effect only on the granting of a divorce, as was the case in Speck v. Dausman, 7 Mo. App. 165, much relied upon by the appellant. Here the separation agreement became effective upon its execution without regard to any divorce, and neither gained nor lost anything by reason of the subsequent divorce. It cannot be said that reference to a possible future divorce of itself invalidated the agreement, for, if sufficient cause existed or came into existence, the wife was entitled by law to sue for and obtain a divorce, and the agreement in no wise affected that right. For the rest, the provisions of the agreement based upon the possible contingency of a divorce were obviously inserted for the protection of the husband, and not for the advantage of the wife. She restricted herself as to what she would ask by way of alimony; no restriction was placed upon him as to resisting her application, even if confined to the maximum amount mentioned in the agreement.

In my opinion, the judgment is right, and should be affirmed, with costs.

BISCHOFF, J., concurs; TRUAX, J., taking no part.

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## CITY OF BUFFALO v. LINSMAN.

(Supreme Court, Appellate Division, Fourth Department. May 2, 1906.)

MUNICIPAL CORPORATIONS—POLICE REGULATIONS—PEDDLERS' LICENSES—ORDINANCES—VALIDITY.

Though Buffalo City Charter, tit. 2, § 17, Laws 1891, p. 187, c. 105, expressly empowers the council to enact ordinances to license and regulate peddlers, and such other ordinances as shall be deemed expedient for the good government of the city, a provision in an ordinance licensing peddlers of garden produce, which prohibits the peddling of such produce on the streets between 5 o'clock in the morning and 1 o'clock in the afternoon, is invalid; it not being a proper regulation, nor on any way necessary for the good government of the city.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1356.]

McLennan, P. J., dissenting.

Appeal from Special Term, Erie County.

John Linsman was convicted of violating an ordinance of the city of Buffalo, and from an order made by the Special Term of the Supreme Court, affirming the conviction, he appeals. Reversed, and defendant discharged.

Argued before McLENNAN, P. J., and SPRING, WILLIAMS, NASH, and KRUSE, JJ.

John T. Ryan, for appellant.

Louis E. Desbecker and William B. Frye, for respondent.

WILLIAMS, J. The order of the Special Term and the judgment of the Municipal Court should be reversed, with costs. The action was commenced by the arrest of the defendant upon a charge of violating section 1, c. 17, of the ordinances. The Municipal Court, after a trial, convicted defendant, and fined him $5 and costs. There was a judgment in Municipal Court, and on appeal an order of affirmance by the Special Term of the Supreme Court but no judgment entered on such order. This appeal is from the order, and not from any judgment.

The ordinance in question provides, in brief, so far as it affects the question here involved, that no person shall offer for sale upon the streets any merchandise without first obtaining a license from the mayor, and no person shall hawk, peddle, or vend any fruits or farm or garden produce on the streets between 5 o'clock in the morning and 1 o'clock in the afternoon. The defendant when arrested was peddling vegetables on the streets, from a wagon, about 11 o'clock in the forenoon. He had a license from the county clerk, but none from the mayor of the city. He was a war veteran, and his license was issued under chapter 371, p. 315, Laws 1896, as amended by chapter 659, p. 1469, Laws 1899, and chapter 556, p. 1350, Laws 1904. By the terms of that act, the defendant under his license had the right to hawk, peddle, vend, and sell his goods, wares, and merchandise in this state. This act was apparently passed to relieve war veterans from taking the license provided for by sections 60, etc., of the domestic commerce law of the state (chapter 376, p. 337, Laws 1896). This latter license, however, did not relieve a person from the effect of any municipal regulations as to li-



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cense, but was in addition to any such regulations (section 64, p. 339); and the same would seem to be true under the veteran act (City of Gloversville v. Enos, 35 Misc. Rep. 724, 72 N. Y. Supp. 398, reversed on other grounds, 70 App. Div. 326, 75 N. Y. Supp. 245). There seems to be no controversy as to this proposition on the part of appellant here. No exemption from the provisions of the ordinance in question is claimed by reason of the license under the veteran act. Section 17, tit. 2, of the city charter (chapter 105, p. 137, Laws 1891), provides that the common council shall enact ordinances to license and regulate hawkers and peddlers, and such other ordinances as shall be deemed expedient for the good government of the city, not inconsistent with the laws of the state. Under these provisions of the charter, the ordinance in question was enacted. The ordinance was one licensing and regulating hawkers and peddlers, and was apparently deemed expedient for the good government of the city. Express power was therefore given to enact the ordinance, if it was not subject to objection as to its peculiar provision prohibiting hawking and peddling between the hours of the day named—5 a. m. and 1 p. m.

We are unable to see how it was necessary or proper to insert this provision in the ordinance. The design was quite apparent—to benefit grocers and shopkeepers dealing in such articles as the peddlers sold. It was inserted in the ordinance by the procurement and by reason of the importunity of the retail grocers association. It deprived the consumers of the opportunity to purchase their supplies of the peddlers, and compelled them to patronize the grocers and shopkeepers. The prohibited hours covered the time when the supplies for the day would ordinarily be purchased. It was in no sense a proper regulation, and was in no way necessary for the preservation of the public health or the good government of the city. It was an unfair discrimination and in restraint of trade. It in no way tended to protect the public health or public order. Hawking and peddling is recognized as a legitimate business by the Legislature, and is so recognized by the city in its ordinances. This provision does not relate to the character of the licensees, or to the peace and quiet of the city. The portion of the day excluded would be no more disturbed than the later part of the day. It is needless to dilate upon the subject. This provision has no proper place in the ordinances. It was put there for an improper and illegal purpose, not as a regulation for the good government of the city, or to protect the public health or the peace and quiet of the streets, but in the interest of the retail dealers and shopkeepers, improperly discriminating in their favor, and was class legislation and in restraint of trade. The ordinance was therefore invalid, and no conviction could properly be had for the violation thereof.

The judgment was erroneous, and should be reversed and the defendant discharged.

**Order of Special Term and Judgment of Municipal Court reversed, with costs. All concur, except McLENNAN, P. J., who dissents.**

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## MEYER v. PAGE et al.

(Supreme Court, Appellate Division, First Department. April 20, 1906.)

1. ABATEMENT—BANKRUPTCY OF BENEFICIAL PLAINTIFF.

Right to maintain an action by a stockholder for an accounting for the benefit of the corporation is not affected by the corporation becoming bankrupt after commencement of the action; the only effect thereof being that any accounting must be to the trustee in bankruptcy.

2. CORPORATIONS—RIGHT OF ACTION.

J. and T., the members of a firm having credit because of the financial standing of J., formed a corporation, which took over the business of the firm. After the retirement of J. from connection with the corporation, other than that he continued to be a large creditor and stockholder thereof, T. became its president, and unknown to J. raised money for it by discounting the note of the firm, which was afterwards paid by J. On learning of such loan of credit, J. required the corporation to make a payment to him in goods of the corporation, of about the amount of the firm note. Immediately thereafter, the corporation made an assignment. Thereupon T. went to M. and S., who with J. were the large creditors of the corporation, and proposed that such three creditors pay the other creditors, and become the owners of the business in proportion to their claims. M. and S. consented, and executed powers of attorney to J. to arrange the matter as seemed best for their interests. J. had enough goods of the corporation sold to pay the other creditors, took over the balance in satisfaction of the claims of himself, M., and S., and had a new corporation formed, to which such goods were transferred in consideration of its stock and bonds, which he distributed to himself, M., and S., all retaining them. *Held*, that any causes of action because of the payment to J. before the assignment of the old corporation, or because of misrepresentations or concealments to or from M. and S. by J., or by T., as his agent, as to such payment, or as to the amount of J.'s claim, or as to the value of the goods exceeding the claims against the old corporation, or because of an inequitable distribution of the stock and bonds of the new corporation, belonged either to the old corporation or to M. and S. individually, and not to the new corporation.

3. JUDGMENT—INCONSISTENT THEORIES.

A judgment proceeding on the inconsistent theories that one agreed to turn over to a corporation for its stock and bonds all the property that another corporation had, and that he falsely represented that property he was turning over to it in exchange for its stock and bonds was of the par value of such stock and bonds, cannot be sustained.

Houghton, J., dissenting.

Appeal from Special Term, New York County.

Action by Frederich Wilhelm Meyer, suing on his own behalf and on behalf of all other stock and bondholders of the New York China, Glass & Toy Company, in like case against Albion L. Page, ancillary executor of John M. Young, deceased, and others. From the judgment, defendants appeal. Reversed, and new trial ordered.

Appeal by defendants Albion L. Page, as ancillary executor of the estate of John M. Young, deceased, and William R. Baird, individually and as assignee of the J. M. Young Importing Company, James W. Snedden, Thomas Young, and Stephen S. Tallman, from an interlocutory judgment of the Supreme Court, entered pursuant to a decision on the trial of the issues at Special Term, directing that the defendant Page, as ancillary executor, account to the defendant Upson, as trustee in bankruptcy of the New York China, Glass & Toy Company, for the sum of $30,000, received from said importing company, with interest, and render an account of the indebtedness of said importing company to said John M. Young, as therein directed; that all of the appel-

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lants account to said trustee in bankruptcy, as therein prescribed, for the stock and bonds of the New York China, Glass & Toy Company issued to said John M. Young; that the defendant Baird, individually and as assignee, account for moneys retained by him as commissions in excess of commissions on cash received and paid out; that the defendant Page, as such executor, and the defendant Baird, individually and as assignee, account to the trustee in bankruptcy for book accounts of said importing company assigned to the assignee and by him sold to the decedent Young; that Page, as executor, and defendants Young and Baird, account to the trustee for the difference between the value of the assets with which the New York China, Glass & Toy Company began business and $140,000, that being the valuation at which said assets were turned over by the assignee to the decedent Young, and by him to said last-named company, together with interest thereon, and appointing a referee to take and state the several accounts, and directing that on the accounting the burden shall be on the defendants other than the defendant Upson, as trustee, and that the plaintiff and the defendant Upson, as trustee, have final judgment on the coming in of the report of the referee in accordance therewith, and for costs and an additional allowance, to be fixed by the final judgment.

Argued before O'BRIEN, P. J., and INGRAHAM, McLAUGHLIN, LAUGHLIN, and HOUGHTON, JJ.

Alfred B. Cruikshank, for appellants.
Alfred E. Hinrichs, for respondent.

LAUGHLIN, J. The plaintiff brought this action as a stockholder and bondholder of the New York China, Glass & Toy Company, in behalf of himself and all other stockholders and bondholders similarly situated who might come in and share in the expense thereof. After the trial, but before judgment, the defendant John M. Young died, and his ancillary executor was substituted in his place. The New York China, Glass & Toy Company was incorporated on the 1st day of April, 1897. This action was commenced on the 27th day of November, 1899, and thereafter, and in the month of February, 1900, the New York China, Glass & Toy Company was adjudged a bankrupt, and the defendant Upson was appointed trustee in bankruptcy. He was joined as a defendant by the order of the court on the 22d day of March, 1901.

The right to maintain the action was not affected by the bankruptcy of the corporation of which the plaintiff is a stockholder. The only practical effect on this action of the bankruptcy is that the accounting, if any, must be to the trustee in bankruptcy, instead of to the corporation, as originally prayed for in the complaint. The John M. Young Importing Company was a corporation organized under the laws of West Virginia on the 30th day of June, 1891, but its business was conducted at Nos. 37 and 39 Murray street, in the city of New York. The purpose of its organization, evidently, was to succeed to a business established in 1866, and carried on by the copartnership firm of John M. Young & Co., composed of said John M. Young, deceased, and his brother, Thomas Young, the defendant, and they owned most, but not all, of the stock. For brevity the copartnership firm will be referred to as the "firm," the importing company will be referred to as the "old corporation," and the New York China, Glass & Toy Company will be referred to as the "new corporation."

The firm had attained a high standing and excellence of reputation as to business methods and the character of its members and for financial

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credit. It did not dissolve on the organization of the old corporation, but continued in existence and to some extent in business. It had substantial credit, principally owing to the financial responsibility of John M. Young, the senior member, and it loaned its credit freely to the old corporation. After 1894 the firm practically ceased active business, and the old corporation had taken its place in that regard. John M. Young became the president and a director of the old corporation, and so continued until the 1st day of January, 1897, when he was not re-elected a director, and was succeeded as president by his brother, Thomas Young, who was the principal stockholder. John M. Young was then 60 years of age. After he ceased to be president, his only connection with the old corporation was that of a stockholder and creditor. He was in poor health, and went to California about the middle of January, and remained there until the last of February, 1897. The plaintiff had known the firm since 1880 and the old corporation since its existence. He had been engaged in the forwarding and banking business at Bremen, Germany, since 1888. In 1895 he solicited business with the old corporation, and, pursuant to his letter of solicitation, met Thomas Young at Leipzig, and arranged to give the old corporation credit to the extent of 80,000 marks for the payment of purchases in Germany and Austria, by having drafts drawn upon him for the purchase price of goods purchased by it. The old corporation used the whole amount of the credit that year, and settled the indebtedness the next spring. He again gave it credit, which it used, for the same amount in 1896, and it owed him a balance of a little less than $20,000 when it failed and made an assignment to the defendant Baird on the 4th day of March, 1897. The plaintiff never met John M. Young until after the events of which he complains in this action. When John M. Young retired, he was a creditor of the old corporation to the extent of about $67,000, for which he held its demand notes, besides a claim for back salary. It also owed one Schroeder, a foreigner, about $50,000 at the time it failed. At the time of the failure John M. Young, Schroeder, and the plaintiff were the principal creditors. The other obligations of the old corporation aggregated less than $20,000. During the absence of John M. Young, the foreign creditors were pressing their claims, and received payments; the principal payment being made to Schroeder. These payments somewhat embarrassed the old corporation, and Thomas Young, without authority from his brother, issued notes of the firm for about $36,000, which were discounted at a bank or through brokers, and the proceeds were loaned to the old corporation, which then or on the return of John M. Young issued notes to his order, payable on demand, for the amount thus loaned. These notes, issued by Thomas Young in the name of the firm, the proceeds of which were loaned to the old corporation, did not fall due until after the failure, and they were then paid by John M. Young. John M. Young, on returning from California, and learning that his brother had raised money on the firm notes and loaned it to the old corporation, demanded that it be repaid. His demand was not complied with. He was a nonresident, and being advised that for that reason he could not obtain an attachment, and being desirous of forcing prompt repayment of the money, with a view to reducing his credit to the old corpora-

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tion to about the amount as it stood before he went to California, he assigned a demand note or notes, apparently not received for this particular loan, for $27,000, which he held against the old corporation, to one Brown, who brought suit thereon. The old corporation then, with a view to settling the litigation, suggested that John M. Young buy goods of it at cost price and pay cash, which it in turn would pay over to Brown or to him to apply on the indebtedness. He raised what money he could, and induced a friend to do likewise, and they together purchased of the old corporation goods of the value of $30,000 or $31,000 on this basis, paying therefor in cash, and the money was applied on the indebtedness on the 2d and 3d days of March, 1897. The merchandise thus received in part payment of John M. Young's claim against the old corporation was subsequently turned over to the new corporation at the same valuation and 6 per cent. interest on the same. On the 4th of March, as already stated, the old corporation made an assignment, without preferences, to the defendant Baird.

The theories upon which it is sought to maintain this action, as disclosed by the complaint, by the evidence, and by the interlocutory judgment, are conflicting and in some aspects not very clear. It is manifest, however, that the principal complaint is concerning the conduct of John M. Young in forcing the old corporation to make the payment of $30,000 or $31,000 on account of the unauthorized loan made to it in his absence. If there was any irregularity or illegality in that transaction, it is evident that his liability therefor was to the old corporation or its assignee, and not to the new corporation, in behalf of which this action was brought, and yet his ancillary executor has been directed to account herein for the amount of that repayment. Two days after the assignment of the old corporation, Thomas Young sailed for Europe, and had an interview on the 16th of March with the plaintiff, and also about the same time with Schroeder. He informed them of the assignment, but represented that it had been forced by threatened attachment proceedings as the only means of securing equality of distribution among the creditors, but did not say that it was at the instance of his brother, and he also represented that the assets exceeded the liabilities by $43,000. He proposed that the creditors, other than his brother, Schroeder, and the plaintiff, be paid in full, and that these three principal creditors take stock of the old corporation for the amount of their respective claims, and that the outstanding stock be canceled, and the business continued. This proposition was accepted by them, and they executed powers of attorney to John M. Young, authorizing him to represent them in the settlement of the affairs of the company, and "to receive and receipt for the sum due thereon, or to otherwise arrange the matter as may seem to him best for my interests." Certificates of stock in the old corporation, which had already made the assignment, were issued to the plaintiff by Thomas Young, at the time the arrangement was made in Europe, to the amount due him, as then ascertained. It was understood that this arrangement was "tentative." This was treasury stock. It was signed by the treasurer and president, but, so far as appears, without authority of the board of directors. Upon his return Thomas Young delivered the powers of attorney to his brother, as authorized by plaintiff and Schroeder, who

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immediately undertook to represent them, as well as himself. The new corporation was organized under the laws of New York to take over the assets of the old corporation, and it continued the business until it went into bankruptcy. The capital stock of the new corporation was fixed at $100,000, half preferred and half common, and an issue of $40,000 bonds of the new corporation was authorized. The Trial Court found that the assignee fixed the value of the assets of the old corporation, above those necessary to pay the other debts and charges of administration, arbitrarily at $140,000; but the evidence shows that it was fixed at the cost price of the goods according to the tickets thereon, which included the invoice prices plus the duty, freight, and brokerage charges, and 3 per cent. added for breakage. Goods of the old corporation, the price of which was estimated on this basis to be $121,187.-47, and shelving, furniture, and fixtures of the estimated value of $2,-642.53, current accounts of the estimated value of $13,255, fireworks of the estimated value of $115, aggregating $137,200, and $2,800, in cash, making, in all, $140,000, were sold by the assignee on the basis of these figures to John M. Young, who by two bills of sale sold and assigned the same to the new corporation at the same valuation. This exhausted nearly all the assets of the old corporation. The property reserved from this sale will be referred to presently. John M. Young in this transaction was acting for himself, for the plaintiff, and Schroeder, and he executed a receipt to the assignee for himself and as attorney in fact for them for the property thus transferred. In consideration for the transfer of this property and money to the new corporation, John M. Young received for himself, for the plaintiff, and for Schroeder the entire issue of $100,000 capital stock and $40,000 of bonds. He then apportioned this stock and the bonds between himself and them, according to their respective claims against the old corporation as adjusted by him and the assignee. He surrendered the stock of the old corporation to the assignee, transmitted to the plaintiff and to Schroeder, pursuant to an arrangement made with them by his brother, Thomas, on a second trip to Europe, their respective proportions of the stock and bonds of the new corporation, stating in his letters that it was in full settlement of their claims against the old corporation, and they accepted and retained the stock and bonds without protest, and have never rescinded the transaction. The assignee did not file an account, and the reason he assigns for not doing so is that the good will of the business and its contracts had passed to the new corporation, the officers of which thought that the good will would be affected or destroyed and that business rivals would be given an advantage by a public accounting. The assets of the old corporation in the hands of the assignee not transferred to the new corporation were sold and converted into cash through John M. Young, and the proceeds used in paying off the other creditors and the assignee's commissions. The balance remaining was divided between the plaintiff, Schroeder, and John M. Young in the adjustment of their respective claims; some additional stock and bonds of the new corporation being issued to John M. Young for part of his claim.

Complaint is made that plaintiff and Schroeder were not informed by Thomas Young of the payment of the $30,000 or $31,000 to John

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M. Young shortly before the assignment, or that the assignment had been precipitated by his assigning the note, and having suit pressed thereon, and that Thomas Young represented to them that the assets of the old corporation exceeded its debts by $43,000. It is also claimed, and has been found by the court, that the notes of the old corporation were given to John M. Young to indemnify him against liability on the notes of the firm, the proceeds of which were loaned to the old corporation; but this finding is not sustained by the evidence. The evidence clearly shows that the only persons interested in the firm were John M. Young and Thomas Young; that the old corporation had the proceeds of the firm notes in cash, and was not liable, as indorser or otherwise, on the firm notes, and that the only notes or obligations by the old corporation for the money thus loaned were the demand notes payable to the order of John M. Young, and that they were issued with the full assent and approval of Thomas Young, if not by his direction. The old corporation, therefore, was liable to John M. Young, and to him only, for the money loaned by the firm, and he owned the notes, and had a perfect right to enforce payment thereof.

There is little evidence to sustain the contention that Thomas Young was the agent of his brother in the negotiations with the plaintiff and Schroeder in Europe which resulted in the new plan and in the execution of their respective powers of attorney. Moreover, the failure of Thomas Young to inform them concerning the payment of $30,000 or $31,000 is not material to any issue in this case. If they had been informed of the facts concerning that transaction, upon the evidence here presented, there is nothing of which they could justly complain in this action at least. The old corporation had the benefit of this money, and a large part of it, or the money which it was needed to replace, was paid to Schroeder, reducing his claim. The old corporation had received the money without authority from John M. Young, and the notes of the firm had been negotiated upon his credit, and, as already seen, he subsequently paid them. He was perfectly justified in insisting that the money thus loaned should be promptly repaid, or that the amount of his claim against the new corporation should be reduced to the amount of credit which he had authorized. No creditor even of the old corporation could, I think, justly complain of this transaction. But, as already observed, it is difficult to perceive upon what theory the new corporation, which through the plaintiff is proceeding in affirmance of the sale of the property to it, can question any settlement made by the old company with its creditors.

So far as the present action is concerned, the plaintiff and Schroeder ratified the acts of John M. Young as their attorney in accepting and retaining the bonds and stock of the new corporation. If he violated his duty to them as their attorney in fact, they might individually seek redress from him or his estate. If he received more than his due proportion of the stock or bonds, the stock or bonds in his hands might be impressed with a trust for their benefit. If he received assets from the assignee which were not turned over to the new corporation, or used in paying the debts of the old company, he and the assignee are doubtless liable therefor in some form of action or proceeding; but whether there be any liability to account in this action, not to the creditors or

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stockholders of the old corporation, or to plaintiff and Schroeder individually, but to the new corporation, must depend upon the agreement made with it. The plaintiff and Schroeder may have an action for damages against Thomas Young and the estate of his brother, if Thomas was his agent, for fraudulent concealment of material facts, which if disclosed would have led them to refrain from issuing the powers of attorney and accepting the stock and bonds of the new corporation in settlement of their claims against the old corporation. But this action is solely in the right of the new corporation. It cannot rescind the transaction between plaintiff and Schroeder and the old corporation, and have a complete accounting. Its rights are such only as it derived under the contract by which it obtained the major part of the property of the old corporation. This action being solely in the right of the corporation, and not in behalf of creditors thereof, it is not entirely clear that any accounting may be had for anything to which the new corporation was not entitled under the agreement made with it by John M. Young, representing himself and the plaintiff and Schroeder, they being the only persons interested therein; but that question need not now be decided. If there was an agreement by which the new corporation was to receive all of the assets of the old corporation, less the amount necessary to pay the other creditors and the assignee's commissions, doubtless the assignee and the estate of John M. Young would be liable to account in this action therefor. But the plaintiff must adopt one theory or the other. If John M. Young deceived the new corporation with respect to the value of the property turned over to it in exchange for its stock and bonds, doubtless his estate would be liable in this action; but upon such theory of the case it would become entirely immaterial whether he turned over all of the assets of the old company, and the inquiry would be limited to the question as to whether the property turned over was equivalent in value to the par value of the stock and bonds received in return.

Complaint is made that the assignee deducted commissions on the value of the property not converted into cash, but sold by him to John M. Young and in turn to the new corporation. It is not at all clear on the facts here presented that the assignee would not be entitled to commissions on the value of that property. McCann v. O'Brien, 40 App. Div. 193, 57 N. Y. Supp. 897. The commissions were agreed upon by Young representing all the persons who were to be interested in the new corporation, and upon the strength of that agreement the assignee instead of selling the property, as he would otherwise have had the right to do, in which event it is clear he would have been entitled to his commissions, surrendered the property to Young.

Complaint is also made that the plaintiff and Schroeder were deceived with respect to the amount of John M. Young's claim against the old company. The amount of his claim was represented to be $67,000. It was understood at the time that the claims of Young, Schroeder, and the plaintiff against the old company, or some of them, might vary somewhat from the figures before the parties; and the claims of each, as finally adjusted, did vary from those figures. The increase of Young's claim over the amount it was represented to them to be consisted in a claim for back salary, which the evidence tends to show

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was owing to him, and for a small amount of moneys advanced. He adjusted the amount of his claim and the amount of their claims with the assignee. There is nothing in this record but mere suspicion to indicate that the adjustment was not fair and honest; in any event, it is not clear that it can be inquired into in this action. The allowance of claims by the assignee could be reviewed on his accounting, but the plaintiff was not a stockholder of the old company, and, having accepted the settlement, it may be that neither he nor Schroeder is now in a position even to call the assignee to account.

The interlocutory judgment proceeds on the theory of fraud. We have carefully considered all of the evidence, and are of opinion that the evidence does not warrant the findings of the learned trial judge in this regard, and, as before observed, that the interlocutory judgment requires accountings as to matters that cannot be reached in this action, and proceeds upon conflicting theories, and cannot be sustained. The principal inconsistencies are that, in addition to requiring that the difference between the actual value of the property received by the new corporation and $140,000, being the par value of the stock and bonds issued therefor, be now paid over, with interest, which alone would make the new corporation, in whose right this action is brought, whole, it requires that the $30,000 or $31,000 be also paid over to the new corporation, and also that all of the other assets of the old corporation be accounted for to the new corporation or its trustee.

It follows, therefore, that the interlocutory judgment should be reversed, and a new trial ordered, with costs to the appellant to abide the event.

O'BRIEN, P. J., and INGRAHAM and McLAUGHLIN, JJ., concur. HOUGHTON, J., dissents.

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## MULL v. MASTEN et al.

(Supreme Court, Appellate Division, Third Department. May 2, 1906.)

WILLS—CONSTRUCTION—ESTATE CREATED.

Where a will leaves all the testator's property to his son J., his heirs and assigns, "except that in the event of his death without heirs by his present wife then she, the present wife of the said J., shall have the use of the property hereby devised to J. during her life, or so long as she remains his widow, and on her decease or remarriage then said property hereby devised to J." to go to the children of the testator's daughter and another son, share and share alike, this was an absolute devise to J., except in the event of his death without children before the death of his "present wife," but not excepting the event of her death without children before his death.

Appeal from Special Term, Rensselaer County.

Action by Anna J. Mull against Edson W. Masten and others, impleaded with Frank Mull and others. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

The following is the opinion of the court below (Cochrane, J.):

This is an action to partition real estate in the town of Schodack, Rensselaer county, N. Y. The property in question was owned by Cornelius I. Schermer-

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horn at the time of his death, which occurred in 1863. He left a will, which was duly admitted to probate, and by the residuary clause of which he devised said property. Such residuary clause is the only portion of the will which need be considered, and is as follows: "All the rest and residue of my property, real and personal, I give and devise and bequeath to my son John, his heirs and assigns, except that in the event of his death without heirs by his present wife, then she, the present wife of said John, shall have the use of the property hereby devised to John during her life or so long as she remains his widow, and on her decease or remarriage then said property hereby devised to John to go to the children of my daughter, Alida, and my son Isaac, share and share alike." At the time of the testator's death, his said son John and also John's wife were about 33 years of age. The wife of John died in 1884. He died in 1902. They never had any children. The defendants, who demur, acquired during the lifetime of John his interest in the property in question, and claim the same under the residuary clause of the will above set forth, invoking the well-established general rule that where real estate is devised in terms denoting an intention that the devisee shall take a fee on the death of the testator, followed by a devise over in case of the death of such devisee without issue, reference is made to the death of the primary devisee without issue in the lifetime of the testator, and that such primary devisee surviving the testator takes an absolute estate in fee simple. This rule, together with its limitations, qualifications, and exceptions, is stated in Becker v. Becker, 22 App. Div. 234, 47 N. Y. Supp. 866, and in the cases there cited, and also in many other cases. The plaintiff and some of the defendants are children of the testator's daughter, Alida, referred to in the said residuary clause, and claim that the context and language of the will evince that this case constitutes an exception to the general rule above mentioned, and that, although John survived the testator, yet as he died without heirs, the property descends to the children of the testator's daughter, Alida, under such residuary clause; the testator's son Isaac mentioned therein not having any living descendants. The question thus raised as to the application to individual cases of the general rule of construction above enunciated is one which has frequently troubled the court and provoked endless discussion; but, as I construe this will, such question is not necessarily involved in the present action. My theory of the construction of this will differs from that advanced by either party. Before stating such theory, it may be well to observe that there is a serious objection to construing the will as desired by plaintiff. Such construction, in the event that John had survived his wife without children, remarried, and then had children, would exclude such children from all possible participation in the property in question. It does not militate against the force of this argument that as a matter of fact John had not remarried. We must consider the will from the standpoint of the testator when he executed the same, more than 40 years ago, and it must receive the same construction as if there were children of a subsequent marriage present in court interposing this demurrer. There must be some imperfection in any reasoning process which accomplishes such a result, unless that was clearly the testator's intention. That such was not his intention is evidenced by the fact that, had there been a remarriage and children of both marriages, John would unquestionably have taken an absolute and indefeasible estate of inheritance, and neither the children of the first or second marriage would by the terms of the will be excluded from participation in the property. And that the testator had in mind the possibility of a second marriage by John is indicated by the fact that not once merely, but twice, in the said residuary clause he speaks of John's "present wife." I think there was an absolute devise to John, except only in the event of his death without children before the death of his "present wife," but not excepting the event of such wife's death without children before his death. The primary rule of construction is to ascertain and effectuate, if possible, the intent of the testator. Certainly the testator's purpose was not to protect John against his own improvidence, because unquestionably in the event of children by his "present wife" he would have taken an absolute and indefeasible title. The purpose of the exception in the residuary clause was to make provision for John's "present wife" in the event that she survived him without children. If she

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had children, they, of course, would naturally receive the property as the heirs of John. But if she survived John without children, she would be practically unprotected, and it was for her benefit in such an event that the provision in question was made. The testator was providing for the wife's survivorship of John, and not in this particular clause for John's survivorship of his wife. That was already provided for by the absolute devise to him, wherein he used words of inheritance, viz., "his heirs and assigns"; the only limitation thereto being a provision for John's wife, whom he knew and evidently held in high esteem, such provision being intended for her benefit in case she survived John childless. It is a well-recognized rule that "an absolute gift is not cut down or limited by subsequent language used, unless the intent to do so appears in as clear and unmistakable language as that which expresses the absolute gift." Mee v. Gordon, 104 App. Div. 520, 93 N. Y. Supp. 675; Banzer v. Banzer, 156 N. Y. 429, 51 N. E. 291; Goodwin v. Coddington, 154 N. Y. 283, 48 N. E. 729; Benson v. Corbin, 145 N. Y. 351, 40 N. E. 11; Washbon v. Cope, 144 N. Y. 287, 39 N. E. 388; Byrnes v. Stillwell, 103 N. Y. 453, 9 N. E. 241, 57 Am. Rep. 760. It certainly cannot be said that the alleged limitation of the absolute devise to John in the event that he survived his wife "appears in as clear and unmistakable language as that which expresses the absolute gift" to John. Save for the absolute devise to John, the will is entirely silent as to whom the property should go in the event of his death without children, except that it should go to his "present wife" during her life or widowhood, which could not happen unless she survived him. And it seems to me that this theory of construction finds further confirmation in the subsequent provision of the residuary clause, where the testator provides for the gift over to the children of his daughter, Alida, and son Isaac. "On her [John's wife] decease or remarriage then" the property was to go to them; that is, at that time, immediately on such "decease or remarriage," which could happen if the exception to the absolute devise to John was intended to apply only in case his wife survived him, but which could not happen if John survived his wife, as is illustrated by the present action; for the plaintiff will scarcely claim that this action could have been maintained during the 18 years which intervened between the death of John's wife and his own death.

The construction of the will which seems to me reasonable and proper, as above indicated, is one which, from the testator's standpoint when he executed the same, could not lead to a harsh, illogical, and unnatural result. It also eliminates from the case the vexatious question as to whether the death of John, mentioned in the will, is to be referred to a time before or after the death of the testator, and it seems to me that it fully and fairly effectuates the intent of the testator. For these reasons, I am constrained to sustain the demurrer.

Demurrer sustained, with costs, and with the usual leave to plead over.

Argued before PARKER, P. J., and SMITH, CHESTER, and KELLOGG, JJ.

Collier, Collier & Browning (John Cadman, of counsel), for plaintiff.

Mead & Hatt (George J. Hatt, of counsel), for defendants Edson W. Masten and others.

PER CURIAM. Judgment affirmed, with costs upon opinion of Cochrane, J., at Special Term.

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## DOBYNS v. COMMERCIAL TRUST CO.

(Supreme Court, Appellate Term. April 24, 1906.)

1. APPEAL—TIME FOR TAKING—TERMINATION OF TIME.

Where appellee's claim that appellant's time to appeal had expired when the notice of appeal was served was based upon the technical sufficiency of the entry of judgment and notice of entry to set the time running, the

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court will give the defending appellant the benefit of any technicalities which may serve him, so far as the steps taken by the adversary may have been insufficient to fix the time.

2. SAME.

The entry of a judgment with the adjustment of costs still open does not suffice to support a notice of entry which will operate to limit the time for taking an appeal.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 1897.]

Appeal from City Court of New York, Special Term.

Action by Robert A. B. Dobyns against the Commercial Trust Company. From an order denying a motion to compel defendant to accept a notice of appeal, plaintiff appeals. Reversed.

Argued before SCOTT, P. J., and TRUAX and BISCHOFF, JJ.

Alexander S. Bacon, Esq., for appellant.

John J. O'Connell, Esq., for respondent.

BISCHOFF, J. The defendant's assertion that the plaintiff's time to appeal had expired when the notice of appeal was served was based upon the technical sufficiency of the entry of judgment and notice of entry to set the time running. If the time had commenced to run when the notice of entry was served, the plaintiff was in default, and could not be relieved; but where, as here, the bare technicality is asserted, the court is to give the intending appellant the benefit of any technicalities which may serve him, so far as the steps taken by his adversary may have been insufficient to fix the time for an appeal. Livingston v. Ry. Co., 60 Hun, 474, 15 N. Y. Supp. 191.

In the present case, it appears that when the notice of entry was served the costs to be inserted in the judgment, taxed without notice, were noticed by the defendant for retaxation a day later, the notice of retaxation being served with the notice of entry; computing the time to appeal from the time of service of the notice of entry, the plaintiff's notice of appeal was 24 hours late. The entry of the judgment with the adjustment of costs still open, however, did not suffice to support a notice of entry which would operate to limit the time to appeal. The point has been directly decided (De Mott v. Kendrick, 63 Hun, 112, 17 N. Y. Supp. 630), and the plaintiff was entitled to the order which he sought.

Order reversed, with $10 costs and disbursements, and motion granted, with $10 costs. All concur.

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## WYATT v. McNAMEE et al.

(Supreme Court, Appellate Term. April 24, 1906.)

INSURANCE—AGENTS—EMPLOYMENT TO SOLICIT LIFE INSURANCE—CONTRACTS—ACTION ON—COMPLAINT—SUFFICIENCY.

Under Insurance Law, Laws 1892, p. 1972, c. 690, § 91, providing that no person shall act as an agent or broker in the solicitation of insurance, or for any policy for any life insurance company doing business in the state, without procuring from the State Superintendent of Insurance a certificate of authority, and Pen. Code, § 577c, making a violation of the

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**statute a misdemeanor, a complaint in an action against defendants, as general agents of a life insurance company, on an alleged contract of employment as agent to solicit insurance, need not allege that plaintiff had procured from the State Superintendent of Insurance a certificate of authority. Failure to procure such certificate, when relied on as a defense, should be set up in the answer.**

Appeal from Municipal Court, Borough of Manhattan, Thirteenth District.

Action by Owen E. Wyatt against Frank A. McNamee and others. Judgment for defendants, and plaintiff appeals. Reversed.

Argued before SCOTT, P. J., and TRUAX and BISCHOFF, JJ.

Louis H. Porter, for appellant.

Andrew Hamilton, for respondents.

BISCHOFF, J. A demurrer for insufficiency of substance was interposed to this complaint, which contains every element of the statement of a cause of action upon a contract of employment to solicit life insurance, but the demurrer was sustained upon the ground that the plaintiff's case depended upon his alleging, affirmatively, that he had procured from the State Superintendent of Insurance a certificate of authority, without which, the statute declares, "No person shall act as an agent, sub-agent or broker, in the solicitation or procurement of applications for insurance or for any policy of insurance, for any life insurance company doing business in this State" (Insurance Law, Laws 1892, p. 1972, c. 690, § 91); a violation of this statute being also a misdemeanor (Pen. Code, § 577c).

Apart from the fact that the complaint does not state that the company for which, as general agents, the defendants employed the plaintiff was doing business in this state, the demurrer should have been overruled upon the main proposition of law referred to. The cause of action did not grow out of the statute in question. It existed by virtue of general principles of law, and the statute simply restricted the plaintiff's lawful performance of his contract by requiring him to obtain a certificate from a public officer; attempted performance in disregard of the restrictions being a crime. In Crichton v. Columbia Ins. Co., 81 App. Div. 614, 81 N. Y. Supp. 363, a similar question was presented, involving the necessity of the plaintiff's averment that the company had complied with the insurance law, which, in the event of noncompliance, prohibited the plaintiff from soliciting insurance for that company, and the reasoning adopted by the court in favor of the sufficiency of the complaint fully covers the case before us.

The court is not to assume that a party has been guilty of a violation of law where the record does not suggest it, and, the complaint being silent upon the subject, the fact of an existing infirmity in the cause of action, though a statutory restriction such as this, must be set up by answer. See, also, Thompson v. Colonial Assur. Co., 33 Misc. Rep. 37, 68 N. Y. Supp. 143; Id., 60 App. Div. 325, 70 N. Y. Supp. 85.

The judgment must therefore be reversed, and the demurrer overruled, with costs, with leave to the defendant to answer upon payment of all costs within 10 days. All concur.

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**PEOPLE ex rel. NATIONAL ENAMELING & STAMPING CO. v. MILLER, State Comptroller.**

(Supreme Court, Appellate Division, Third Department. March 22, 1906.)

1. LICENSES—FOREIGN CORPORATIONS—CAPITAL EMPLOYED WITHIN STATE.

The basis for the assessment of the license fee against a foreign corporation, under section 181 of the tax law (Heydecker's Gen. Laws, p. 1918, c. 24), which provides that such fee shall "be computed upon the basis of the capital stock employed by it within this state," is the capital, not the capital stock, employed in the state.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, § 672.]

2. TAXATION—FRANCHISE TAX.

The basis for the assessment of the franchise tax against a foreign corporation under section 182 of the tax law (Heydecker's Gen. Laws, p. 1919, c. 24), which provides that such tax shall "be computed upon the basis of the capital employed by it within this state," is the capital, not the capital stock, employed in the state.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, § 672.]

3. SAME—ASSESSMENT—REVIEW BY CERTIORARI—REVERSAL—DISPOSITION OF CAUSE.

On reversal of the determination of the State Comptroller assessing a franchise tax and license fee against a foreign corporation, the Supreme Court will not undertake to modify the same, but will remit the case to him for a new hearing upon the merits.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, § 908; vol. 9, Cent. Dig. Certiorari, § 185.]

Certiorari by the people, on the relation of the National Enameling & Stamping Company, to review a determination of Nathan L. Miller, as Comptroller of the state, assessing a franchise tax and license fee against relator. Determination of the Comptroller reversed, with $50 costs and disbursements to the relator, and the matter remitted to the Comptroller for a new hearing.

Argued before PARKER, P. J., and SMITH, CHESTER, KELLOGG, and COCHRANE, JJ.

Louis Marshall, for relator.

Julius M. Mayer, Atty. Gen., and James G. Grahm, Deputy Atty. Gen., for respondent.

CHESTER, J. The relator is a foreign corporation having preferred and common stock, and this is a proceeding by certiorari to review the determination of the Comptroller in assessing it for a franchise tax, under section 182 of the tax law (Heydecker's Gen. Laws, p. 1919, c. 24), for the years 1899, 1900, and 1901, and for a license fee under section 181 of such tax law. During the years in question the relator paid a dividend of 7 per centum on its preferred, but paid no dividends on its common, stock. Section 182 of the tax law provides that the franchise tax imposed upon foreign corporations shall "be computed upon the basis of the capital employed by it within this state." Section 181 of the tax law provides that the license fee imposed upon a foreign corporation shall "be computed upon the basis of the capital stock employed by it within this state." It has recently

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been decided that the basis for the assessment of the license fee against a foreign corporation under such section 181 is the capital employed in this state. People ex rel. Gin Seng Co. of America v. Kelsey as Comptroller, 105 App. Div. 175, 93 N. Y. Supp. 369, affirmed 182 N. Y. 526, 74 N. E. 1123. The Comptroller, acting before this decision was made, assessed the license fee against the relator on the basis of the capital stock, instead of on the basis of the capital employed in the state. It also appears that he assessed the franchise tax on the basis of the capital stock, and not of the capital employed in the state. Having concededly adopted an erroneous basis for the assessment of both the license fee and the tax, we think his determination must be reversed, and the case remitted to him for a new hearing upon the merits, as we do not think we should undertake to modify the determination in such a case, as that, in effect, would be to make an assessment in the first instance in this court. This we should not do for the further reason that the testimony might be materially changed upon a rehearing.

The relator insists, however, that it is not liable to any tax whatever. It is entirely clear that it has, during the years in question, employed a large amount of its capital in this state. This is practically conceded, but it urges that its debts are greater in amount than the capital so employed. It appears that the indebtedness which it seeks credit for in the reduction of its assessment was contracted for its general business throughout the country, and not for the use or on account of its business in this state. Nor does it appear how much, if any, of such indebtedness relates to the business here. Manifestly, it would not be entitled to deduct its entire indebtedness incurred for the prosecution of a business extended through the country in arriving at the amount for which it should be assessed in this state. We are in no position, therefore, to determine now how much, if any, of this indebtedness should be taken into account in making an assessment, and, more than this, on the new hearing the proof as to the amount of capital employed in this state may be materially different from that upon the hearing which is now the subject of review, so that the whole matter should be remitted to the Comptroller.

Determination of the Comptroller reversed, with $50 costs and disbursements to the relator, and the matter remitted to the Comptroller for a new hearing. All concur.

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## MOORE v. MAGUIRE.

(Supreme Court, Appellate Term. April 24, 1906.)

BROKERS—COMMISSIONS—SUFFICIENCY OF SERVICE.

A broker for the owner of real estate, who procures a purchaser ready and able to take the property at the price fixed by the owner, is entitled to his commissions.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Brokers, §§ 69, 75–79, 81, 91, 92, 94–96.]

Appeal from Municipal Court, Borough of Manhattan, Seventh District.

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Action by Godfrey Moore against Sylvester Maguire. From a judgment dismissing the complaint, plaintiff appeals. Reversed.

Argued before SCOTT, P. J., and TRUAX and BISCHOFF, JJ.

Lewkowitz & Schaap, for appellant.

Leon Laski, for respondent.

TRUAX, J. The action was brought to recover the sum of $250 as commission to be paid by the defendant to the plaintiff upon the sale of certain premises in the city of New York. The authorization of the plaintiff was in writing, and the evidence shows that the plaintiff procured a purchaser who was ready and able to take the property at the price named by the defendant. See Putter v. Berger, 95 App. Div. 62, 88 N. Y. Supp. 462, and Gilder v. Davis, 137 N. Y. 504, 33 N. E. 599, 20 L. R. A. 398.

Judgment is reversed, and a new trial ordered, with costs to appellant to abide the event. All concur.

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## EGNER v. STRONG.

(Supreme Court, Appellate Term. April 27, 1906.)

ACCOUNT STATED—ACTION—EVIDENCE.

Where a stockbroker carried stocks on margin for plaintiff's assignor, a mere statement that there was a balance in the latter's favor did not evidence the existence of a defined debt due from the broker to such assignor, in the absence of evidence of authority from the assignor to sell the stock, and a sale thereof by the broker.

Appeal from Municipal Court, Borough of Manhattan, Tenth District.

Action by Frederick Egner against Cyrus H. Strong. Judgment for plaintiff, and defendant appeals. Reversed.

Argued before SCOTT, P. J., and TRUAX and BISCHOFF, JJ.

George F. Maguire, for appellant.

Randall H. Ludlow, for respondent.

BISCHOFF, J. We cannot uphold this recovery upon the evidence disclosed by the return. The plaintiff's assignor, Brewer, dealt with the defendant as a customer for whom stocks were carried on margin, and the action was brought for an amount based upon an alleged verbal statement of account. This essential fact of a statement of a balance depends simply upon Brewer's testimony that some person in the defendant's office had told him, in response to his inquiry, that there was a balance in his favor of the sum now in suit; but there is no suggestion that the customer had ordered his stocks disposed of before this conversation, or directed that the account then be closed to realize the balance stated. Clearly, from every indication which the proof affords, the statement of balance referred to an account of stocks then carried for the customer upon margin, not to a cash balance upon such an account, actually liquidated, and, without some order from the customer to dispose of the holdings, the statement did not evidence the



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existence of a defined debt due from the broker to the customer. The apparent balance represented the difference between the market value of the stock carried and the broker's charges upon it, but, without the customer's order to sell, the value of the stock could not be realized by the broker, and the debt was therefore in no way determined by the alleged statement, assuming it to have been made by one having authority to bind the defendant.

Upon this question of agency, much of the evidence was objectionable, as substituting the conclusion of the witness for the fact from which authority might be inferred, and this fact of authority in the unidentified person who made the statement was, to say the least, far from clear.

The judgment must be reversed, and a new trial ordered, with costs to the appellant to abide the event. All concur.

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## POCHER v. HALL et al.

(Supreme Court, Appellate Term. April 24, 1906.)

LANDLORD AND TENANT—LEASE—NATURE OF CONTRACT.

A contract giving defendants the right to use the roof of plaintiff's premises for advertising purposes, involving the construction and maintenance by defendants of a structure for signs, was a lease, and not a mere license.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Landlord and Tenant, § 8.]

Appeal from Municipal Court, Borough of Manhattan, Seventh District.

Action by Isidore J. Pocher against Harry J. S. Hall and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Argued before SCOTT, P. J., and TRUAX and BISCHOFF, JJ.

Heyn & Covington, for appellant.

Benjamin F. Feitner and Louis Salant, for respondent.

BISCHOFF, J. The plaintiff's recovery, upon the theroy that the agreement between the parties was a lease, and not a mere license, is, in our opinion, to be upheld. This agreement gave to the defendants the use of the roof of the premises for advertising, a restricted purpose, but one which none the less involved the defendants' possession of and dominion over a substantial part of the realty. The transaction comprised the construction and maintenance of the defendants' own structure for signs, not the mere placing of signs upon a wall, as in the case of Goldman v. N. Y. Adv. Co., 29 Misc. Rep. 133, 60 N. Y. Supp. 275, nor the simple right to affix advertising matter to a structure already erected upon a roof, as in Reynolds v. Van Beuren, 155 N. Y. 123, 49 N. E. 763, 42 L. R. A. 129; and the ground of distinction is noted in O. J. Gude Co. v. Farley, 28 Misc. Rep. 184, 58 N. Y. Supp. 1036, where the opinion was expressed by this court that an identical agreement was to be construed, under these circumstances, not as a license, but as a lease.

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The defendants having remained in possession, the lease endured for the period covered by the demand in suit, and there is no ground for our disturbing the result of the trial, upon the conceded facts.

Judgment affirmed, with costs. All concur.

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## BRILL v. BARNETT.

(Supreme Court, Appellate Term. April 24, 1906.)

TRIAL—EXCLUSION OF EVIDENCE.

**In an action to recover for work done in sponging cloth at defendant's order, a counterclaim was based on plaintiff's failure to perform an alleged agreement to examine all cloth, and advise defendant of any defects, and defendant testified that he had no conversation with plaintiff at the time that the particular goods in question were sent. *Held* that, it appearing that the cloth in question was but a part of several lots sent at different times, it was error to exclude evidence as to the counterclaim, on the ground that the matter had been covered by the testimony.**

Appeal from Municipal Court, Borough of Manhattan, Twelfth District.

Action by Soloman Brill against Abraham M. Barnett. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Argued before SCOTT, P. J., and TRUAX and BISCHOFF, JJ.

Ralph Barnett, for appellant.

Leon H. Prince, for respondent.

PER CURIAM. It appears that proof in support of the defendant's counterclaim was improperly excluded, and there should be a new trial of the cause. The plaintiff's claim was for work done in sponging cloth at the defendant's order, and the counterclaim was based upon the plaintiff's failure to perform an alleged agreement, whereby he had undertaken to examine all cloth thus sent to him, and to advise the defendant of defects before sponging in order that the defendant might cause the cloth to be returned to the jobber from whom he had purchased it. In answer to the court the defendant had stated that he had no conversation with the plaintiff at the time the particular goods were sent, and, apparently, this was taken by the court and by the plaintiff's counsel as meaning that at no time had there been any conversation or course of dealing between the parties from which the agreement, alleged by the defendant, was to be inferred, since all future evidence to this end was excluded, not for inartificiality in the form of the questions, but on the ground that the matter had been already covered by the testimony. The cloth which was the subject of the counterclaim was but a part of several lots sent at different times to the plaintiff at the defendant's order, and the fact that nothing was said when one lot was sent did not conclude the issue of an agreement, as against the defendant, if the agreement could have been established by prior conversations, or by a course of dealing, or by some well-defined and recognized custom of the trade.

Judgment reversed, and a new trial ordered, with costs to the appellant to abide the event.

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## HERSCHKOVITZ v. BRADLEY et al.

(Supreme Court, Appellate Term. April 24, 1906.)

WORK AND LABOR—ACTION—EVIDENCE.

In an action for services evidenced by pay tickets issued by the defendants, evidence *held* sufficient to justify a judgment in favor of plaintiff.

Appeal from Municipal Court, Borough of Manhattan, Fifth District.

Action by Bennie Herschkovitz against William Bradley and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Argued before SCOTT, P. J., and TRUAX and BISCHOFF, JJ.

John H. Mulcahey and S. B. Livingston, for appellant.

Emanuel Klein, for respondent.

BISCHOFF, J. The action was for work, labor, and services in removing snow from the streets of the city, at the instance and request of the defendant Bradley, a general contractor with the municipality, and the items of work were evidenced by pay tickets, issued, in accordance with the system adopted by the defendant, to the plaintiff's assignor or his servants. According to this system, "snow tickets" were given by the defendant's agents upon the streets to drivers of dump carts when a load of snow was taken, which tickets were transferred at the dock, where the load was dumped, for "pay tickets," showing that the work was done. The testimony for the plaintiff disclosed, generally, that all tickets in his hands were received in the usual course of dealing under this system, and these tickets were delivered in gross to the defendant, who gave a receipt for the number. Each ticket called for 33 cents compensation for work done, and while, of course, not of the character of negotiable instruments, the ticket was as between the parties, evidence of the fact as to which they, by agreement, had made it the token—that is, the fact of the performance of so much work at an established price. The defense was directed to the proposition that the plaintiff's assignor did not receive these tickets in the usual course of dealing which they purported to evidence, the claim being that the pay tickets were distributed to drivers at the docks from pads of 100 tickets, each ticket consecutively numbered and torn, one at a time, from the pad, as a driver unloaded his car. According to the defendant's witnesses, who checked off the tickets received from the plaintiff, some of them were consecutively numbered from 1 to 100 and in one instance from 1 to 147, and the defendant's contention is that there must have been fraud, or that, in any event, the value of the evidence afforded by the possession of the tickets was destroyed, since the plaintiff's assignor did not use more than 46 carts at a time.

This does not follow from the facts presented. According to the defendant's own evidence, there was a complete checking system governing the issuance of these tickets, and if, in fact, there had been any irregularity, the proof which was peculiarly available to the defendant should have been produced by him. Again, there were several dumping docks within the territory covered by the transactions in suit, yet the system of giving tickets, one at a time, was proven only with regard to one dock, and it was not shown that the tickets, apparently

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alike, had been issued from pads at none but this dock. For all that appears, the plaintiff's tickets may have been issued at different docks, and his drivers may have been given tickets exclusively from a particular book, at the election of the distributing agents, in the instances referred to, or, indeed, error may have crept into the method of checking off the tickets received from the plaintiff by the defendant's employés. It was thus by no means clear that these tickets were not actually received in the usual course of business, and the prima facie proof afforded by the plaintiff's evidence of possession, and the general manner in which that possession had been obtained, sufficed for the favorable finding of the court.

The judgment should be affirmed, with costs. All concur.

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## JONES v. UNION RY. CO.

(Supreme Court, Appellate Term. April 24, 1906.)

1. ELECTRICITY—NEGLIGENCE—EVIDENCE.
   In an action for the killing of a horse by electricity by coming in contact with a wire which had been thrown over and hung from the feed wire of a street railway, where the evidence did not show how the wire had been placed there, nor how long it had remained, except that it was not there eight minutes before the accident, the evidence was insufficient to show the railway company guilty of negligence.

2. SAME—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.
   In an action for the killing of a horse by electricity by coming in contact with wire thrown over the feed wire of a street railway while being driven by the plaintiff, whether the plaintiff was guilty of negligence was a question for the jury.

   [Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Electricity, § 11.]

Appeal from Municipal Court, Borough of the Bronx, Second District.

Action by Sylvester Jones against the Union Railway Company. From a judgment in favor of plaintiff, defendant appeals. Reversed, and new trial granted.

Argued before SCOTT, P. J., and TRUAX and BISCHOFF, JJ.

William E. Weaver, for appellant.

Headley M. Greene, for respondent.

SCOTT, P. J. The defendant operates its railway by means of an overhead trolley. About half past 5 o'clock on the 20th day of August, 1905, the plaintiff was driving a truck with two horses along defendant's track, when one of the horses came into contact with a wire which had by some means been thrown over and then hung from defendant's feed wire. The horse received an electrical shock, from which it immediately died. The wire was not of a kind used by the defendant, and evidently was no part of its equipment, and the circumstances pointed irresistibly to the conclusion that some mischievous person had thrown this loose piece of wire over defendant's feed wire, and left it dangling there. There was no evidence how long the wire had been in this position, except that one of defendant's motormen said that he had

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passed the spot eight minutes before and had not observed it. Under these circumstances, there was no evidence of defendant's negligence to submit to the jury. We think, also, that the justice erred in withdrawing from the jury altogether any question as to plaintiff's negligence. While he had a right to assume that the road would be unobstructed, he was not wholly relieved from the obligation to be reasonably vigilant in watching for unexpected and unusual obstacles, and it was at least a question for the jury whether, if he had been so vigilant, he would not have seen the wire before he reached it.

Judgment reversed, and new trial granted, with costs to appellant to abide the event. All concur.

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## ROSS v. NEW ENDICOTT CO.

(Supreme Court, Appellate Term. April 24, 1906.)

JUDGMENT—CONFORMITY—FACTS AND EVIDENCE.

**Where in an action for services the only question litigated was the authority of the defendant's engineer to employ plaintiff, and the court found in plaintiff's favor on such question, it was error to give him judgment for only half his claim.**

Appeal from Municipal Court, Borough of Manhattan, Eleventh District.

Action by Frederick C. Ross against the New Endicott Company. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Argued before SCOTT, P. J., and TRUAX and BISCHOFF, JJ.

George P. Breckenbridge, for appellant.

Richard T. Greene, for respondent.

SCOTT, P. J. Plaintiff sues for $97, claimed to be due for work performed at defendant's hotel. He was employed by defendant's chief engineer, and the only question litigated or sought to be litigated by defendant was the engineer's authority to employ plaintiff. If the engineer was vested with the authority to make the employment, the plaintiff was entitled, under the evidence, to the amount for which he sued. For some reason not apparent upon the record, the learned justice, while finding in plaintiff's favor upon the question of employment, gave him judgment for exactly one-half of his claim. The defendant does not appeal, and we are therefore not called upon to consider its exceptions, nor to examine the question whether or not the defendant's engineer had the extent of authority claimed for him. On plaintiff's appeal, however, we must reverse the judgment for inadequacy and inconsistency. If the plaintiff was entitled to recover at all, he was entitled to all he sued for. Since the court had found that he was entitled to recover something, it was error to cut his claim in two.

Judgment reversed, and new trial granted, with costs to appellant to abide the event. All concur.

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## CURTIS BLAISDELL CO. v. ROSS et al.

(Supreme Court, Appellate Term. April 24, 1906.)

DAMAGES—INJURY TO HORSE—EXCESSIVE DAMAGES.

Where, in an action for injuries to a horse, plaintiff claimed $100 as the depreciation in the value thereof, and there was nothing to show that he was put to any expense for medical attendance or for procuring a horse to take the place of the one injured, the damages awarded must be limited to the depreciation in the value of the horse.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, § 280.]

Appeal from Municipal Court, Borough of Manhattan, Seventh District.

Action by the Curtis Blaisdell Company against Marion J. Ross and others. From a judgment for plaintiff, defendants appeal. Reversed, and new trial granted.

Argued before SCOTT, P. J., and TRUAX and BISCHOFF, JJ.

Seth B. Robinson (Henry H. Hull, of counsel), for appellant.

William C. Relyea, for respondent.

SCOTT, P. J. The plaintiff's coal cart, drawn by three horses, was proceeding at a walk up First avenue between the easterly car track and the curb, near the track. A wagon, said to belong to defendants, was coming up the avenue at a trot on the easterly track. Upon the wagon was loaded a section of iron railing, which projected outside the body of the wagon, but not outside the hubs of the wheels. In some way the projecting railing struck and cut the rump of one of plaintiff's horses, causing the injury for which damages are sought. The only evidence given by plaintiff as to how the accident happened is that of its driver, whose account is almost unintelligible, but which appears to be to the effect that the injury happened when defendants' wagon was attempting to pass the coal cart. The story of defendants' driver, corroborated by a bystander, is that plaintiff's driver, in attempting to pass some wagons standing in the roadway, pulled his team suddenly to the left, throwing his outside horse into a position where defendants' driver could not avoid hitting him. This story seems at least as probable and as well supported as that told by plaintiff's driver.

The damages are excessive. The plaintiff only claimed $100 as the depreciation in the value of the horse, and has been awarded $190. It appeared that plaintiff was put to no actual expense for medical attendance or for procuring a horse to take the place of the injured one, so that its damage should have been limited to the depreciation in the value of the horse. There was no evidence of defendants' partnership. On the whole case, justice will be best served if there be a new trial.

Judgment reversed, and new trial granted, with costs to abide the event. All concur.

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## WISOTZKEY v. NIAGARA FIRE INS. CO.

(Supreme Court, Appellate Division, Fourth Department. May 2, 1906.)

1. INSURANCE—MISSTATEMENT OF INTEREST—ESTOPPEL.

Where insurer's agents, at the time they issued a policy insuring certain lumber as held by plaintiff "in trust on commission or sold, but not removed," had full knowledge that plaintiff was not the owner of the lumber, and that the policy was intended to protect plaintiff for loans, advances, and indorsements made by him to enable the owner to manufacture and sell the lumber, defendant was estopped to deny liability on the policy because plaintiff's interest was not truly stated, though the policy also provided that no agent should have power to waive any provision or condition in the policy unless otherwise provided therein, and then only by an agreement indorsed thereon or added thereto.

2. PARTNERSHIP—INTEREST AND PROFITS.

Where plaintiff advanced money and indorsed notes for the owner of certain lumber to enable him to carry on his business, it being agreed that, in addition to repaying the money loaned and satisfying the notes, the owner of the lumber should pay plaintiff one-third of the net profits realized from the enterprise, such contract did not constitute plaintiff a partner in the lumber enterprise.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Partnership, § 17.]

Appeal from Special Term, Allegany County.

Action by Daniel Wisotzkey against the Niagara Fire Insurance Company. From a judgment in favor of plaintiff on a referee's report, defendant appeals. Affirmed.

Argued before McLENNAN, P. J., and SPRING, WILLIAMS, NASH, and KRUSE, JJ.

Horace McGuire, for appellant.

F. A. Robbins, for respondent.

SPRING, J. On the 26th day of May, 1903, the defendant, an insurance corporation organized pursuant to the laws of the state of New York, issued its policy of standard form, whereby it insured certain property to the plaintiff against loss or damage by fire as follows:

"Daniel Wisotzkey. $2,500. On lumber, timber, lath, posts, and all other stock, materials, and supplies pertaining to his line of business, his own, or held by him in trust, on commission or sold but not removed while located in the town of Grove, Allegany county, N. Y. Other insurance permitted."

The plaintiff was not the absolute owner of the property described. It was owned by a man by the name of Michael, and was piled up near his mill in the town of Grove, in said county of Allegany. The greater part of it was destroyed by fire of an incendiary origin on the 30th day of October, 1903, and while said policy was in force. There is no proof implicating the plaintiff with the burning of said lumber, and the referee has found "that there is not sufficient evidence to connect Michael with the incendiary act," and the evidence sustains that conclusion. The value of the property destroyed is fixed by the referee at $13,214.14. The plaintiff was a hotel keeper, residing in Williamsport, Pa., and in the fall of 1902 agreed to loan money to said Michael and indorse notes for him, to enable the latter to purchase logs and manufacture the same into lumber. In pursuance of this agreement, the plaintiff had

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loaned to or indorsed notes which were negotiated for the benefit of Michael to the amount of $15,000, and at the time of the fire the said notes and loans aggregated $13,307. The notes were secured by property of the plaintiff and his wife. Michael, in order to protect the plaintiff, agreed to keep the logs and lumber insured in the plaintiff's name. Murray & Jones of Hornellsville, N. Y., at the time of the issuance of the policy in suit were the general agents of the defendant, and also represented several other fire insurance companies. They issued the policy in suit at the instance of Michael, and at the same time issued other policies, making the full amount of the insurance placed upon this property at $15,000, and all concurrent. The premiums on all the policies, aggregating $525, were paid to Murray & Jones by Michael, to whom the policies were delivered, and he sent them to the plaintiff. Due and proper proofs of loss were furnished to the defendant after the fire.

Payment of the policy is contested on the ground that the interest of the plaintiff was not correctly stated in the policy, and, consequently, that the contract is void by virtue of the provision contained in it declaring that:

"The entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance, or the subject thereof; or if the interest of the insured in the property be not truly stated herein."

Parol proof was received on the trial, against the objection and exception of the defendant, to show that before the making of the contract the agents of the defendant were informed that the plaintiff had loaned money and indorsed notes to aid Michael to purchase and saw the logs into lumber, and that Michael was the sole owner of the property, but had agreed to have this property insured to protect the plaintiff for the advances and indorsements made by him. On this subject, after reciting in detail the facts, the referee made this general finding of fact:

"That said policy, issued by the defendant through its said agents, was issued with full knowledge on the part of said defendant through its said agents that the plaintiff was not the owner of said property, but that said Michael was the owner thereof, and that the plaintiff had the interest described by said Michael to said Murray as above set forth, and that said defendant, by its said agents, issued said policy with the intent, and adopted the form and description of the assured's interest appearing therein with the intent, to describe and cover the interest of said plaintiff in said property as disclosed to them, and any interest which the plaintiff might have in said property of any kind whatever."

The evidence is ample to sustain the conclusion of the referee that the agents of the defendant were fully apprised that Michael was the owner of the property insured, and that the policy was intended to protect the plaintiff for his loans, advances, and indorsements. The contract of insurance contains the clause that no agent of the company "shall have power to waive any provision or condition of this policy" unless the policy provides otherwise, and then such waiver can only be effective by "agreement indorsed hereon or added hereto." It is urged that the effect of the parol evidence and the finding based upon it is to vary this stipulation in the written agreement.

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The courts of this state are anchored to the proposition that where an insurance company issues its policy knowing fully the facts, which, if upheld, would vitiate the contract at its inception, it will be estopped from repudiating the policy, or be deemed to have waived the strict provisions contained in it. To hold otherwise would involve the perpetration of a fraud upon the insured, who parted with his money in good faith, and without any misrepresentation or deception, believing that his property was insured. Wood v. American Fire Ins. Co., 149 N. Y. 382, 44 N. E. 80, 52 Am. St. Rep. 733; Forward v. C. Insurance Co., 142 N. Y. 382, 37 N. E. 615, 25 L. R. A. 637; Lewis v. Guard. F. & Life Ins. Co., 181 N. Y. 393–395, 74 N. E. 224, 106 Am. St. Rep. 557; Brooks v. Erie Fire Ins. Co., 76 App. Div. 275, 78 N. Y. Supp. 748, affirmed on opinion below, 177 N. Y. 572, 69 N. E. 1120; Benjamin v. Palatine Ins. Co., 80 App. Div. 260, 80 N. Y. Supp. 256, affirmed on opinion below 177 N. Y. 588, 70 N. E. 1095. The court in the case first cited say, at page 388 of 149 N. Y., page 81 of 44 N. E., 52 Am. St. Rep. 733:

"The restrictions inserted in the contract upon the power of the agent to waive any condition, unless done in a particular manner, cannot be deemed to apply to those conditions which relate to the inception of the contract, when it appears that the agent has delivered it and received the premiums with full knowledge of the actual situation. To take the benefit of a contract with full knowledge of all the facts, and attempt afterwards to defeat it, when called upon to perform, by asserting conditions relating to those facts, would be to claim that no contract was made, and thus operate as a fraud upon the other party."

The counsel for the appellant recognizes the current of authorities to be as stated, but contends that they do not apply to the present case. The distinction sought to be maintained is that in each of the cases permitting a waiver of the conditions in the policy to be established by parol evidence the right of the agent to waive by writing upon the policy was accorded in it. We think the distinction is flatly opposed to the principle upon which these many cases rest. The rule is an equitable one, and exists in order that the insurance company may be estopped to claim that its policy was never valid after it has received the benefits accruing to it, and insured with full knowledge of the facts, which after loss it claims vitiates the contract.

It is also worthy of note that the policy did not in any event "truly state" the interest of the plaintiff in the property supposed to be insured, as the agents must have known. No one ever suggested that he was the trustee of the property, or held it "on commission." According to the claim of the defendant, his title was believed to be that of an unqualified owner. The contention of the plaintiff was that he was a creditor of the true owner, and his insurable interest was due to the fact that he furnished the money for carrying on the business. By the agreement between the plaintiff and Michael, and pursuant to which the money was advanced and the indorsements made, Michael, in addition to repaying the money loaned and satisfying the notes, was also to pay the plaintiff one-third of the net profits realized from the lumber enterprise. The appellant contends this agreement constituted the parties copartners in the project, and the nature of the relation was not disclosed to the agents of the defendant, and, consequently, the real

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interest of the plaintiff in the property was not revealed to them, and the policy, for that reason, was avoided. The plaintiff never saw the logs, and took no part in the management of the business. Michael sold the lumber, and used the avails as he desired, without the interference or control of the plaintiff. The arrangement between them did not constitute the plaintiff a partner in the business. Richardson v. Hughitt, 76 N. Y. 55, 32 Am. Rep. 267; Cassidy et al. v. Hall et al., 97 N. Y. 159; Curry v. Fowler, 87 N. Y. 33, 41 Am. Rep. 343; Meehan v. Valentine, 145 U. S. 611, 12 Sup. Ct. 972, 36 L. Ed. 835. The relations of the plaintiff and Michael are not to be determined by the rules applicable if we were considering the rights of creditors who had loaned money or trusted Michael upon the assumption that the plaintiff was liable as a partner.

The judgment should be affirmed, with costs.

**Judgment affirmed, with costs and disbursements of this appeal. All concur.**

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## WISOTZKEY v. HARTFORD FIRE INS. CO.

**(Supreme Court, Appellate Division, Fourth Department. May 2, 1906.)**

INSURANCE—BROKERS—KNOWLEDGE OF FACTS—ESTOPPEL.

**Plaintiff applied to M. & J. for a line of insurance on lumber belonging to another, to secure plaintiff's interest therein as a creditor of the owner. M. & J., being unable or unwilling to place all the insurance, according to a custom among insurance agents, applied to defendant's agent for a policy, which was issued, in which plaintiff's interest in the lumber was improperly stated. The policy, which provided that no person unless duly authorized in writing should be deemed the agent of the insurer, was delivered to M. & J. Plaintiff paid the premium for the entire insurance to them, and they paid the premium on the policy in question to defendant's agent. *Held*, that M. & J. were mere insurance brokers, and not defendant's agents, and hence defendant was not estopped by their knowledge of plaintiff's interest to insist on a forfeiture.**

**[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 968.]**

**McLennan, P. J., dissenting.**

Appeal from Special Term, Allegany County.

Action by Daniel Wisotzkey against the Hartford Fire Insurance Company. From a judgment in favor of plaintiff, entered on a referee's report, defendant appeals. Reversed.

Argued before McLENNAN, P. J., and SPRING, WILLIAMS, NASH, and KRUSE, JJ.

Horace McGuire, for appellant.

F. A. Robbins, for respondent.

SPRING, J. The policy of insurance in this case was issued concurrently with the one involved in the action of the same plaintiff against The Niagara Fire Insurance Company, a decision in which case is handed down simultaneously with the present decision. The records in the two cases are largely identical, with, however, one important difference. Murray & Jones were the insurance agents at Hornellsville to whom Michael, the owner of the property, applied for insurance.

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They were unable or unwilling to place all the $15,000 of insurance desired in companies represented by them. They accordingly applied to Mr. Dunning, the general agent of the defendant at Hornellsville, and he thereupon issued the policy in suit, countersigning it as agent. Murray & Jones placed on the outside of the policy, "Murray & Jones, General Insurance, 132 Main Street, Hornellsville, New York," the same as upon all the other policies, and delivered them all to Michael, who paid them the premium on the policy, and they settled with Dunning, the agent of the defendant. Michael never had any communication with Dunning, and never employed him to insure his property. His agreement was with Murray & Jones. The parol proof shows that they knew that the plaintiff was not the absolute owner of the insured property, but the policy was intended primarily to protect him for loans, advances, and indorsements for the benefit of Michael, the owner, and to enable the latter to carry on the lumber business.

The referee, upon evidence which justifies the conclusion, has made the following finding of fact:

"That in the year 1903, and for some time prior thereto, there had existed among the insurance offices and agencies in said city of Hornellsville a custom of dividing insurance in the manner following: When an agent received an application for a line of insurance larger than he desired or was able to write, he placed a part of it with another agent, obtained the policy or policies so issued, placed them with the policies issued by himself or the companies he represented directly, on the same property, delivered all the policies to the insured, collected the whole premium, and settled with the agent issuing the policy or policies so applied for. That under this custom the insured had no communication with agent writing and issuing the policy so applied for by the other agent, and the insured did not know him in the transaction. That the defendant herein, the Hartford Fire Insurance Company, had notice and knowledge of said custom."

The policy contains this clause:

"In any matter relating to this insurance, no person, unless duly authorized in writing, shall be deemed the agent of this company."

We think Murray & Jones were not the agents of the defendant, but in effecting this insurance were insurance brokers, and their knowledge of the real interest of the plaintiff in the insured property cannot be deemed information binding the defendant. Northrup v. Piza, 43 App. Div. 284, 60 N. Y. Supp. 363; affirmed 167 N .Y. 578, 60 N. E. 1117; McGrath v. Home Insurance Co., 88 App. Div. 153, 84 N. Y. Supp. 374.

The prevalence of the custom for the mutual accommodation of the various agencies in Hornellsville does not alter the principle applied in the cases cited. The custom or practice was for the convenience of the agents, and did not constitute each one of them a general agent of the defendant.

The judgment should be reversed, and a new trial ordered, with costs to the appellant to abide the event.

Judgment reversed, and a new trial ordered, with costs to the appellant to abide the event. All concur, except McLENNAN, P. J., who dissents in opinion.

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McLENNAN, P. J. (dissenting). I dissent, upon the ground that the finding of the referee that Murray & Jones were the agents of the defendant was amply supported by the evidence; upon the further ground that it would be against public policy to hold that a general insurance agent, who is made acquainted with all the facts in an application for insurance, may go to another insurance agent, when their usual course of business permits such dealing, and effect the desired insurance without disclosing the information received by him from the applicant for insurance, and thus prevent a valid policy of insurance being issued. It is well known that a person or corporation having property to be insured usually intrusts such insurance to an agent or broker, who represents a number of insurance companies. If the amount of insurance is greater than the companies represented by such agent can carry, the desired amount is effected through other agencies, representing other insurance companies. This system of placing insurance is almost universal, but it has been expressly found by the referee upon competent evidence that it was the practice and system adopted by the defendant insurance company in the city of Hornellsville. We think, under the circumstances, that the information received by the agent of the Niagara Fire Insurance Company was the information received by the defendant, and that it was bound thereby.

It therefore follows that the judgment should be affirmed, with costs.

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## BROOKS v. INTERNATIONAL RY. CO.

(Supreme Court, Appellate Division, Fourth Department. May 2, 1906.)

1. APPEAL—PRESUMPTIONS—APPEAL FROM NONSUIT.

Where plaintiff suffers an involuntary nonsuit, he is entitled on appeal to have all questions of fact involved in the evidence and all inferences which may be legitimately drawn therefrom construed most favorably to him.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3748.]

2. STREET RAILROADS—COLLISION WITH CYCLIST—CONTRIBUTORY NEGLIGENCE.

Where a person riding a bicycle upon the street in the usual way reaches a point 20 feet from a street car track, and sees a car approaching 150 feet distant, his failure to stop and wait until the car passed is not contributory negligence as a matter of law.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Street Railroads, §§ 257, 214.]

3. SAME—QUESTION FOR JURY.

In an action against a street railway company for death caused by a collision between a car and cyclist at a street crossing, evidence *held* to require submission to the jury of the question whether deceased was guilty of contributory negligence.

Appeal from Trial Term, Erie County.

Action by James F. Brooks, as administrator of Sarah A. Brooks, deceased, against the International Railway Company. From a judgment for defendant, and from an order denying a motion for a new trial, plaintiff appeals. Reversed and remanded.

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Argued before McLENNAN, P. J., and SPRING, WILLIAMS, and KRUSE, JJ.

Eugene M. Bartlett, for appellant.
Simon Fleischmann, for respondent.

McLENNAN, P. J. The facts are not in dispute, and the plaintiff, having been nonsuited, is entitled to have all questions of fact involved in the evidence and all inferences which may be legitimately drawn therefrom construed most favorably to him. The defendant, a domestic corporation, at the time of the accident complained of, was engaged in operating a double-track street surface railroad, extending along the center of Jefferson street in the city of Buffalo, N. Y., which runs north and south, and is crossed at right angles by Northland avenue. Both of said streets are 30 feet in width between the curbs. At about 9 o'clock on the evening of the 9th day of May, 1903, the plaintiff's intestate, who was riding a bicycle at a moderate rate of speed going easterly along Northland avenue, attempted to cross the tracks of defendant's railroad, and when upon the last or most easterly rail of defendant's second track was struck by a car approaching from the south and so injured as that death resulted. The evidence quite conclusively shows that the defendant was guilty of negligence which caused the accident, at least it was of such a character as to make it a question of fact for the jury, because such evidence tends to show that the car as it approached the crossing was going at a very high rate of speed, 20 miles an hour; that it was not under control as it approached Northland avenue; and that it gave no signal or warning of its approach. Indeed, the learned trial justice apparently assumed, in granting defendant's motion for a nonsuit, that the evidence was sufficient to raise a question of fact as to defendant's negligence; but the motion was granted solely upon the ground that the plaintiff failed to establish affirmatively that his intestate was free from contributory negligence.

Notwithstanding plaintiff's intestate is dead, and therefore cannot state what precautions she took to avoid the accident, and that she did those things which a person in the exercise of ordinary care and prudence would have done under like circumstances, we will assume that the plaintiff cannot recover, unless it may be reasonably inferred from the facts proven that the deceased did exercise such care and prudence, and that the burden of affirmatively establishing such proposition rests upon the plaintiff. The evidence tends to show that upon the night in question plaintiff's intestate was upon her bicycle going easterly along Northland avenue. The deceased was first seen riding at a moderate rate of speed in the center of Northland avenue near the corner of a drug store, the east wall of which is 24½ feet west of the westerly curb of Jefferson street, and the north wall 17½ feet south of the southerly curb of Northland avenue. She was on a line 2 or 3 feet east of the drug store and was headed east, going straight across the tracks. At that time the car which struck her was 150 feet from the crossing and was going at the rate of 20 miles an hour. She went across the first track, but before, or just as, she reached the track upon which the car was coming, she turned her wheel to the north, going

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to the farther side of the street, and tried to cross at that point, and was struck by the car at the north side of Northland avenue just as the rear wheel of her bicycle was leaving the easterly rail of the defendant's most easterly track. When she turned her wheel to the north the car had already reached the southerly line of Northland avenue.

From these few and simple facts we think it would have been proper for the jury to have inferred that in so attempting to cross she saw the car approaching, but that she assumed, as she had a right to do, that the car would approach the crossing at a proper rate of speed, and under such control as would enable it to be stopped before coming into collision with her, she being rightfully upon the crossing; that, observing the defendant failed in the discharge of its duty in that regard, and being then about to go upon the track upon which the car was approaching, and being unable to stop instantly, she turned her wheel to the north, went diagonally across the tracks to the farther side of the street, and was struck just as the rear wheel of her bicycle was leaving the easterly rail of defendant's most easterly track. Reasonable care and prudence could not have been more clearly proven than by the facts and circumstances disclosed by the record if the deceased had been living and testified:

"When I got to a point within 20 feet of defendant's tracks, I saw its car approaching the crossing, 150 feet away. I supposed that I had ample time to cross in safety, as I would have had if the defendant had obeyed the duty imposed upon it by law, which I assumed it would do. When I got across the first track I discovered that such duty was not being performed by the defendant, and I was in a place of danger. I could not stop my wheel or turn back, and sought to avoid a collision by turning to the north to the end that I might have greater space in which to make the crossing."

If plaintiff's intestate had given such testimony, we think it must be conceded that the question of her contributory negligence would have been for the jury, and, as suggested, we think it was permissible for the jury to have drawn precisely those inferences as to the acts and conduct of the plaintiff from the facts and circumstances disclosed. It is not the law that a person passing along a city street upon a bicycle in the usual way, when he reaches a point 20 feet from a street car track upon an intersecting street, and sees a car approaching 150 feet distant from such crossing, must stop and wait until such car has passed before he attempts to proceed, in order to be relieved from the imputation of negligence in case a collision occurs. The practical result of such a rule would be to declare that a railroad company has a paramount right of way at such crossing. The contrary has been repeatedly held.

In Zimmerman v. Union Ry. Co., 3 App. Div. 219, 38 N. Y. Supp. 362, the court said:

"The wagon was being driven across the railroad, not within its tracks. The defendant's car had no paramount right of way at the crossing. O'Neill v. Dry Dock, etc., R. R. Co., 129 N. Y. 125, 29 N. E. 84. The distance from the car to the crossing, at the time Madden sought to cross, was such as to enable the wagon to pass safely, if the defendant's car had been properly managed, and this Madden and the deceased had a right to expect. The wagon was prior in time at the crossing, and therefore prior in right. The driver was not bound to get out of the way of the car, nor can it be said to be negligence on his part that he proceeded to cross at a walk."

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In the case of Lawson v. Met. St. Ry. Co., 40 App. Div. 308–312, 57 N. Y. Supp. 1000, it was said:

"When one attempts to cross the track of a street car, and has approached the track at such a distance from an approaching car that he has reasonable ground to suppose that he will be able to cross the track, it is the duty of the street car driver to give him a reasonable opportunity to cross, and if, for that purpose it is necessary for him to check the speed of his car, or even stop the car entirely for a short space, it is his duty to do it, and the person crossing the track has the right, without being charged with contributory negligence, to assume that that duty will be performed."

The rule is very concisely stated in Dunican v. Union Ry. Co., 39 App. Div. 497–500, 57 N. Y. Supp. 329, as follows:

"He [the plaintiff] had the right to cross the track, even though the car was approaching, and even though the fact of his crossing required the car to slacken its speed (Kennedy v. Third Ave. R. R. Co., 31 App. Div. 30, 52 N. Y. Supp. 551); and whether he had sufficient opportunity to observe the approach of the car, or used due diligence in his effort to avoid it after he became aware of its situation, was clearly a matter for the jury to determine."

See, also, Johnson v. Rochester Ry. Co., 61 App. Div. 12, 70 N. Y. Supp. 113; Smith v. Met. Ry. Co., 7 App. Div. 253, 40 N. Y. Supp. 148; Brozek v. Steinway Ry. Co., 10 App. Div. 360, 41 N. Y. Supp. 1017.

Many other cases might be cited to the same effect, all of which hold that it is not negligence as matter of law for a pedestrian traveling upon a public street, a person driving a vehicle, or riding upon a bicycle, to attempt to cross a street surface railroad track when a car is approaching 150 feet away; that such traveler has the right to assume that the car so approaching is going at a proper rate of speed, is under control, and will slow down or stop, if necessary, in order to avoid colliding with such traveler. Neither can it be said that such traveler is as matter of law guilty of negligence, because, when he discovers that such car is not going to slow down or stop, he seeks to avoid collision by going farther from it and attempts to pass around it, although as a result an accident occurs.

Upon the evidence the jury would have been justified in inferring from the facts and circumstances proven that plaintiff's intestate did just that, and nothing more, and therefore the question of her contributory negligence was for the jury. It follows that the judgment and order appealed from should be reversed, and a new trial granted, with costs to the appellant to abide event.

Judgment and order reversed, and new trial granted, with costs to appellant to abide event. All concur.

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## WILCOX v. FOX.

(Supreme Court, Appellate Division, Fourth Department. May 2, 1906.)

NEW TRIAL—PROCEEDINGS TO PROCURE—STATUTORY PROVISIONS.

Where a motion for a new trial is not made at the term and before the justice who held the trial, as prescribed by Code Civ. Proc. § 999, it must be made on a case and exceptions, as prescribed by section 997.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, § 263.]

Appeal from Onondaga County Court.

Action by Ralph A. Wilcox against Josiah Fox. From an order vacating and setting aside the verdict of the jury in defendant's favor and the judgment entered thereon, and directing a new trial, defendant appeals. Reversed, and motion to set aside verdict denied.

The action was commenced in the County Court of Onondaga County on the 21st day of March, 1905, to recover the value of medical services alleged to have been rendered to defendant's wife at his special instance and request. The defendant in his answer alleged that such services were rendered at the request of another, and under an agreement that such other would pay for the same, and also that the defendant at the time of the commencement of the action was not a resident of the county of Onondaga.

Argued before McLENNAN, P. J., and SPRING, WILLIAMS, NASH, and KRUSE, JJ.

O. M. Reilly, for appellant.

Roscoe R. Wilcox, for respondent.

McLENNAN, P. J. The action, we must assume, was tried upon the issues raised by the pleadings. Whether or not such issues were properly determined, we cannot know, as the evidence is not before us. As a result of such trial, a jury determined that the plaintiff was not entitled to recover upon the merits, and also by a special verdict found that the defendant was not a resident of the county of Onondaga at the time the action was brought. Upon such verdict the defendant, as he had a right to do, entered a judgment dismissing the complaint upon the merits, with costs, and served a notice of the entry of such judgment upon the plaintiff's attorney. Upon the rendition of the verdict by the jury, plaintiff's attorney did not move for a new trial, and, so far as appears by the record, he was entirely satisfied with the manner in which the case had been submitted to the jury by the learned County Court. After the verdict had been rendered and judgment thereon had been entered, and notice of entry given to the plaintiff by defendant's attorney, the court at which such action was tried adjourned without day, and ceased to exist. Thereafter the plaintiff's counsel made a motion upon the charge of the court, which is contained in the record, and upon certain affidavits, to have the verdict so rendered set aside, and the judgment entered thereon vacated. Defendant's counsel appeared upon the return of such motion, and objected specifically that the court did not have jurisdiction to entertain such motion. Notwithstanding, the order appealed from was made.

We think it is elementary that a new trial of an action may not be directed unless such motion is made at the term and before the justice who held the same, as prescribed by section 999 of the Code of Civil



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Procedure, or else upon a case and exceptions, as prescribed by section 997 of the Code of Civil Procedure. In the case at bar the respondent did not comply with either of these requirements, and therefore we conclude that the learned trial court was without jurisdiction to make the order appealed from.

It follows that the order appealed from should be reversed, with $10, costs and disbursements, and the motion denied, with $10 costs.

**Order reversed, with $10, costs and disbursements, and the motion denied, with $10 costs. All concur.**

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## BANNON v. NEW YORK CENT. & H. R. R. CO.

**(Supreme Court, Appellate Division, Fourth Department. May 2, 1906.)**

1. APPEAL—APPEAL FROM JUDGMENT—QUESTIONS REVIEWABLE.

   An appeal from a judgment raises only questions of law, and the successful party is entitled to have the evidence construed most favorably to him, to establish any fact necessary to support the judgment.

2. MASTER AND SERVANT—INJURY TO SERVANT—FELLOW SERVANTS—NEGLIGENCE—STATUTORY LIABILITY OF EMPLOYER.

   A foreman of a crew engaged in repairing railway bridges assisted the members of the crew in gathering material with which to make a fire in order to thaw out the material necessary to repair a culvert passing under the railroad track. The foreman attempted to move a tie across the track, and while doing so a train struck the tie, and injured a member of the crew. *Held*, that the foreman while attempting to supply material for the fire was acting as a co-employé of the members of the crew, and the employer was not liable for his negligence, under Employers' Liability Act, Laws 1902, p. 1748, c. 600, making an employer liable for an injury to an employé occasioned by the negligence of one exercising the duty of a superintendent.

   [Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 450.]

3. SAME—PROXIMATE CAUSE.

   A member of a crew engaged in repairing railroad bridges was injured while standing on a track in consequence of a train running on another track striking a tie attempted to be drawn across the track by a co-employé. *Held*, that the failure of the foreman to give warning of the approach of the train was not the proximate cause of the accident, and the employer could not have anticipated that the employé would be put in danger by a co-employé putting a tie in front of an approaching train.

Appeal from Trial Term, Onondaga County.

Action by John J. Bannon against the New York Central & Hudson River Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed, and new trial granted.

The action was commenced on the 6th day of February, 1904, under the employers' liability act, being chapter 600, p. 1748, Laws 1902, to recover damages sustained by the plaintiff on account of injuries alleged to have been caused solely through the negligence of the defendant.

Argued before McLENNAN, P. J., and SPRING, WILLIAMS, NASH, and KRUSE, JJ.

A. H. Cowie, for appellant.

John H. McCrahon, for respondent.

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McLENNAN, P. J. No motion having been made by the defendant upon the minutes of the court for a new trial, and no order having been entered refusing to grant such new trial, only questions of law are presented by this appeal, which is taken from the judgment only (Collier v. Collins, 172 N. Y. 101, 64 N. E. 787), and the plaintiff is entitled to have the evidence construed most favorably to him to establish any fact necessary to support the judgment.

It is urged by the appellant that the evidence so construed fails, as matter of law, to establish a cause of action in plaintiff's favor. On the 15th day of December, 1903, and for some time previous, the plaintiff was in defendant's employ, engaged with a number of others in repairing bridges upon its railroad. He was a member of the "bridge gang," so called, of which one Reilly was foreman. On the day of the accident Reilly was absent from the work, and assumed to direct one Mickel to take charge of the men, whether with the knowledge or consent of the defendant does not appear. On the day in question the plaintiff, with his associates, including Mickel, was engaged in repairing a stone culvert, which passed under defendant's tracks near Oriskany, N. Y. The material with which to make the repairs was placed between the tracks near the culvert which was being repaired. In the progress of the work it became necessary to build fires upon such material, in order to thaw it so that it could be handled, and for that purpose the men went to work gathering material, old ties, etc., with which to make a fire. In the course of such work Mickel, who we will assume was in charge of the men in the absence of Reilly, himself assumed to attempt to draw a tie across one of the tracks for the purpose of putting it on the fire; the plaintiff at the time being upon the track adjoining. Before Mickel got the tie entirely across, an express train going at the rate of 50 or 60 miles an hour struck the tie in such manner that it was thrown upon the adjoining track, struck the plaintiff, and broke his leg, which is the injury for which he complains.

It is claimed that the defendant is liable upon two grounds: First, because Mickel, while acting as superintendent, attempted to move the tie in front of the approaching express train, and that he was negligent in the performance of such work; and, second, because he failed to give warning of the approach of the express train.

As to the first ground upon which liability is sought to be predicated, we think it is apparent that the act of Mickel in attempting to move the tie across the track was not an act of superintendence, but was the act of a co-employé, for which the defendant is not liable. Liability for negligence in superintending is what is created by the statute, and not for the negligent act of a superintendent in no manner connected with his duties as such. Quinlan v. Lackawanna Steel Co., 107 App. Div. 176, 94 N. Y. Supp. 942.

As to the second ground upon which it is claimed the defendant is liable, to wit, the failure of Mickel to give warning of the approach of the express train, it is sufficient to say that that was not the proximate cause of the accident. The plaintiff was in a safe place, except as it was rendered unsafe by the negligent act of Mickel. No train was approaching on the track upon which he was standing. If he had been notified that a train was approaching upon one track, he would only

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have stepped upon another, and the defendant could not have anticipated that he would then be put in danger by another employé putting a tie in front of a moving train upon another track. The direct, proximate, and sole cause of the accident was the negligent act of Mickel in placing a tie in front of a rapidly moving express train, for which, as we have seen, the defendant was not liable, and not because of the fact that he failed to give warning of the approach of such train.

Judgment reversed, and new trial granted, with costs to appellant to abide event upon questions of law only; the facts having been examined, and no error found therein. All concur.

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## VANDERVORT v. MINK.

(Supreme Court, Appellate Division, Fourth Department. May 2, 1906.)

1. SET-OFF AND COUNTERCLAIM—SAME TRANSACTION.

Where plaintiff sued for false and fraudulent representations in the sale of a horse, alleging a reliance thereon and resulting damages, and defendant admitted the sale of the horse, denied all other allegations, and pleaded a counterclaim for the balance of the purchase price of the horse unpaid, such counterclaim arose out of the same transaction, and was properly pleaded, as authorized by Code Civ. Proc. §§ 501, 502, 2945, whether plaintiff's cause of action be regarded as one in tort or for breach of warranty.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Set-Off and Counterclaim, §§ 49, 50.]

2. JUSTICES OF THE PEACE—APPEAL—NEW TRIAL ON THE MERITS.

Plaintiff sued for false representations in the sale of a horse, demanding judgment in the sum of $49. Defendant answered, admitting the sale, denying all other allegations in the complaint, and pleading a counterclaim for the balance of the price of the horse unpaid, amounting to $64. *Held* that, the counterclaim being properly pleaded, defendant on appeal from the justice's judgment was entitled to a new trial on the merits in the county court, as authorized by Code Civ. Proc. § 3068, authorizing a new trial when the sum for which judgment was demanded by either party exceeded $50.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Justices of the Peace, § 656.]

3. SAME—VARIANCE.

Where plaintiff sued before a justice in tort for false representations in the sale of a horse, such complaint was not sustained by proof of a breach of warranty.

Appeal from Ontario County Court.

Action by Gilbert M. Vandervort, as administrator of the estate of Clarence S. Vandervort, deceased, against Lincoln A. Mink. From a County Court judgment, affirming a justice's judgment in favor of plaintiff, and directing that the appeal from the Justice's Court be regarded as one on questions of law only, and that defendant was not entitled to a new trial in the County Court, defendant appeals. Reversed.

Argued before McLENNAN, P. J., and SPRING, WILLIAMS, NASH, and KRUSE, JJ.

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E. A. Griffith, for appellant.
Willis C. Ellis, for respondent.

WILLIAMS, J. The judgment of the County Court and the order of May 18, 1904, should be reversed, with costs, and the case held for trial in County Court. There were two trials in Justice's Court. The first one resulted in a disagreement of the jury. The original complaint was in writing, but is not contained in the record. The answer thereto was merely a general denial. Before the second trial, amended pleadings were made and filed, which are in the record. When the second trial was called, the defendant did not appear, and the plaintiff gave his evidence, and took judgment by default. The defendant appealed from such judgment to the County Court, and demanded a new trial in the Appellate Court, under section 3068, Code Civ. Proc., but required a return of the evidence taken at the trial in Justice's Court. The return was made, and the evidence was included therein. The County Court held the appeal was upon questions of law only, that no new trial could be had in County Court, and upon the evidence and proceedings affirmed the judgment of Justice's Court. The plaintiff in his amended complaint demanded judgment for $49 only. The defendant in his amended answer set up a counterclaim, and demanded judgment therein for $64. The question of a new trial in County Court was therefore dependent upon the counterclaim, and whether it was properly interposed in the case. The amended complaint set out a cause of action in tort, viz., the sale of a horse, the making of false and fraudulent representations on the sale, and the reliance of the plaintiff thereon, and resulting damages. The answer admitted the sale of the horse, and denied all other allegations in the complaint, and then set up a counterclaim for balance of the purchase price of the horse unpaid. This counterclaim was upon contract. The plaintiff's cause of action was in tort, but both causes of action arose out of the same transaction (the sale of the horse), and the counterclaim was therefore properly interposed, under sections 501, 502, 2945, Code Civ. Proc. This rule was recognized in Green v. Parsons, 27 Wkly. Dig. 544, Hall v. Werney, 18 App. Div. 565, 46 N. Y. Supp. 33, and Carpenter v. Man. Life Ins. Co., 93 N. Y. 552.

If the plaintiff's cause of action was merely for breach of contract of warranty, then clearly the counterclaim on contract also was permissible under the sections of the Code referred to.

There is another view of this case which would require a reversal of the judgment of the County Court, though not the order requiring the appeal to be regarded as one on questions of law only, and not for a new trial. The complaint, as we have said, was one in tort, but the proof given before the court was merely of a breach of warranty. The judgment of the justice was not, therefore, supported by the evidence under the pleadings, and would have to be reversed for that reason. If the complaint should be regarded as in contract merely breach of warranty, the evidence would support it, but in that event the counterclaim, being on contract, would certainly entitle the defendant to a new trial in County Court, and the judgment of the County Court and the order of May 18th would have to be reversed for that reason.

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We think, however, whether the complaint was on contract or in tort, the counterclaim was properly interposed, and the appeal to the County Court entitled the defendant to a new trial in that court.

**Judgment of County Court and order of May 18, 1904, reversed, with costs, and case held for trial in County Court. All concur.**

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## KIELEY v. KAHN.

**(Supreme Court, Appellate Term. April 24, 1906.)**

**JUDGMENT—SPLITTING CAUSES—INSTALLMENTS OF RENT.**

**Judgment in an action for the recovery of an installment of rent due August 28th does not bar a subsequent action for installments due August 14th and 21st, where an action for those installments was pending when the action for the installment due August 28th was commenced, but was discontinued before judgment in that action.**

**[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, § 1111.]**

Appeal from Municipal Court, Borough of Manhattan, Third District.

Action by Timothy J. Kieley against George Kahn. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Argued before SCOTT, P. J., and TRUAX and BISCHOFF, JJ.

Abraham Goldfarb (Maurice Rapp, of counsel), for appellant.

Hardy & Shellabarger (Charles J. Hardy, of counsel), for respondent.

SCOTT, P. J. The facts are undisputed. The defendant is sued as guarantor for one Lichtwitz under a lease. The present action is for two installments of rent falling due respectively on August 14, and August 21, 1905. On August 25, 1905, plaintiff commenced an action for these two installments against both Lichtwitz and this defendant. On September 13th judgment was taken against Lichtwitz, and the action discontinued against this defendant. Meanwhile, and on August 30, 1905, an action was commenced against this defendant for an installment which had fallen due on August 28th, and in this action judgment was obtained on September 14th, and subsequently paid. The present action was commenced on September 8th. The pleadings were oral, the answer being "general denial and payment." The only defense relied upon is based upon the familiar rule that when a plaintiff sues upon a single contract, such as a lease, providing for payment in installments, and does not include all installments due at the time of commencing suit, he may not after judgment sue for installments which were due when the prior action was commenced, but were not included in it. Bendernagle v. Cocks, 19 Wend. 207, 32 Am. Dec. 448; Jex v. Jacobs, 19 Hun, 105; Lorillard v. Clyde, 122 N. Y. 41, 25 N. E. 292, 19 Am. St. Rep. 470. The contention is that, inasmuch as the installments of August 14th and August 21st, now sued for, were due when plaintiff began his action for the installment of August 28th, he should have included those installments in his action for the latter, and, having failed to do so, and having recovered a judgment for and been paid the installment of August 28th, he cannot now recover for the prior installments.

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It is perhaps a sufficient reason why this defense should not prevail that the judgment relied upon as a bar was not so pleaded. But, even if it had been, the defense would have been unavailing. The rule relied upon by defendant is thus stated by Vann, J., in Lorillard v. Clyde, supra:

"It is doubtless true, as a general proposition, that each default in the payment of money falling due upon a contract payable in installments may be the subject of an independent action, provided it is brought before the next installment falls due; but each action should include every installment due when it is commenced, unless a suit is at the time pending for the recovery thereof, or other special circumstances exist."

There can be no doubt that plaintiff had the right to sue for each installment as it accrued, and since he was neither bound, nor would have been permitted, to maintain simultaneously two actions within the same jurisdiction for the same debt, he could not properly include in his action for the installment of August 28th a claim for the installments of August 14th and 21st, if he already had another action pending for these installments. The record shows that the action for the installment of August 28th was begun on August 30th, and that at that time the plaintiff did have an action pending against this defendant for the prior installments of August 14th and August 21st; said action not being discontinued until September 13th. The plaintiff could not, therefore, have properly included in his action for the installment of August 28th a claim for the prior installments, which were then in suit, and the exception or qualification pointed out in Lorillard v. Clyde applies.

That the action for the installments of August 14th and August 21st was discontinued after the commencement of the action for the installment of August 28th, and before judgment therein, we deem to be immaterial. The judgment in the last-mentioned action could be no greater than the plaintiff's claim as it existed at the time the action was commenced, and the vital question remains whether the plaintiff could or should have included a demand for the prior claims in that action. Clearly, he should not, for they were already in suit.

It follows that the judgment was right, and should be affirmed, with costs. All concur.

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## BLOODGOOD et al. v. SHORT.

(Supreme Court, Appellate Term. April 24, 1906.)

1. PRINCIPAL AND AGENT—UNAUTHORIZED ACTS OF AGENT—LIABILITIES OF AGENT AS TO THIRD PERSONS.

An agent who makes an unauthorized contract on behalf of his principal is liable to the person dealing with him on the faith that he possessed the authority which he assumed, where the contract is one on which the principal could have been held if the agent had in fact possessed the assumed authority.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Agent, §§ 476, 477, 558.]

2. SAME.

A husband employed without authority a broker to procure a purchaser of his wife's land. The broker, relying on the husband's assumed authority, procured a purchaser. The husband did not give to the broker

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a written authority to sell, as prescribed by Laws 1901, p. 312, c. 128. *Held*, that the husband was not liable for breach of an implied warranty that he was authorized to employ a broker, since there could have been no recovery against the wife.

3. BROKERS—COMPENSATION—SERVICES.

The right of a broker, employed to procure a purchaser, to his commissions does not accrue until he has notified the owner or agent that he has procured a purchaser.

4. WITNESSES—COMPETENCY—TRANSACTION WITH DECEASED PERSONS.

A broker, suing the representative of a deceased person for breach of warranty based on the fact that decedent, assuming without authority to act as agent for another, employed the broker to procure a purchaser, is not competent, under the express provisions of Code Civ. Proc. § 829, to prove that he gave notice to decedent that he had procured a purchaser.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 651, 652.]

Appeal from City Court of New York, Trial Term.

Action by William D. Bloodgood and others against Anna L. Short, as executrix of Edward L. Short, deceased. From a judgment for plaintiffs, defendant appeals. Reversed, and new trial granted.

Argued before SCOTT, P. J., and TRUAX and BISCHOFF, JJ.

Joline, Larkin & Rathbone (Arthur H. Van Brunt, of counsel), for appellant.

James A. Deering (James R. Deering, of counsel), for respondents.

SCOTT, P. J. This is an appeal from a judgment entered upon the direction of a verdict in favor of plaintiffs. The action is by a firm of real estate brokers, and was originally brought against Edward L. Short, now deceased, for the alleged breach of an implied warranty by him that he was authorized, as his wife's agent, to employ plaintiffs as brokers to sell her home. The plaintiffs contend that the deceased, professing to act in behalf of his wife, authorized them to procure a purchaser for the house at the price or sum of $70,000; that in so doing he impliedly warranted that he was authorized to act for his wife in that regard; that in fact he was not so authorized, and consequently that he was guilty of a breach of his implied warranty.

That the deceased authorized plaintiffs to attempt to find a purchaser at $70,000 is substantially admitted by the answer, as is the fact that he was not authorized by his wife to sell the property, or to employ plaintiffs as brokers for that purpose. Assuming that plaintiffs relied upon the presumed authority of the deceased to act in his wife's behalf, and so far fulfilled the terms of their employment that a valid claim against the wife would have accrued if her husband had in fact been authorized to represent and act for her, the facts admitted by the answer would, in general, sustain this action. Baltzen v. Nicolay, 53 N. Y. 467; Simmons v. Moore, 100 N. Y. 140, 2 N. E. 640. As was said in the former case:

"When an agent makes a contract beyond his authority, by which the principal is not bound, by reason of the fact that it was unauthorized, the agent is liable in damages to the person dealing with him upon the faith that he possessed the authority which he assumed."

It is essential, however, to a recovery under such circumstances that the contract be one upon which the principal could have been held if

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the agent had in fact possessed the authority which he assumed. Dung v. Parker, 52 N. Y. 494; Baltzen v. Nicolay, supra. Otherwise, as is pointed out in the latter case, the anomaly would be presented of giving a right of action against an assumed agent for an unauthorized representation of his power to make a contract, when the breach of the contract itself, if he had been authorized to make it, would have furnished no ground of action. In the present case no recovery could have been had against the actual owner of the property, even if her husband had been authorized by her to retain the plaintiffs to find a purchaser, for there is neither allegation nor proof that she or her attorney in fact had ever given to plaintiffs the written authority prescribed by chapter 128, p. 312, Laws 1901. Nor did the plaintiffs show by competent legal evidence that they had ever communicated to the deceased the fact that they had procured a purchaser. Assuming that they had been competently and legally employed, no right to a commission would accrue until they had not only found a purchaser, but had notified the owner or her agent of the fact, because until then there could be no refusal. No claim is made of notice to the owner, and plaintiffs are forced to rely upon a notice to the assumed agent. It is sought to show that such notice was given by telephone. The answer admits that some one notified the deceased by telephone that a purchaser had been found, but the answer does not admit that the person so telephoning was one of the plaintiffs; leaving that fact to be established by proof. It was sought to be established by the evidence of one of the plaintiffs that on the day in question he called up the deceased on the telephone, and "got him." We think that this evidence was improperly received, under the provisions of section 829, Code Civ. Proc. Healey v. Malcolm, 99 App. Div. 370, 91 N. Y. Supp. 207. Rejecting this incompetent evidence, there is nothing in the case to show that plaintiffs ever tendered to the deceased the proposed purchaser, so that, if he had been duly authorized to employ plaintiff, and to accept or reject, in behalf of his wife, the proposed purchaser, there is no legal evidence in the case that the opportunity to do so was ever presented to him.

The judgment must be reversed, and a new trial granted, with costs to appellant to abide the event. All concur.

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## RUSSELL HARDWARE & IMPLEMENT MFG. CO. v. UTICA DROP FORGE & TOOL CO.

(Supreme Court, Appellate Division, Fourth Department. May 2, 1906.)

REFERENCE—COMPULSORY REFERENCE—NATURE OF ISSUES.

Code Civ. Proc. § 827, provides that, whenever the court is obliged to make an examination or inquiry, it may direct a reference, and section 1013 provides that the court may, on its own motion, direct a trial of issues of fact by a referee where the trial will require the examination of a long account, and will not require the decision of difficult questions of law, and that in an action triable by the court a reference may be made to decide the whole issue or any of the issues, or to report the referee's finding upon one or more specific questions of fact involved in the issue; and section 1015 provides that the court may direct a reference

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to take an account and report to the court thereon, either with or without the testimony, or where it is necessary to do so for the information of the court, and also to report upon a question of fact arising in an action. Plaintiff sued for an accounting on a contract whereby defendant was to pay plaintiff royalties for manufacturing and selling a certain patented device, and for a permanent injunction restraining the making and sale of the device, and the court by an interlocutory judgment on its own motion ordered a reference to take proof of the amount due plaintiff for royalties and damages, and requiring the referee to report the proof with his opinion, and reserving the question of injunctive relief until the coming in of the referee's report. *Held*, that the interlocutory judgment was erroneous as referring questions not merely incidental to the relief sought, and in that the reference, as concerned incidental questions, was not in the form required by section 1015.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Reference, § 29.]

Appeal from Special Term, Oneida County.

Suit by the Russell Hardware & Implement Manufacturing Company against the Utica Drop Forge & Tool Company. From a judgment in favor of plaintiff, and from an interlocutory judgment, defendant appeals. Reversed, and new trial granted.

The action was brought for an accounting upon a contract made between the parties, whereby the defendant agreed to pay certain royalties for manufacturing and selling a certain staple puller, which theretofore had been manufactured and put upon the market, known as the "Russell Staple Puller," and claimed to be protected by letters patent, and also for a permanent injunction restraining making and selling such a device under another name, or in violation of the contract. An interlocutory judgment was directed, appointing a referee to take proof upon the question of damages, and final judgment directed upon the coming in of the report of the referee. The appeal is taken from both the final and the interlocutory judgment.

Argued before McLENNAN, P. J., and SPRING, WILLIAMS, NASH, and KRUSE, JJ.

Richard S. Martin, for appellant.
Charles H. Searle, for respondent.

KRUSE, J. The plaintiff, a foreign corporation organized under the laws of the state of Missouri, was engaged in the business of manufacturing and selling the Russell staple puller, a device for pulling staples. It was located and commenced manufacturing the device at Kansas City in October, 1898, it having become the owner of letters patent granted to inventor of said device. It continued the business until January 11, 1900. The device was extensively advertised by the plaintiff, all of the profits of the business having been spent for that purpose, and it became widely known, and had a large and extensive sale. This was the condition of the business when the defendant entered into negotiations for the contract, which was finally entered into by the parties on the 11th day of January, 1900. By this contract the plaintiff granted to the defendant the exclusive right to manufacture and sell the device according to the letters patent in the United States and other nations. Each party agreed to endeavor to detect and prevent infringements, and communicate promptly to the other any information relative thereto; the prosecutions for the infringements to be assumed and directed by the plaintiff, or, in the case of failure of plaintiff, then by the defendant, and the expense to be repaid from

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the "license fee," so called, provided for in the contract, so that ultimately the expense was to be borne by the plaintiff. The defendant agreed to have its plant in full operation by January 1, 1901, sufficient to supply the trade as demanded, and take the entire charge and control of manufacturing such device; but in the meantime the plaintiff was to continue its factory at Kansas City, and deliver the entire output, as might be required, to defendant, beginning February 1, 1900, upon certain terms and fixed prices, but when defendant was prepared to manufacture, as has been stated, plaintiff should cease manufacturing the tool. The defendant agreed to pay for all goods manufactured by it, upon the sale of such goods, a royalty of 50 cents a dozen flat, to be made at the end of each month from and after February 1, 1900; the said licensee (the defendant) to furnish statement from month to month of all sales made by it during the previous month, and the licensor (the plaintiff) to have the right at all reasonable times to examine the books of said licensee, so as to verify the correctness of the said statement. It was further provided that, on default in the payment of the royalties, or failure to manufacture the article according to the terms of the contract and keep the trade properly canvassed, the privilege of such manufacturing and selling should become null and void after giving the defendant six months' notice. It further provided that on and after February 1, 1900, the defendant should have full charge and control of the sales, fill the orders of customers at certain prices, and all agencies or contracts for the sale of the article made between the plaintiff and its agents and salesmen should be canceled, and no contracts or prices made by plaintiff for future sales, but all contracts and prices to be made by the defendant. It will thus be seen that the contract contemplated the giving up by the plaintiff of its entire business and the good will thereof, closing down its works, and turning it all over to the defendant, and giving it the absolute and sole control thereof, subject only to the terms of the contract. This was done. The plaintiff closed up its works and went out of business as soon as the defendant was ready; the defendant beginning about April 1, 1901, to manufacture the article, and has even since continued to manufacture and sell it.

The Russell patent was issued in 1895, and for the purpose of fortifying that patent the plaintiff acquired another patent on March 12, 1900, for a similar device, known as the "Heard Patent," issued June 14, 1872, which inured to the defendant's benefit, and thereafter the article was stamped with appropriate reference to both patents. The article was changed slightly from time to time to improve it, but in its essential features it has remained unchanged, and the trial judge finds that from the commencement of the manufacturing of the tool by the defendant down to about March 1, 1904, the tool was stamped with the words "Patented Sept. 3, 1895; Patented June 14, 1892," and that the tool was advertised and sold as the Russell staple puller, and further finds that the defendant failed to perform the contract; that defendant made false statements of sales, and failed to account for all the sales made by it, and remitted less than the true amount due; that from about March 1, 1904, the defendant failed to stamp the tool as patented, and changed the name to evade liability for payment of royalties, and drive

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the Russell staple out of the market, and substitute therefor the same device under another name, and has sold the device since about March 1, 1904, many thousand of them, under the name of the "Utica Improved Staple Puller," and the Russell staple puller, under its true name, has been withheld from the market.

We think the evidence justified these findings, as well as the decision made by the trial court that the plaintiff was entitled to recover the unpaid royalties and the damages the plaintiff had sustained by these violations of the contract. The trial court did not, however, determine in its decision the amount of the unpaid royalties, nor what amount of damages the plaintiff had sustained from these violations, but directed an interlocutory judgment to be entered, establishing the defendant's liability, and of its own motion ordering a reference "to take proof as to the amount due the plaintiff for royalties, and the amount of damages it has sustained, and report such proof, with his opinion thereon, to the court"; and the question as to whether the plaintiff was entitled to injunctive relief was also reserved by the interlocutory judgment until the coming in of the referee's report. The defendant excepted to this decision, and specifically to the provision ordering a reference.

We think that this practice cannot be sustained, and that it resulted in a mistrial, and that the interlocutory judgment and the final judgment based on the evidence taken before the referee and his findings thereon must be reversed.

Counsel for the respondent relies upon sections 827 and 1015 of the Code of Civil Procedure. We think neither of these sections authorize a compulsory reference, as was done in this case, nor does section 1013 furnish such authority. It must be remembered that this action was brought and relief demanded in the complaint for a money judgment and an injunction restraining certain violations of the contract. The final judgment awarded both, but the interlocutory judgment awarded neither.

The essential questions raised by the pleadings should have been determined upon the evidence given upon the trial, and not left in abeyance, to be tried upon the evidence given before the referee, supplemented by his findings and opinion thereon. Kirkwood v. Smith, 72 App. Div. 429, 75 N. Y. Supp. 1016; Standard Fashion Co. v. Siegel-Cooper Co., 44 App. Div. 121, 60 N. Y. Supp. 739. These two questions were not merely incidental to the primary relief; they were the very questions involved in the issues raised by the pleadings. The reference was not limited to merely taking an account of the sales, but it directed generally that proof be taken of the amount due the plaintiff for royalties, and the amount of damages it had sustained, and mentioned in the fourth conclusion of law, which was "the compensation for the damages it has sustained in consequence of defendant's acts in making, advertising, and selling said tool under a new name, and without being stamped, as covered by plaintiff's patents, and in consequence of the withdrawal of said Russell staple puller from the markets under its true name and properly stamped," and even so far as the reference was merely upon incidental questions, which is permissible under section 1015, it is not in the form required

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by that section, for it only authorized the referee to take proof and report the same with his opinion thereon.

The question of the power of the court to order a compulsory reference under these sections and the form of reference has been passed upon by the Court of Appeals in Doyle v. M. E. R. Co., 136 N. Y. 505, 32 N. E. 1008, and again in Standard Fashion Co. v. Siegel-Cooper Co., 44 App. Div. 121, 60 N. Y. Supp. 739, and we regard these cases decisive upon that question and decisive of this case.

The judgment should be reversed, and a new trial granted, with costs to abide the event. All concur.

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## WITMER v. BUFFALO & N. F. ELECTRIC LIGHT & POWER CO.

(Supreme Court, Appellate Division, Fourth Department. May 2, 1906.)

1. ELECTRICITY—NEGLIGENCE—DEATH—QUESTION FOR JURY.
   In an action for death caused by electricity, evidence *held* to present a question for the jury whether the electric company was sufficiently careful in maintaining its wires and system to make them safe for a user of electric lights on its lines.
2. SAME—INSTRUCTIONS.
   In an action for death caused by electricity, an instruction that the electric company was required to use reasonable care in constructing and maintaining its system, and to prevent a secondary system, used for lighting houses, from being charged with a high voltage current, was sufficiently favorable to the company.
3. SAME—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.
   In an action for death caused by an electric current from wires used in lighting a house, where the usual voltage was less than enough to be dangerous to life, whether the deceased was guilty of contributory negligence in handling the wire was a question for the jury.
   [Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Electricity, § 11.]
4. SAME—PROVISION IN CONTRACT.
   A provision in a contract for electric lighting that the company should not be liable in any event for damage to person or property from the use of the light does not relieve the company from liability for death caused by its negligence.
5. EVIDENCE—RES GESTÆ—DECLARATIONS.
   In an action for death caused by an electric current from the wire used for the electric lighting of a house, a statement of the deceased just prior to the accident causing his death, in response to a warning to be careful, that there was no danger, as a sufficient current could not get into the house, was competent as a part of the res gestæ.
   [Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 345, 346.]

Appeal from Trial Term, Niagara County.

Action by Mary L. Witmer, as administratrix of Loren T. Witmer, against the Buffalo & Niagara Falls Electric Light & Power Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

The action is brought to recover damages for the death of plaintiff's husband through negligence of the defendant, resulting from his coming in contact with a highly overcharged wire in the home of deceased at Niagara Falls on the 27th day of September, 1903. The claim of the plaintiff is that the wires used for supplying light to the deceased had become overcharged through the defendant's negligence, and the deceased, being unaware of this

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**dangerous condition, took hold of an extension cord, at the end of which was an electric light bulb used for lighting the cellar or basement of the house, and was killed.**

Argued before McLENNAN, P. J., and SPRING, WILLIAMS, NASH, and KRUSE, JJ.

Maurice C. Spratt, for appellant.
Fred M. Ackerson, for respondent.

KRUSE, J. That Loren T. Witmer came to his death by coming in contact with a wire overcharged with a deadly current of electricity is scarcely disputed. Neither is the fact seriously controverted that ordinarily the current was not deadly, or even dangerous. The incandescent electric lighting was used in this house. The incandescent circuit voltage was about 2,200, carried on two primary wires, which distributed the electricity about the city. Transformers were placed in various parts of the city, which reduced or stepped it down, as it is stated, from a voltage of 2,200 to about 106, and at this reduced voltage it was used for lighting the houses and other places. Less than 500 voltage is, under ordinary circumstances, not dangerous to human life, so that, if the deceased came to his death by coming in contact with a current of electricity, it is reasonably certain that the current exceeded the usual house-lighting voltage.

No claim is made that the defendant is liable for the wiring in the house, for that was not done by the defendant. The sole claim of the plaintiff is that the defendant, through its want of care and attention in respect to the matters which will be adverted to a little later, was responsible and became liable for the consequences resulting from the overcharged condition of the wires in this house, which caused the death of the deceased, and that question is the serious question presented by this appeal.

It appears that on the early morning of September 27, 1903, between 2 and 3 o'clock in the morning, an unusual buzzing noise was heard. The deceased was awakened by his wife, and evidently determined that the disturbance was due to electricity, for he went upstairs, and turned off the entrance switch connection. His wife warned him to be careful, and he replied that there was no danger; that there couldn't enough come in to hurt anybody; that it would blow out the transformer before it would come in. After turning off the switch, they proceeded on their way downstairs, and the buzzing noise came on again. The cellar indicator in the dining room showed that there was light in the cellar. He started down cellar. The noise continued about a second. It had ceased before he opened the cellar door. On his way down he struck a match. The cellar was usually lighted by an electric bulb attached to the end of a cord. The cord was about seven or eight feet long, and when not in use was hung up. He took hold of the cord, lifted it towards him; the match was going out. His wife said, "I will go and get a light for you." After she had turned and gone for the light, the buzzing sound came on again, the bulb lighted up, and at the same time the deceased groaned and fell. She was at the head of the cellar stairs when she saw him take hold of the wire. His wife and sister picked him up, and put him in a sitting posi-

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tion. His wife went for a doctor, and at her return the deceased had been carried upstairs by his father and his sister; they were working over him, but he was evidently dead, for they were unable to revive him.

The hight tension wire of the arc system carried a voltage of 7,-500. That this current was communicated in some measure and by some means to the wires of the residence of the deceased is reasonably certain; indeed, both parties so claim. The serious question is, whether it was done, as is claimed on behalf of the plaintiff, by the proximity of the arc and incandescent wires and their sagging, or by the limbs of a tree through which the two wires passed connecting them, thus surcharging the incandescent wire, or both; or whether, as is claimed on behalf of the defendant, the fire alarm wire fell upon the high tension arc wire, conveying the current in some manner to the telephone wire, and then from the telephone wire to the incandescent wire, and eventually finding its way into the home of the deceased. If the latter, then under the rule of law adopted by the learned trial court a recovery against the defendant cannot be sustained, for such was the charge to the jury. It seems reasonably certain that the fire alarm wire fell upon the high tension arc light wire, or in some way the current from the high tension wire was communicated to the fire alarm wire, but it is still open to doubt as to whether this overcharged current was communicated to the telephone wire, and from the latter to the incandescent wire, and from thence into this house. It was a stormy night, and high winds prevailed. The alternate buzzing and the light coming on momentarily and then disappearing would seem to indicate that there was an alternating current transmitted to the wires in this house. The defendant contends that this same condition was apparent on the fire alarm system, as testified to by the person in charge, at about the same time that the accident occurred; thus lending credence to the claim that the current was not only alternating, but may well have been caused by the swaying motion of the wires, thus causing intermittent contact, or proximity of wires sufficiently close to communicate the current from the high to the low tension wires. The defendant contends that this intermittent current was produced by the swaying of the telephone wire by the wind, while the plaintiff contends that it was the swaying motion of the other wires and the intermittent contact between the two wires communicated by the limbs of the trees which were being swayed by the wind. Witnesses were called upon both sides testifying to what they observed before and after the accident with reference to conditions in the trees and on the wires and transformers, and other conditions which might throw some light upon the question.

Without going into the details of the testimony, we think the evidence presented a fair question of fact for the jury, and finding thereon by them favorable to the plaintiff's claim afforded the grounds for the further finding that the defendant was not sufficiently careful in maintaining its wires and system, and did not have that regard for the safety of human life that the law requires shall be observed in handling so dangerous an agent as electricity. The rule, as charged by the learned trial court, that the defendant was required to use reasonable care in

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constructing and maintaining its system, and to prevent the secondary system being charged with a high voltage current, was as favorable to the defendant as it could ask. Nor can it be said that the evidence showed that the deceased was not reasonably careful. It is true the extension cord may have rested on the cellar bottom, and the insulation so worn that it afforded an easy way for the current to reach the ground, and that the deceased knew that, and was reasonably familiar with the dangers of electric current; but it must be remembered that ordinarily the house wires did not carry a sufficiently strong current to make it dangerous, so that from the lack of insulation or for any other reason would it be dangerous to take hold of this extension cord. Under all the circumstances, it was a question of fact for the jury to determine whether the deceased was free from contributory negligence.

The contract under which the defendant supplied light to the deceased contained the following provision:

"In case the supply of light should fail, whether from natural causes or accident in any way, this company shall not be liable for damage by reason of such failure, nor shall it be liable in any event for damage to person or property arising, accruing, or resulting from the use of the light."

It is contended by the defendant that this provision exonerates the defendant from liability for damages, even if caused through its own negligence. We cannot assent to this claim. Contracts of this character, to warrant such a construction respecting the negligence of a party in omitting a plain legal duty, must do so in terms and expressly provide to exempt from such liability. Nicholas v. N. Y. C. & H. R. R. R., 89 N. Y. 370; Jennings v. G. T. & G. Co., 127 N. Y. 438, 28 N. E. 394; Rathbone v. N. Y. C. & H. R. R. R., 140 N. Y. 48, 51, 35 N. E. 418.

As regards the statements made by the deceased to his wife when the switch was being turned off, stating that there was no danger, that a sufficient current could not get into the house, in response to her statement asking him to be careful, we think they constitute a part of the res gestæ, and were competent. Waldele v. N. Y. C. & H. R. R. Co., 95 N. Y. 274, 279, 47 Am. Rep. 41; Landon v. P. A. Ins. Co., 43 App. Div. 487, 60 N. Y. Supp. 188.

We conclude that the verdict of the jury should not be disturbed, and that there are no errors requiring a new trial.

The judgment and order should be affirmed.

Judgment and order affirmed, with costs. All concur, except NASH, J., not voting.

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## BUFFALO CLEAN STREET CO. v. CITY OF BUFFALO.

(Supreme Court, Appellate Division, Fourth Department. May 2, 1906.)

MUNICIPAL CORPORATIONS—CONTRACTS—VALIDITY.

Where an ordinance authorized the board of public works to make a contract for the period of 10 years, providing for placing receptacles for waste paper at street corners, and reserved the right to terminate the contract on 60 days' notice, and a 10-year contract, entered into in pursuance of the ordinance, was terminated at the end of 2 years, the commissioner had no authority to enter into a new contract for the same purpose for a period of 10 years from the expiration of the first contract.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 666.]

Spring, J., dissenting.

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Appeal from Special Term, Erie County.

Action by the Buffalo Clean Street Company against the city of Buffalo. From a judgment dismissing the complaint, plaintiff appeals. Affirmed.

The following is the opinion of Kruse, J., at Special Term:

The plaintiff seeks to reform a contract made with the commissioner of public works of the city of Buffalo, which provided for placing at street corners in the city, by the plaintiff's assignors, of receptacles for receiving waste paper and the like material for the use of the city, with permission to the owners of the receptacles to place thereon advertising matter. The reformation desired does not seem to be seriously resisted by the city if the contract is binding upon it. It is, however, attacked by the city upon the ground of its invalidity, it being contended that inasmuch as one contract had been made by the city for the same purpose, covering a period of 10 years, although it was terminated by the city before the expiration of that period, the commissioner of public works was without authority to make this contract in question, for the reason that the resolution or ordinance authorizing the making of such a contract provided only for a single contract, covering a period of 10 years, beginning with the date of the contract, and that, one contract having been so made, although remaining in force for only 2 years, the power so granted by the common council was exhausted, and that the attempt to make a second contract was unauthorized, and not binding upon the city. I am inclined to the view contended for on behalf of the city. I think it quite plain that this method of furnishing means for receiving and storing this waste material, and thus serving to keep the streets clean, was experimental only, and that at the end of the contract term further action would have been required on the part of the legislative branch of the city government to continue this system; and so, where the original contract was terminated by the city before the expiration of the 10-year period, under the right reserved by the city in the resolution or ordinance, such further action was likewise necessary to authorize the making of a new contract, to supplement the original contract for the unexpired term thereof. Taking the view, however, that this resolution or ordinance contemplated that this system should continue for the maximum contract term of 10 years, and that the commissioner of public works was authorized to use this system for that entire period, and to that end make contracts for different sections of the city, or to supplement by further contracts such as might be terminated before the contract period had expired, under the right reserved to the city, yet it will be seen that this contract is for the period of 10 years from its date, and thus extends beyond the original maximum contract period, so that even in this view the contract was unauthorized. I think this contract is not binding upon the city, and that the plaintiff is not entitled to maintain this action.

Judgment may therefore be entered declaring it void, and dismissing the complaint.

Argued before McLENNAN, P. J., and SPRING, WILLIAMS, HISCOCK, and NASH, JJ.

Simon Fleischmann, for plaintiff.

Charles L. Feldman and Edward L. Jung, for defendant.

PER CURIAM. Judgment affirmed, with costs, on opinion of Kruse, J., delivered at Special Term.

SPRING, J. (dissenting). By the ordinances passed on the 25th of July, 1900, and which comprise Exhibit A of the record, an entire new scheme was blocked out to collect and dispose of the waste paper and other litter which collected upon the streets. In the first para-



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graph or subdivision the duty was imposed upon the board of public works to take charge of this business. In order to carry out the scheme, that department was authorized to enter into a contract with a respectable person or firm for the erection and maintenance of 300 of the boxes or receptacles designed for the deposit of this litter. By this contract the person or firm was to have "the exclusive right and privilege for a period of ten years * * * to erect and maintain said boxes."

. In the first place, I do not think the project was intended to be experimental, unless it can be said that because a new method or plan was intended to be adopted pursuant to the ordinances an experiment was involved. The scheme was designed to continue for at least 10 years, for the first contract to be entered into was to extend over that period. A contract of that length, covering the entire city, is too extensive to denominate it a mere experiment.

In the second place, it seems to me to narrow the scope of the contract to limit the authority to the original agreement which the board of public works was to enter into. We must keep in mind that this whole business was committed to the board of public works, and the making of the contract was simply the mode of executing it. It would be rare that the one contract would continue for a period of 10 years, and the board of public works, in order to make effectual the new plan adopted, must possess the power to make new agreements as occasion should arise. The ordinances themselves, it seems to me, inherently indicate this purpose. By subdivision 4, the department of public works is directed, "as frequently as shall be necessary," to provide for the taking care of the waste paper and litter. Again, in subdivision 5, the expression "in any contract" is used, and in the succeeding subdivision, in referring to the license or privilege, we find the following language, "with whom such contract or contracts shall be made." The city is fully protected. In the first place, by subdivision 6, the right is given to terminate the contract upon 60 days' notice; in the second place, if it desired to abandon the business, it could do so by repealing the ordinances. Pursuant to the authority given it, the department of public works, now a commissioner, entered into an agreement which continued along until 1902, when he terminated it under the 60-day clause. He immediately entered into another agreement with the plaintiff, which the common council disapproved, but did not repeal the ordinances. It is not necessary here to discuss the right of the common council to interfere with the commissioner of public works to the extent of annulling the agreement which he has made. The point is, it seems to me, that the agreement was valid when executed, and, whatever expenses have been incurred (and it seems some were incurred), or whatever rights accrued to the plaintiff by virtue of the agreement, they may be entitled to; that is, it was a valid agreement at its inception, because the board of public works was authorized to make it.

The only question, therefore, to consider is what the ordinances meant, and it does not seem to me, in view of the scope of the business, of the power committed to the board of public works, the phrase-

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ology of the ordinances, and the extent of the plan designed, that we can say they should be limited to the first contract made by the board.

I think the judgment should be reversed.

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## PEOPLE ex rel. LA FORTE v. RUBIN.

(Supreme Court, Special Term, Onondaga County. December 8, 1905.)

1. INDIANS—CUSTODY OF CHILD—HABEAS CORPUS—JURISDICTION.

Under Domestic Relations Law, Laws 1896, p. 222, c. 272, § 40, providing that the husband or wife, being an inhabitant of this state, living in a state of separation without being divorced, who has a minor child, may apply to the Supreme Court for a writ of habeas corpus, and have the child brought before the court, and on the return the court may award the custody of the child to either parent, under such regulations as the case may require, habeas corpus proceedings may be maintained by an Indian woman, a ward of the United States government living on an Indian reservation, where she is living in separation from her husband without being divorced.

2. MARRIAGE—ESSENTIALS—INDIAN CUSTOM.

Under Laws 1892, p. 1574, c. 679, § 3, providing that Indians who contract marriage according to the Indian custom and cohabit as husband and wife shall be deemed lawfully married, members of the Onondaga Nation, who were married according to custom of that nation, consisting simply in an agreement to live together as man and wife, and in following out that agreement till by mutual consent or otherwise a separation occurs, were lawfully married.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Marriage, § 6.]

3. PARENT AND CHILD—RIGHT TO CUSTODY OF CHILD.

Where, on separation of a husband and wife without procuring a divorce, the husband forcibly took their child and placed it with its grandmother, with whom it lived till her death, when it remained with an aunt, the mother of the child, leaving aside the question of its welfare, is entitled to its custody as against the aunt.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Parent and Child, § 13.]

4. SAME—FORFEITURE OF RIGHT.

A mother who for eight years never made any claim to the custody of her child, who resided during that time with its grandmother and aunt, forfeited her legal right to its custody.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Parent and Child, §§ 23, 24.]

5. SAME—WELFARE OF CHILD—EVIDENCE.

In habeas corpus proceedings by a mother for the custody of her child, evidence *held* to show that the welfare of the child will be best promoted by leaving it in the custody of the respondent, an aunt of the child.

Habeas corpus proceedings by the people, on the relation of Leah La Forte, against Sarah Rubin for the custody of Kimball Thomas. Writ dismissed.

The following is the report of the referee:

To the Hon. Maurice L. Wright, Justice of the Supreme Court: Pursuant to an order made by you in the above-entitled matter, and dated October 20, 1905, whereby I was directed to take the evidence in said matter and report the same to you, with my opinion thereon, I herewith respectfully report that I have taken said evidence, and herewith submit the same, my opinion in the matter, preceded by a statement of the facts, being as follows: The relator

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herein, Leah La Forte, an Indian, on the 11th day of October, 1905, petitioned your honor for a writ of habeas corpus directing one Sarah Rubin to produce before you on a certain day the body of one Kimball Thomas, alleged to be illegally imprisoned and restrained by her at her home on the Onondaga Indian reservation. Return to the writ was duly made, and said Kimball Thomas produced. It appears from the evidence taken on the hearings before me that both the relator and the respondent are Indians, residing at the Onondaga Reservation, and that relator is the mother of said Kimball Thomas, who is a boy about 11 years of age. It further appears that respondent is the aunt of the boy, being a sister of the boy's father. It is undisputed that the father of the boy, one Eddie Thomas, also an Indian, was married to relator by the Indian custom of marriage about 12 years ago, and that they lived together until the child was about 3 years of age, when the parents separated, and the boy was taken to his grandmother's, an Indian, one Elizabeth Thomas, where he lived up to the time of her death, which occurred about 2 or 3 years ago. Since that time he has lived with his aunt, the respondent, Sarah Rubin. Some interesting questions have arisen on the examination of this matter. Counsel for respondent raises the question of jurisdiction. The parties are Indians, wards of the United States government, living on their Indian reservation. There is no question in my mind but what this court has jurisdiction of these proceedings, and has the power to issue the writ. In People ex rel. Pruyne v. Walts, 122 N. Y. 238, 25 N. E. 266; it was stated by the court that "the common-law writ of habeas corpus was a writ in behalf of liberty, and its purpose was to deliver a prisoner from unjust imprisonment and illegal restraint. It was not a proceeding calculated to try the rights of parents and guardians to the custody of infant children. It was of frequent use, however, when children were detained from their parents or guardians on the grounds that absence from legal custody was equivalent to illegal restraint and imprisonment. In the case of children of the age of discretion, the object of the writ was usually accomplished by allowing the party restrained the exercise of his volition; but in the case of an infant of an age incapable of determining what was best for itself, the court or officer made the determination for it, and in so doing the child's welfare was the chief end in view. The purpose of the writ, as now regulated by the Code, is the same." Code Civ. Proc. § 2015 et seq. The Domestic Relations Law, Laws 1896, p. 222, c. 272, § 40, et seq., says: "The husband or wife being an inhabitant of this state, living in a state of separation without being divorced, who has a minor child, may apply to the Supreme Court for a writ of habeas corpus to have such minor child brought before such court; and on the return thereof, the court, on due consideration, may award the charge and custody of such child to either parent for such time, under such regulations and restrictions as the case may require, and may at any time thereafter, vacate or modify such order." This section is derived from Rev. St. (1st Ed.) pt. 2, c. 8, tit. 2, §§ 1–3. The sole requirement of the statute as to the status of the husband or wife living in a state of separation without being divorced is that he or she shall be an inhabitant of this state. It draws no line between color or race, white, black, or red, but declares that he or she must be an inhabitant. In the case before us relator is an inhabitant, is living in a state of separation from her husband, without being divorced, and the child is a minor. Consequently the court has jurisdiction.

Some dispute has arisen as to the legitimacy of the boy whose custody is here sought by the relator. While in the view I take of the case his legitimacy is not a fact of vital importance, nevertheless, it seems best to me to touch on that point in passing, since counsel for relator bases one of his strongest arguments on the allegation that the child is illegitimate; and in this connection the Indian custom of marriage must be explained. Eddie Thomas and the relator, father and mother, respectively, of the child, were married by Indian custom. This custom, as the undisputed evidence of several of the witnesses discloses (and some of these witnesses were leading people of the Onondaga Nation), consists merely in an agreement to live together as man and wife, and in following out that agreement by so doing until by mutual consent or otherwise a separation occurs. It appears that this is one of the most ancient of the Indian customs, and is largely adhered to at the

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present time by the Indians. It has also been made legal by the laws of this state. Laws 1849, p. 577, c. 420, §§ 3, 4, as found in 2 Cumming and Gilbert's General Laws, p. 1686, § 3. I quote therefrom: "The laws of the state relating to the capacity to contract marriage, the solemnization of marriage, the annulment of the marriage contract and divorce, are applicable to Indians; and, subject to the jurisdiction of the peacemakers' courts of the Seneca Nation to grant divorces, the same courts shall have jurisdiction of actions arising therennder as if such Indians were citizens; but Indians who have heretofore or shall hereafter contract marriage according to the Indian custom or usage and shall cohabit as husband and wife, shall be deemed lawfully married, and their children legitimate." This was re-enacted in the Indian law found in Laws 1892, p. 1574, c. 679, § 3. Applying this to the case in hand, I cannot see how the legitimacy of the child can be questioned, and by the undisputed evidence of the father himself, Eddie Thomas, he had no wife living when he married relator, so that the claim of the relator that the boy is illegitimate has no foundation whatever.

Leaving aside the question of what is best for the boy's welfare—the question which we deem of paramount importance in this case, and which we shall consider a little later—I must now touch on the relative rights of the relator and the respondent to the custody of the child. Relator is the mother and respondent is the aunt of the boy. The evidence of the relator was that the boy was forcibly taken from her by the father and placed with its grandmother. It further appears that he lived with said grandmother until her death, when he remained with the respondent. Purely, as between the mother and the aunt, the mother would undoubtedly be entitled to the custody of the child, were we to ignore questions as to the character of the parties and the best interests of the boy. It appears from the evidence of the mother herself, however, that she was accustomed to drink intoxicating liquors, and that she became intoxicated several times while the boy lived with her. It further appears that after separating from Eddie Thomas she lived with three different men, and for several years after said separation bore a questionable reputation. The result of the relator's assuming custody of the boy would be largely in doubt, in view of her past life and the uncertainty whether or not her acts would be repeated. Undoubtedly, the child was taken by force by the father, and placed with its grandmother, but the father's testimony was that he did so for the best interests of his child; and as the natural father of the boy, his right to place his child where he considered that his best interests would be conserved can only be commended and approved. He still wishes the boy to remain with respondent for the same reasons. It seems to me that the mother (the relator here) by her past life has forfeited her claim to the custody of the child. Further, it appears that for nearly eight years she never made any claim for the boy, or tried to obtain him, and that her first effort in that direction occurred some two months ago. Her motive for that effort seems to me to be quite apparent. It appears that, by a recent award of money by the United States government to the Indians, the sum of $100 has come to the boy, and the probability is that this will shortly be increased. The mother for eight years never made a move to obtain custody of her child until he came into some money. On the other hand, the respondent, even while the boy lived with his grandmother, bought his clothes and hired his washings done. It does not appear that the relator ever contributed a thing toward the support of the boy—her own child. Since the grandmother's death respondent has cared for the boy, actuated, so far as I can see, by no other motive than her affection and pity for him. It seems to me that the mother practically abandoned her child, and that in so doing she forfeited, in large measure, her right to his custody. In this connection the case of People ex rel. Wehle v. Weissenbach et al., 60 N. Y. 386, is in point. In that case a father petitioned for a writ of habeas corpus, seeking the custody of his daughter, an infant seven years of age. It appeared that the father in 1869 placed the girl to board with the board of commissioners of charities and corrections of the city and county of New York, paying a certain amount for her board. In 1870 defendants obtained the child from the commissioners, and claimed to hold her as an apprentice by virtue of indentures made with them by said commissioners. It appeared

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that the father had paid for only one month's board of the girl with the commissioners, and that he then left the state, and the child was left on the hands of the commissioners as a pauper. The father's petition was dismissed; the court intimating that he had virtually abandoned his daughter, and was not entitled to her custody. In his case the mother paid no attention whatever to the child for even a longer time than in the case above, and I am inclined to believe that, but for the fact that the boy has come into a little money, these proceedings would never have been instituted. On this point the case of In re Murphy, 12 How. Prac. 513, offers authority. A mother brought habeas corpus for the custody of her boy nine years old. When the boy was eleven weeks old he was placed with relatives, who always gave him the best of care, and to whom he clung with filial devotion. The court said: "Does not nine years of undisturbed possession on the one hand, and of uninterrupted acquiescence on the other, constitute as good evidence of the understanding of the parties as any written instrument?" In other words, the mother because of her acquiescence for so long a time was refused custody of the child; it appearing that the child's welfare was receiving the best of attention. Her petition was dismissed. The case seems very similar on this point to the one before us.

The sole remaining point to be considered is what is best for the welfare of the child. Will he be better off morally, financially, and physically, will his comfort and education be better attended to by relator or respondent? "The jurisdiction of the court is equitable in its character. The welfare of the child is the chief object to be obtained, and must be the guide for the judgment of the court." People ex rel. Pruyne v. Waits, 122 N. Y. 238, 25 N. E. 266. The rule laid down in a long line of cases, and which is established beyond dispute, is that in a controversy for the custody of an infant of tender years the court will consider the best interests of the child, and will make such order for its custody as will be for its welfare, without reference to the wishes of the parties, their parental rights, or their contracts. In re Waldron, 13 Johns. 418; People v. Mercein, 8 Paige, 47; People v. Pillow, 1 Sandf. 672; People v. Kling, 6 Barb. 366; People v. Cooper, 8 How. Prac. 288; People v. Olmstead, 27 Barb. 9; In re Lesslier, 17 Abb. Prac. 397; In re Holmes, 19 How. Prac. 329; People v. Brooks, 35 Barb. 85; In re Schroeder, 65 How. Prac. 194; People v. Brown, 35 Hun, 324; Day v. Day, 4 Misc. Rep. 235, 24 N. Y. Supp. 873; In re McDowle, 8 Johns. 328; People ex rel. Winston v. Winston, 31 App. Div. 121, 52 N. Y. Supp. 814; People ex rel. Sternberger v. Sternberger, 12 App. Div. 398, 42 N. Y. Supp. 423; In re Paddock v. Eager (Sup.) 10 N. Y. Supp. 710; In re McKain, 17 Abb. Prac. 399; People v. Erbert, 17 Abb. Prac. 395. In the case of In re Waldron, 13 Johns. 418, cited above, the court said: "Where a habeas corpus is directed to a private person to bring up an infant, the court is bound to set the infant free from improper restraint; but whether they shall direct it to be delivered over to any particular person rests in their discretion under the circumstances of the case, and that although the person making the application be the father of the infant." In that case the infant was in the custody of its grandfather, and it appeared that it would be more for its benefit to remain with him than to be put in the care of the father. No improper restraint was shown, and the court refused to direct the infant to be delivered to the father. In People ex rel. Davenport v. Kling, 6 Barb. 366, the court said: "In the case of a child too young to be capable of determining for itself, the court or officer assumes to determine for it, and in doing so the welfare of the child is chiefly, if not exclusively, to be held in view. Upon habeas corpus to determine as to the custody of an infant, all the court is bound to do is to set the infant free from improper restraint. Whether it will deliver it over to anybody is left to its discretion. The rights of the parental authority are to be regarded no further than they are considered consistent with the best good of the child." In the Matter of Schroeder, 65 How. Prac. 194, the court says: "The security, good conduct, and well-being of infant children are the important considerations to be regarded, and when those considerations can only be best accomplished by depriving the mother of their custody, it is the uniform practice of the courts to give such a direction." Other cases maintaining this principle are In re Reynolds

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(Sup.) 8 N. Y. Supp. 172; Matter of Wollstonecraft, 4 Johns. Ch. 80; In re Clifton, 47 How. Prac. 172; In re Welch, 74 N. Y. 299; People v. Trafford (Sup.) 12 N. Y. Supp. 43; People v. Manley, 2 How. Prac. 61; In re Watson, 10 Abb. N. C. 215; In re Riemann (Super. Buff.) 10 N. Y. Supp. 516. People ex rel. Trafford v. Trafford (Sup.) 12 N. Y. Supp. 43, offers a strong authority also. That was a habeas corpus by a father to obtain custody of his daughter, five years old, from the mother, with whom she lived. The parents had two children. Trouble arose between them, and the wife left her husband, taking both children with her. Later she sent one girl to her grandparents, and again later tried to get her back from them, but on their refusal she went and took her by force. The allegation was made that the other daughter died as a result of the mother's acts in refusing proper medical attendance; that Christian Science treatment was used, and the child really died from neglect; and that the mother was wholly unfit for the custody of the remaining child. The court said: "The welfare of the child is the object to be secured. Where will her health, education, and morals be best cared for? Her expectations as to property, though of minor importance, should be given proper weight. Neither parent has any rights touching the custody of children which can be allowed to mitigate against the welfare of the child. Its custody may be awarded to either parent, or they may both be refused its custody, and its custody awarded to some other person." The court held that, in view of the facts as proven, and in view of the fact that both father and mother were poor, while the grandfather was wealthy, it was for the best interest of the child that she should be given to the grandfather. This was done.

The argument of counsel for relator, that relator's right to the custody of the child is paramount to that of the alleged putative father, must be disregarded, in our view of the matter that the boy is legitimate offspring. The authorities cited by counsel for relator are on the point of the mother's right as opposed to that of the putative father, and I do not consider them in point. Even in this case, if the boy was illigitimate, I would still deem it for his best interests that his mother be refused his custody.

It is contended by relator that at present the boy comes in daily contact with a pagan Indian, namely, Morris Lyon, the present husband of the respondent, and that it will be dangerous for his well-being and morals to be subjected to such contact; also that relator is a Christian, and married to a Christian husband, and that the boy should have the advantages of such an environment. On this point the evidence shows that respondent is a member of the Episcopal Church, and that up to a recent date has kept the boy in constant attendance at the Sunday School. I do not fear for the future welfare of the boy in the hands of respondent. It appears that she has taken the best of care of him, that she has a tender affection for him, and that he possesses many of those things that go to make life happy for a boy, the gifts of respondent to him; in fact, he seems better off than the average boy of parents in moderate circumstances. He seems fond of her, and well satisfied where he is. The undisputed evidence shows that the respondent is a kind, generous woman of ample means, far more so than relator; that she clothes the boy well, keeps him constantly at school, where his morals, comfort, and education receive proper attention. No illegal restraint or imprisonment is exercised by respondent. Relator claims that she is well able to care for the boy, but there is some doubt in my mind of that, since both her title and that of her husband to the property they live on has been disputed before me on the trial of the matter. Under these circumstances, I do not deem it for the boy's best interest to be removed from the custody of the respondent, who has no children, and who takes such a lively interest in his welfare. While I can appreciate the feelings of a mother who from good motives seeks the care, custody, and society of her child, yet I am not able in this case to find ground for disturbing the respondent in the possession of the boy.

The writ should be dismissed, but I recommend that the petitioner be allowed to see the child at all reasonable times.

William Gilbert, for relator.
Lawrence T. Jones, for respondent.

ANDREWS, J. Report confirmed, and writ dismissed.

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## LIGHTON et al. v. CITY OF SYRACUSE.

(Supreme Court, Appellate Division, Fourth Department. May 2, 1906.)

1. JUDGMENT—CONCLUSIVENESS—PERSONS CONCLUDED.

A judgment in mandamus to compel the mayor and clerk of a city to execute a contract for the purchase of land, pursuant to a resolution of the council directing them to enter into a contract for the purchase of land, is conclusive in specific performance against the city; the mayor and clerk being, under Laws 1885, pp. 40, 41, c. 26, tit. 5, §§ 33–40, and Laws 1898, p. 379, c. 182, § 47, executive officers, charged with the duty of executing the agreement on behalf of the city.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, § 1227.]

2. SPECIFIC PERFORMANCE—CONTRACTS ENFORCEABLE—CONTRACTS FOR THE CONVEYANCE OF REALTY—ENFORCEMENT BY VENDOR.

The council of a city adopted a resolution directing the mayor and clerk to purchase land for city purposes, the title to be approved by the corporation counsel. The vendor executed a contract in conformity to the resolution, and the court, in mandamus proceedings, directed the mayor and clerk to execute the contract in behalf of the city. The corporation counsel refused to approve the abstract of title tendered. The transaction was fair and free from fraud. *Held*, that a decree of specific performance would be entered on the vendor tendering good title, though the corporation counsel refused to approve it.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, § 260.]

Appeal from Special Term, Onondaga County.

Action by Mary Lighton and another against the city of Syracuse. From a judgment for plaintiffs, defendant appeals. Affirmed.

In November, 1899, the plaintiffs owned a lot in the city of Syracuse at the southwest corner of East Water and Montgomery streets. On the 27th day of that month a resolution was adopted by the common council of the city directing the mayor and clerk to enter into an agreement to purchase said lot for city purposes for the sum of $21,000, "free and clear of all incumbrances; $5,000 to be paid over before January 12, 1900, the title of which to be approved of by the corporation counsel, and the same to be paid for in such manner as the city is authorized by an act of the Legislature to be passed at the legislative session commencing January 1, 1900, and for that purpose the senators and members of assembly of Onondaga county are requested to procure the passage of such an act." The mayor did not approve the resolution, and it was passed over his veto. The contract was prepared in conformity to the resolution, executed by the plaintiffs, and presented to the mayor and city clerk for their signatures, but in disregard of the legislative direction they refused to execute the same. In February, 1900, a peremptory writ of mandamus was applied for, requiring these officials to sign said contract, and the corporation counsel to certify that the same "was in proper form and duly authorized." Thereafter said proceeding was dismissed as to said corporation counsel, on the ground that his certificate was not essential until after the execution of the contract. The application for the peremptory writ was denied, but an alternative writ was granted against the mayor and clerk, to which a return was made by them. The issues were referred to a referee to hear, try, and determine. A report was made in favor of the relators therein, and the same was approved by the Special Term, and a peremptory writ issued, requiring the then mayor and city clerk to execute the agreement, which they did. Upon the refusal of the city to carry out the agreement, this action was commenced to compel specific performance of the agreement. No appeal was ever taken from the judgment in the mandamus proceeding.

Argued before McLENNAN, P. J., and SPRING, WILLIAMS, NASH, and KRUSE, JJ.

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Walter W. Magee, for appellant.
James E. Newell, for respondents.

SPRING, J. The judgment in the mandamus proceeding conclusively determined between the parties all the issues involved in it. People ex rel. McCabe v. Matthies, 179 N. Y. 242–248, 72 N. E. 103; Culross v. Gibbons et al., 130 N. Y. 447, 29 N. E. 839. The mayor (section 47, c. 182, p. 379, Laws 1898; sections 33–40, tit. 5, c. 26, pp. 40, 41, Laws 1885) and city clerk were the executive officers charged with the duty of executing said agreement on behalf of the city of Syracuse by the resolution of the common council, and the judgment against them is binding also upon the city. Ashton v. City of Rochester, 133 N. Y. 187–193 et seq., 197, 30 N. E. 965, 31 N. E. 334, 28 Am. St. Rep. 619. It may be useful, therefore, to state briefly just what was decided in the mandamus proceeding. The defendants in their return to the writ alleged that the price agreed to be paid for the premises was grossly excessive, and that in fact they were not worth to exceed $12,000, and also that the members of the common council in authorizing and directing the purchase of said premises acted in bad faith, and were guilty of "a legal and also an actual fraud upon the city of Syracuse, its citizens and taxpayers." After a lengthy trial, the referee found against the defendants, and specifically that the premises were worth the purchase price set out in the agreement, and that there was no taint of fraud or collusion in the adoption of said resolution by the common council or in the making of said agreement, but all parties acted in good faith in the entire transaction. The referee further found as a fact that the contract executed by the plaintiffs "was in proper form and duly executed" by them, and as matter of law they were entitled to a peremptory writ of mandamus, directing the mayor and city clerk "to forthwith sign and execute said contract, and affix the seal of said city to the same." The Special Term, in its order bearing date April 25, 1903, preliminary to the issuance of the peremptory writ, distinctly confirmed all the findings of fact and conclusions of law of said referee adverted to.

The question of the binding effect of this judgment is now academic to a large degree, for upon the trial in the pending action the defendant again presented its proof on these various issues, and the trial court explicitly "found and confirmed all the findings of said referee," which were adopted in the final order and the judgment in the mandamus proceeding. There have, therefore, been two trials on the questions connected with the execution and carrying out of this agreement, and in each the plaintiffs have been successful.

Substantially the only question now up for consideration is the effect of the refusal of the corporation counsel of the city to approve of the abstract of title tendered on behalf of the vendors. We must consider this aspect of the case in the light of the adjudication and of the findings of fact alluded to, establishing that the contract is in proper form, represents an honest transaction, and the premises are worth the price stipulated to be paid therefor; and that in obedience to the judgment of the court the contract has been properly executed on behalf of the defendant. The issue is a narrow one, and should be construed in

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favor of an enforcement of the agreement, if the rights of the parties can be fully subserved by so doing.

Shortly after the adoption of the resolution by the common council directing the purchase of the land, the contract as executed by the plaintiffs was tendered to the mayor and the city clerk for their signatures, which were refused, and the corporation counsel was asked to certify that the same was in proper form and duly authorized, which he also declined to do. The mandamus proceeding was then commenced, and ended in the judgment July 6, 1903, and the peremptory writ was granted November 7th, and the contract was signed by the mayor and clerk the 10th of that month. A verified claim was thereupon presented to the comptroller and treasurer of the city for the purchase price of the land, but payment was refused. The Special Term, as noted, dismissed the proceeding against the corporation counsel, on the ground that his certificate should not be indorsed until after the execution of the contract by the mayor and clerk. During the pendency of the mandamus contest, it was futile to request the corporation counsel to approve the agreement, for the transaction itself was involved in that controversy. Within 10 days after the granting of the peremptory writ this action was commenced. The complaint does not allege specifically that the corporation counsel was asked to certify that the title of the premises was marketable, or that they were free from incumbrance. The answer does not allege the failure to do so, and there is no direct proof on the subject relating to a time prior to the commencement of the action, except the demand referred to, made anterior to the mandamus proceeding. The evidence shows that at the time of the execution of the contract by the plaintiffs, and also at the time of the commencement of the action, they were the absolute owners of the premises, with an indefeasible title, but subject to mortgage and tax liens. In December, 1903, they tendered to the mayor and city clerk a good and sufficient conveyance of said premises, demanding payment of the purchase price, with interest, and offered to have the amounts of all the liens set out on the certified abstract of title deducted from the purchase price, but the officials named declined to pay said purchase price. On the 24th day of February, 1904, the plaintiffs, by their attorney, attended a session of the common council, and again tendered a good and sufficient deed of said premises, at the same time presenting an abstract of title, certified by the clerk of Onondaga county, showing in the plaintiffs a good and marketable title, free and clear of lien or incumbrance, except those for which satisfactions were also tendered, ready to be delivered upon the payment of the purchase price, which they then demanded in compliance with said contract. At the same time a like presentation and tender with a similar demand were made to the mayor and other officials, each of whom refused to respond. Simultaneously the plaintiffs requested the corporation counsel to approve said abstract of title, which he declined to do. There is a conflict in the evidence over what occurred at this time, but the corporation counsel, in justification of his refusal, testified as follows:

"I asked him if the search showed these mortgages and tax liens undischarged, and he said it did. We figured about what the amount would be. I stated to him then that there was substantially $19,000 or more of undis-

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**charged liens on the abstract of title and search. He said that was so. Then I stated to him that the city had absolutely no need of that property, and in my judgment it was not worth to exceed half the contract price. That I was fully convinced from what I knew about the matter that the whole deal was corrupt, and I said so far as I was concerned that I deemed it my duty not to approve any abstract of title and search unless it complied with the conditions of the contract. That it was not any good for me to examine the search with his statement that undischarged liens appeared thereon. I said there might be other reasons why I would not approve of the abstract of title and search, and I would not approve it with those undischarged mortgages and taxes on it; I would not approve it unless it complied with the terms and conditions of the contract."**

Among the liens appearing upon said search was a mortgage held by the Cortland Savings Bank. After the refusal of the officials of the defendant to carry out said contract, an action to foreclose said mortgage was commenced, terminating in a judgment and sale, at which the mortgagee bid off the said premises, obtaining a referee's deed, which was recorded April 21, 1904. On the 24th of June thereafter the said plaintiffs tendered to all said officials of the defendant a deed of conveyance in proper form, executed by said savings bank to said city, and accompanied such tender with a deed of the plaintiffs, containing full covenants of warranty, also naming said city as grantee, together with a search duly certified by the clerk of said county, disclosing said premises free and clear of lien or incumbrance; but said officials again refused to pay said purchase price or perform said contract. A similar tender was made later, and also upon the trial of the action, but with a like refusal.

The trial court finds specifically on each of these endeavors of the plaintiffs to induce the defendant to perform its agreement, and we will quote only from the one pertaining to the last attempt:

**"That upon the trial of this action plaintiffs duly tendered to said defendant a good and perfect title of said premises, and tendered said two deeds, said Exhibits 13 and 14, and also said search, duly certified by the clerk of Onondaga county, which shows said premises free and clear from all liens and incumbrances, and being Exhibit 2 in evidence, and demanded the contract purchase price, all of which were refused by said defendant; and its corporation counsel then and there unreasonably refused to approve of said title or approve of said search, and that the said title so tendered by plaintiffs to defendant upon the trial was a good and perfect title, free and clear from all liens, and in all things conformed with the terms and conditions of said contract of purchase and with the conditions of the said resolution of said common council directing the purchase of the same."**

On the 20th of June, 1904, the common council of the defendant, in response to a communication from the corporation counsel, passed a resolution rescinding the preceding resolution authorizing said contract, and declaring the same to be inoperative and void. A history of the transaction from its inception denotes that there was much opposition on the part of some of the officials of the defendant to the performance of this agreement, and that opposition culminated in the action just referred to. The conclusion also seems reasonably well founded that the corporation counsel participated in this opposition, and his reason for declining to pass upon the search or assent to the sufficiency of the title was apparently due more to this sentiment than to any apprehension that the city would not become the unqualified owner of the premises free of lien or incumbrance.

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We think the certificate of approval of the corporation counsel was not an essential prerequisite to the enforcement of the agreement. The object of the precautionary clause that he inspect and pass upon the search was to insure the city an indefeasible title to the premises cleared from incumbrance. If he declined to act, and the city is unquestionably assured of the ownership of the premises without lien, as stipulated in the agreement, the purpose to be attained by his certificate has been accomplished. As was said in Amer. & Eng. Ency. of Law, vol. 26, p. 689 (2d Ed.):

"Statutory prescriptions in regard to the time, form, and mode of proceeding by public functionaries are generally directory, as they are not of the essence of the thing to be done, but are given simply with a view to secure system, uniformity, and dispatch in the conduct of public business."

As suggested in the opinion of the learned trial justice, the principle is akin to that which enables a contractor to recover on a building contract without the certificate of the architect required in the agreement, providing a reasonable excuse for the omission of the certificate and substantial performance are shown.

The plaintiffs presented a clean abstract of title upon the trial and during the pendency of the action, and were therefore entitled to judgment decreeing specific performance. Baldwin v. Slater, 8 Paige, 473; Nicklas v. Keller, 9 App. Div. 216, 41 N. Y. Supp. 172; Jenkins v. Fahey, 73 N. Y. 355; Onderdonk v. Ackerman, 62 How. Prac. 318–321. As was said in the case first cited, at page 473:

"It is a general rule that a specific performance of an agreement may be decreed if the complainant is in a situation to perform on his part, and make a good title when the cause comes before a court for a decree."

The objection urged that the plaintiffs' lot is not of the full width described in the contract and deed has been fully met in the opinion of the court below, and we deem any further discussion of that question unnecessary.

The city may not now "need" these premises, as contended by the corporation counsel in declining to pass upon the abstract of title. Its common council by formal resolution authorized the execution of the contract of purchase. The fairness of the transaction has been vindicated by a judgment from which no appeal has been taken. The contract has been duly executed on behalf of the city. Upon the present trial, after careful consideration, its validity and integrity are unimpeached, and the price which the city is to pay for the land is again determined to be reasonable, and not in excess of its value. The city should not, therefore, be excused from performance for any trivial reason.

The judgment should be affirmed, with costs.

**Judgment affirmed, with costs. All concur; KRUSE, J., in result.**

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## BRADLEY et al. v. STANDARD LIFE & ACCIDENT INS. CO. OF DETROIT, MICH.

(Supreme Court, Appellate Division, Fourth Department. May 2, 1906.)

INSURANCE—EXISTENCE OF CONTRACT.

Plaintiff, insured in an employer's liability policy covering certain work, wrote the general agent of insurer, stating that plaintiff understood that the policy covered certain other work which plaintiff had undertaken, to which the agent replied that the policy did not cover the work, that the rate was a specified sum, but that he would "bind the risk" until plaintiff decided what he desired to do, and that plaintiff should communicate with the agent at a certain time on the next day. The agent's letter was not answered, and after the time fixed by the agent for consultation an employé was injured. *Held*, that there was no contract of insurance covering the employer's liability for the injury.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 196.]

Appeal from Trial Term, Oswego County.

Action by Walter Bradley and others against the Standard Life & Accident Insurance Company of Detroit, Mich. From a judgment (93 N. Y. Supp. 245) in favor of plaintiffs, defendant appeals. Reversed.

The action was commenced on the 18th day of November, 1901, to recover the amount which the plaintiffs paid in settlement of a claim made between them and the representatives of one of their employés, who, as is alleged, was killed solely through their negligence; the contention being that, by an alleged contract of insurance previously entered into between them and the defendant, it agreed to indemnify and save harmless the plaintiffs from all such claims and liability in the premises. The defendant denies that any such contract was made or entered into on its part, and that issue presents practically the only question involved upon this appeal.

Argued before McLENNAN, P. J., and SPRING, WILLIAMS, NASH, and KRUSE, JJ.

Theodore E. Hancock, for appellant.

D. P. Morehouse, for respondents.

McLENNAN, P. J. The circumstances and correspondence which it is claimed constituted a contract of insurance between the parties to this action, stated most favorably to the plaintiffs, are as follows: The defendant at all the times mentioned was engaged in the business of issuing empolyers' liability insurance by means of a certain form of policy. Previous to the time involved in this litigation, the defendant had issued at least two of such policies to the plaintiffs, one commencing April 21, 1897, and ending April 21, 1898, and purporting to insure them against accident to their employés while engaged in canal excavation, earth, and rock, on the Oswego Canal at Oswego, N. Y., and the second policy, commencing April 21, 1898, and ending April 21, 1899, insuring them against accident to their employés while engaged in mason work on the Oswego Canal, rebuilding lock No. 18, section 2, and laying slope and vertical wall. The last of such policies, at least, was the usual form of policy which the defendant company issued during the year 1898, and was in force at the time when the alleged contract in suit is claimed to have been made. At all the times mentioned one A. T. Armstrong, who had his office in Syracuse, N. Y.,

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was the general agent of the company. While the second policy referred to was in force, the plaintiffs entered into a contract to rebuild and enlarge a raceway at Fulton, N. Y., in the county of Oswego, for a manufacturing concern known as the W. G. Gage & Co. Such work was in no manner connected with the Oswego Canal or with the work referred to in either of the insurance policies previously issued to the plaintiffs. On the 16th day of July, 1898, while the last policy above referred to, issued by the defendant to the plaintiffs, was in force, the plaintiffs wrote to the defendant's general agent as follows:

"Oswego, N. Y. July 16, 1898.

"Mr. A. T. Armstrong, 306 Granger Block, Syracuse, N. Y.—Dear Sir: We have commenced work on a job of rock excavation and masonry at Fulton, N. Y. As we understand it, policy No. 8,750 held by us covers this work; also, what is the additional cost to cover public?

"Yours truly, Walter Bradley & Co."

Three days later, and on July 19th, defendant's general agent replied to plaintiffs as follows:

"Syracuse, N. Y., July 19, '98.

"Walter Bradley & Co., Oswego, N. Y.—Dear Sir: Your esteemed favor of the 16th received, and in reply would say that your present policy 8,750 will not cover work done in Fulton, N. Y., as the policy was taken out for mason work done on the Oswego Canal. As near as I can figure the work you now have on hand at Fulton, the rate will be $3 per $100 on the excavating and blasting, and $1.98 on the mason work; $1.50 per $100 on the outside public. Wish you would call me up by 'phone to-morrow at 12 o'clock, if possible, at my expense; I can then explain the matter more satisfactorily to you. I will bind the risk now until you have decided just what you want to do. If you so desire, I can come to Fulton or Oswego to-morrow afternoon. Trusting that we may arrange the matter satisfactory to you, I remain,

"Yours, very respectfully, A. T. Armstrong."

Such letter was received by one of the plaintiffs at the company's office in Oswego on the evening of July 20th. No answer was made to the letter; its receipt was not acknowledged, but it was filed away with the other business papers of the plaintiffs, and the member of plaintiffs' firm who received it states, in substance, that he so filed it away understanding that the firm was insured. The other two members of the firm, including the one who wrote the letter of July 16th to defendant's agent, were absent from plaintiffs' place of business when the letter in question was received. On July 26th, and before Mr. Armstrong or the defendant, which he represented, had received any answer or response to his letter of July 19th, one Fred Guy Fitch, an employé of the plaintiffs, working in the excavation in enlarging the raceway at Fulton, N. Y., for W. G. Gage & Co., was injured, we will assume through the negligence of the plaintiffs, and in such manner that he died. On the following day the plaintiffs mailed a letter to Armstrong, in which was inclosed a detailed statement of the accident, and a claim that the defendant was liable to the plaintiffs on account thereof. On the same day the plaintiffs mailed a letter to the defendant at its home office in Detroit, in which they stated:

"Inclosed you will find notice of accident on our work at Fulton, N. Y., which resulted in the death of Fred Fitch of that place. Have also sent notice to Mr. A. T. Armstrong, your agent at Syracuse, N. Y."

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Such letters were received by Armstrong and by the defendant company on July 28th. On August 1st one of the plaintiffs called upon Armstrong, and was informed that the matter had passed out of his (Armstrong's) jurisdiction; that it had been referred to the company. Aside from that conversation, the plaintiffs received no communication from the defendants until August 12th. On August 12th one E. E. Niess, an agent of the defendant, went to Fulton, inspected the plant, works, and machinery of the plaintiffs, and received from the plaintiffs a brief account of the accident, and after such interview informed the plaintiffs that the company which he represented was not liable for the accident. Thereafter, and on August 15th, defendant's agent Niess returned the detailed notice of loss which the plaintiffs had mailed on July 27th, and stated that the defendant was not liable, "as this company has no policy or contract of insurance on the work where this accident happened." Subsequently an administrator was duly appointed of the Fitch estate (the employé who was killed), and commenced an action against the plaintiffs to recover for the damages caused by his death. The plaintiffs notified the defendant of the commencement of such action, and asked that it defend the same. Subsequently the plaintiffs settled the action brought by the representatives of Fitch by paying the sum of $1,500. Thereupon this action was brought to recover said $1,500 and $185.75, costs incurred therein, upon the theory that the defendant had made a contract of insurance by which it became obligated to indemnify and save the plaintiffs harmless against any loss or damage occasioned by the death of their employé Fitch.

It seems to me that a bare statement of the facts is sufficient to show that no contract of insurance covering the accident in question ever existed between the parties. Clearly the work upon which plaintiffs' employé was engaged at the time when he received the injury which resulted in his death was not covered by either of the former policies issued by the defendant. The letter written by the plaintiffs under date of July 16th indicates that they understood such work was covered by the last policy issued to them; that it would be only necessary to determine the additional premium which should be paid. But the letter which they received from defendant's agent Armstrong clearly and explicitly states that the former policy issued to them did not cover the work being done by them in Fulton, and where the accident occurred. He states what the rate will be for insurance upon such work, and asks that they call him up the following day on the telephone, and adds: "I can then explain the matter more satisfactorily to you." He then adds:

> "I will bind the risk now until you have decided just what you want to do. If you so desire, I can come to Fulton or Oswego to-morrow afternoon. Trusting that we may arrange the matter satisfactory to you, I remain," etc.

These two letters cannot by any possibility be held to constitute a contract of insurance. "Whether a contract of insurance has been made or not depends upon the question of whether the respective parties have come to an understanding upon all the elements of the contract; the parties thereto; the subject-matter of insurance; the amount for which it is to be insured; the limits of the risk, including

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its duration in point of time and extent in point of hazards assumed; the rate of premium; and, generally, upon all the circumstances which are peculiar to the contract and distinguish it from every other, so that nothing remains to be done but to fill up the policy and deliver it, on the one hand, and pay the premiums, on the other." May on Insurance (4th Ed.) section 43. In the case at bar all the essential elements specified by the learned author are wanting. An unevinced mental determination to accept a proposition to enter into a contract is not sufficient to establish the contract. White v. Corlies et al., 46 N. Y. 467. In the case at bar the facts and circumstances disclosed by the record, construed most favorably in plaintiffs' behalf, only indicate that they communicated to the defendant by letter their understanding that they were insured against accident to their employés while engaged in work for W. G. Gage & Co. because of another policy issued by the defendant which related to an entirely different piece of work, and they asked what rates or premium would be demanded to insure them against accident to others not their employés. Immediately they were informed by defendant's general agent that their understanding in that regard was incorrect, that the policy previously issued had no reference to and did not cover the work in which they were then engaged, but that the defendant was willing to enter into a contract of insurance covering the liability desired by them, and he quoted rates or premium which he assumed would cover such liability. He asked the planitiffs to communicate with him immediately, naming a time the following day, so that they might come together and settle upon the terms of the contract. He stated in his letter, however, that he would bind the risk in the meantime. We think that the agreement to bind the risk was only operative until the time fixed by Armstrong when the consultation with the plaintiffs should occur, and it should be determined whether or not a contract of insurance should be effected. Defendant heard nothing more from plaintiffs for a period of nearly 10 days, and until after the accident in question occurred, and then it was informed for the first time, in substance, that its alleged proposal to insure had been accepted, and that the plaintiffs would seek to hold it liable for any claims made against them on account of the accident. Up to this time the parties had not agreed upon the terms or conditions of the contract of insurance; what its scope should be; the nature or character of the liabilities insured against; the premium which was to be paid; the term for which the insurance should continue; or, in fact, any material detail respecting the alleged contract of insurance. These facts show conclusively that no valid contract of insurance was entered into between the parties. That being so, it is of no consequence what was subsequently done as between the parties. Clearly nothing was done by the defendant which led the plaintiffs to incur any expense, or to assume for the moment that the defendant admitted or assumed that it was liable for the injuries sustained by the plaintiffs' employé, and therefore the question of estoppel is not involved.

We conclude that upon the undisputed facts disclosed by the record the plaintiffs are not entitled to recover.

It follows that the judgment appealed from should be reversed, and a new trial ordered, with costs to the appellant to abide event. All concur.

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## HUMMEL v. HURD.

(Supreme Court, Appellate Division, Fourth Department. May 2, 1906.)

1. EXECUTORS—ACTIONS—EVIDENCE—SUFFICIENCY.
   In an action on a claim against a decedent's estate, evidence *held* sufficient to sustain a finding that deceased had agreed to pay plaintiff $1,000 in addition to weekly wages for her services.
2. SAME—LIMITATIONS—EVIDENCE.
   In an action on a claim against a decedent's estate, evidence *held* to show that plaintiff had received a written notice from the executor more than six months prior to the commencement of the suit, rejecting or disputing her claim, so that it was barred by the six-month limitation, prescribed by Code Civ. Proc. § 1822.

Appeal from Trial Term, Erie County.

Action by Louise Hummel against Henry C. Hurd, as executor of the estate of Cloyes Hurd, deceased. From a judgment in favor of plaintiff, and an order denying a motion for new trial, made under Code Civ. Proc. § 999, defendant appeals. Reversed, and new trial granted.

The action was commenced on the 19th day of April, 1901, to recover the amount claimed to be due and owing to the plaintiff from the estate of one Cloyes Hurd, deceased, represented by the defendant, Henry Hurd, as executor. Two defenses were interposed by the answer: First, that the plaintiff had no valid claim against the decedent's estate; and, second, that her alleged cause of action was barred by section 1822 of the Code of Civil Procedure, because, as alleged, the action was not begun within six months after her claim was disputed or rejected; there being no written consent filed by the respective parties with the surrogate that said claim may be heard, etc., as required by said section. Both issues were determined adversely to the defendant by the verdict of the jury.

Argued before McLENNAN, P. J., and SPRING, WILLIAMS, NASH, and KRUSE, JJ.

Thomas E. Boyd, for appellant.
Percival M. White, for respondent.

McLENNAN, P. J. Practically the only contention made by the appellant is that the verdict of the jury was contrary to or against the weight of the evidence, except he urges that, as matter of law, the evidence establishes that a notice disputing plaintiff's claim was served upon her more than six months before the action was commenced, and therefore that her claim was barred by the statute. Cloyes Hurd, defendant's testator, died on the 18th day of January, 1900, then being about 87 years old. The plaintiff had resided with, worked for, and taken care of him continuously for 25 years up to the time of his death. During the last years of his life, he being in feeble health, she performed the duties of nurse, and they constituted the only members of the household. So far as appears, she served him faithfully, and their relations were always friendly and agreeable. Concededly, for the services rendered the plaintiff received, or was entitled to receive, $2 per week, but the defendant claims she had been fully paid for the same by the deceased. Plaintiff's claim as finally presented to the executor included about $100, alleged to be due and owing to her on account of her weekly wages. It also included a balance of $400,



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which she claimed was owing to her under an oral agreement made years before the testator's death, the exact date not appearing, by which, as alleged, the deceased promised and agreed that, if the plaintiff would remain with and care for him until his death, she should be entitled to receive $1,000 in addition to her weekly wages. There was also included in the claim as presented a promissory note for $300, dated November 2, 1899, executed by the deceased, and payable to the plaintiff with use one year after date. It is claimed by the plaintiff that this note was given to her by the deceased to apply upon the $1,000 agreement; also, that shortly previous to his death he gave her a check for $300 to be applied in the same manner, leaving a balance due her by virtue of said alleged agreement of $400. The defendant contended, in substance, that the check for $300 was given by the deceased and received by the plaintiff in full payment of all demands, that the promissory note was without consideration, and that the alleged agreement to pay $1,000 was never made.

The chief question of fact, so far as the genuineness of plaintiff's claim is concerned, involves the proposition as to whether the $1,000 agreement was made. The plaintiff sought to prove such agreement by three witnesses, each of whom testified, in substance, that upon one occasion he or she heard the deceased admit, in answer to a question put or suggestion made by the plaintiff, that he had made such an agreement, and by two other witnesses that he admitted there was $400 due thereon, or that $600 had been paid on the same. Such witnesses only assume to give the merest fragments of such conversations, in most instances simply disconnected remarks of the deceased, always made in response to a suggestion made by the plaintiff. The testimony offered by the plaintiff to prove that the agreement in question was made is not entirely satisfactory, and we would conclude that it was subject to the criticism stated in Hamlin v. Stevens, 177 N. Y. 39, 69 N. E. 118, and so not of sufficient probative force to establish the agreement, were it not for the fact that the defendant's testimony, given upon cross-examination, strongly tends to corroborate plaintiff's claim in the premises. He testified:

"I know a matter of fifteen, sixteen, or seventeen years ago, father offered to give her $1,000 if she would stay as long as he lived, and if she would sign a contract."

No contract was signed, but the plaintiff did stay, and we think the fair inference is that she stayed because of the promise which the defendant says his father made, even although the execution of a written contract was not insisted upon.

Upon all the evidence (and we have only called attention to the more prominent features) we think this court ought not to interfere with the finding of the jury that the agreement was made, and that the other items of plaintiff's claim were valid because contrary to or against the weight of the evidence.

The evidence, however, wholly fails to support the finding necessarily involved in the verdict, that the notice disputing plaintiff's claim, specified in section 1822 of the Code of Civil Procedure, was not served upon her more than six months before this action was brought. Concededly, the testator died on the 18th day of January, 1900. On January 29, 1900, the executor began the publication of notice to

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creditors to present their claims against the estate. About the 26th day of July the plaintiff presented her claim as finally prepared to the executor, and he claims that on the 16th day of August following he caused a notice in writing in due form to be personally served upon her, by which he disputed said claim, and offered to refer the same. The action was not begun until eight months and ten days after the date when it is alleged such notice was served. If so served, concededly the action is barred by the statute, and the learned trial court so charged the jury. The evidence given upon this issue is remarkable in that it very clearly indicates that the attorney of record for the plaintiff, and who took part in this trial and also upon a former trial, had personal and positive knowledge that such notice had been served upon his client, and still was in the attitude of urging in the court below and before this court that such notice had not in fact been served. Briefly, the testimony upon that issue is as follows: Mr. Troilus C. Koons, who is an attorney and counselor of this court, testified positively that he prepared upon his typewriter the notice Exhibit H in duplicate for and at the request of Mr. Henry G. Adams, the attorney of record for the defendant, and that he delivered both to Mr. Adams. He positively identified Exhibit H as being the notice made, and was equally positive that the other was an exact duplicate. Mr. Adams testified that he received such notice in duplicate from Mr. Koons; that he then signed them both as attorney, and gave them to the defendant, who also signed both as executor, making each an original notice; that after carefully comparing them he delivered them on the 16th day of August, 1900, to one George Gurney, a constable at North Evans, N. Y., where all the parties resided, and directed him to serve the same upon the plaintiff; that he saw the constable go across the street where the plaintiff resided with such notices in his hand, saw him hand a paper to the plaintiff, and immediately return the other to the witness; that the one so returned is Exhibit H, and has been in possession of witness ever since. The constable testified that he received the notices from Mr. Adams on the 16th day of August, 1900; that he compared the same, and immediately went across the street where plaintiff was, handed one to her, and returned the other, Exhibit H, to Mr. Adams; that the one delivered to plaintiff was a duplicate of Exhibit H. But this is not all. Mr. Adams testifies that shortly after such notice was served upon the plaintiff, at the request of her attorney, he went to his office in the city of Buffalo, and that he then saw the notice which he had signed, and which was an exact duplicate of Exhibit H, in the possession of plaintiff's attorney. He also testifies that, after the expiration of six months from the date of service of such notice, plaintiff's attorney called upon him, and asked him to waive such service, and the statute which had run against plaintiff's claim by reason thereof; that plaintiff's attorney made several similar requests, all of which were refused. Mr. White, plaintiff's attorney, does not attempt to contradict Mr. Adams, was not sworn as a witness either upon this or the former trial, although Mr. Adams had testified practically as above indicated upon both. The plaintiff hardly testified that a duplicate of Exhibit H was not served upon her. Indeed, she admits that a notice entitled "In the Surrogate's

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Court," and signed by Henry Adams, was served upon her at the time claimed by the plaintiff; but she states that, as she recollects, it did not contain the word "dispute" or "reject," and that, therefore, it was not a duplicate of Exhibit H. Her testimony in that regard, in view of the other evidence to which attention has been called, is not sufficient to make an issue of fact. Indeed it is established, practically beyond doubt, that the notice in question was served upon the plaintiff; that her attorney of record knew that fact; that it had been delivered to him, and presumptively was in his possession when he was urging in the court below and upon this appeal that it had never been served.

It follows that the judgment and order appealed from should be reversed, and a new trial ordered, with costs to the appellant to abide event upon questions of fact.

**Judgment and order reversed, and new trial granted, with costs to appellant to abide event upon questions of fact. All concur.**

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## BAKER v. PACKARD.

**(Supreme Court, Appellate Division, Fourth Department. May 2, 1906.)**

CONTRACTS—WRITINGS—CONSTRUCTION.

**Plaintiff's attorneys wrote to defendant, giving him an option to purchase at any time within 10 days certain mortgage bonds owned by plaintiff, who was to retain and collect past due unpaid interest coupons thereon, defendant to pay a certain sum in cash, and, in case of realizing on the bonds without bidding on the property securing the same on foreclosure sale, to pay plaintiff one-half his profits. Defendant in reply wrote that he elected to purchase the bonds, and desired a date set at which the parties might get together, whereupon plaintiff's attorneys wrote they would be glad to have defendant call the following day to make the transfer mentioned in his letter, and requesting him to wire when he would arrive, and they would have their client there. *Held*, that the correspondence made a valid and binding contract, entitling plaintiff to recover for defendant's breach thereof in refusing to purchase the bonds.**

**[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, § 119.]**

**Williams and Kruse, JJ., dissenting.**

Appeal from Trial Term, Monroe County.

Action by Frances A. Baker against Mark Packard. From a judgment for plaintiff, and from an order denying motion for a new trial, defendant appeals. Affirmed.

Argued before McLENNAN, P. J., and SPRING, WILLIAMS, NASH, and KRUSE, JJ.

Joseph G. Dudley, for appellant.
Hiram R. Wood, for respondent.

McLENNAN, P. J. The facts are not in dispute. The only question presented by this appeal is whether or not the correspondence which passed between the parties, consisting of three letters—two written for and on behalf of the plaintiff and one by the defendant—constitutes a valid and binding contract. On the 24th day of October,

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1903, McGuire & Wood, attorneys at Rochester, N. Y., for and on behalf of the plaintiff, wrote to the defendant as follows:

"Dear Sir: We are authorized by Miss Frances A. Baker of this city to give you on her behalf, and you may consider this letter, an option to purchase, at any time within ten days from this date, the sixteen thousand dollars' worth of second mortgage bonds of the Consolidated Gas & Electric Company of Batavia, N. Y., owned by her, upon the following terms and conditions: (1) She to retain and collect the past due unpaid interest coupons, the same to be collected as soon as may be without prejudicing the foreclosure action now pending. (2) You to pay eight thousand dollars in cash, and our bill for services and disbursements in the matter to date of transfer, not exceeding say four hundred dollars. (3) If you take the bonds under the foregoing conditions, and sell them, or they are paid or otherwise realized upon, and you are not obliged to bid in the property on the foreclosure sale, you to give Miss Baker, in addition to the above amounts, one-half of your profits on the bonds. (4) This option to be void and inoperative after ten days from date. We found the inclosed copy of the second mortgage in our papers, which we are glad to let you have.

"Yours very truly, McGuire & Wood."

On November 2, 1903, the defendant wrote to McGuire & Wood the following letter:

"Gentlemen: Replying to yours of Oct. 24, beg to say that I elect to purchase these bonds, and wish you would kindly set a date at which we can get together. Please say nothing to the Consolidated Gas & Electric Co. about this, nor to any one else in fact.

"Yours truly, Mark Packard."

On the following day, November 3, 1903, McGuire & Wood mailed to the defendant the following letter:

"Dear Sir: We would be glad to have you call here to-morrow to make transfer mentioned in yours of yesterday. Wire when you will arrive, and we will have client here.

"Yours truly, McGuire & Wood."

When this letter reached the office of the defendant on November 4, 1903, he was out of the city of Buffalo, and continued to be away for a week thereafter, and no reply was received from him in answer thereto. The defendant refused to accept or pay for the bonds referred to in the letter of October 24th, although requested so to do, and they were duly tendered to him, and thereupon this action was brought.

No question is raised but that the judgment represents the correct amount in case the plaintiff is entitled to recover. We think the correspondence, consisting of the three letters referred to, makes a valid and binding contract, and that upon a breach thereof the plaintiff was entitled to recover the damages sustained. The letter of October 24th is clear and explicit. It states exactly upon what terms and conditions the defendant might purchase the bonds in question. Before the 10 days mentioned therein expired, and by his letter of November 2d, the defendant said, in effect, that he elected to purchase the bonds upon the conditions stated in plaintiff's letter of October 24th, and he asked, in substance, that the plaintiff's representatives fix a day certain when the transfer might be made and the purchase price paid. The plaintiff's representatives designated the day following as the time to make such transfer and complete the transaction. The correspondence is, in effect, an offer by the plaintiff to sell certain property, to be transferred by the seller and paid for by the buyer within 10 days, a state-

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ment by the purchaser that he accepts the offer, and a request that the seller fix a date when the transfer may be made and money paid, which is fixed at a day within the 10-day period. The offer and acceptance, with request that a date be fixed for the completion of the transaction, and the fixing of such date by the plaintiff, made the contract. It cannot be questioned if the defendant had appeared in Rochester on the 3d day of November, and demanded of the plaintiff the bonds in suit, she would have been obligated to deliver the same upon compliance by him with the conditions specified in the option. The fact that after the expiration of such time the contract may have ceased to be binding upon her in case the defendant made default by refusing to pay we consider of no importance. The defendant would then have been in the position of having made a default, but, the plaintiff having been at all times ready and willing to perform, he could not urge the default upón his part as a ground for insisting that the agreement was not enforceable by her.

The alleged agreement is not, as it seems to us, novel or unusual. A person offers to sell property belonging to him at a certain price, to be received and paid for within a certain specified time. The offer is accepted, and the seller is asked to fix a day certain within the option period when the property may be delivered and the purchase price paid, which the seller does. Can there be any doubt but that under such circumstances a valid contract has been made? In the case at bar, if the plaintiff in her letter of October 24th had asked the defendant, in case he accepted her offer, to fix a place and time within the 10 days limited when the bonds might be delivered and the purchase price paid, and the defendant had fixed such time and place, which was assented to by the plaintiff, could there have been any doubt but that if the plaintiff had appeared at such time and place, ready to fulfill upon her part, that the defendant upon his failure to perform would have been liable as upon breach of contract? The case at bar, as proven by the correspondence in question, is no different upon principle. The defendant, in effect, stated to the plaintiff, "I accept your proposition to sell, but you fix a time and place where my acceptance of your option may be consummated." This the plaintiff did, and we can hardly conceive of correspondence which more effectually makes a contract alike binding upon both parties.

The case of Blanchard v. Archer, 93 App. Div. 459, 87 N. Y. Supp. 665, relied upon by appellant's counsel, we do not consider in point. There the question related to the sale of real property. In that case the party seeking to enforce the contract was the person who had not complied with its conditions within the time specified, and there was no suggestion, as in this case, that the seller fix the date for the consummation of the agreement.

We think it is so elementary that perhaps authority cannot be found which decides the express proposition that if a person offers in writing to sell his property upon condition that a certain price be paid within a certain specified time, and another accepts in writing such proposition, but asks the proposed seller to fix a date when the transaction can be consummated, and the seller does so in a reasonable manner, that such correspondence constitutes a valid contract, alike binding

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upon both parties. In the case at bar the plaintiff offered to sell bonds upon certain conditions. The defendant agreed to accede to plaintiff's proposition, and asked her to fix a date on which the transaction should be consummated, which she did. Thus a valid contract was made, and for the breach of it the plaintiff was entitled to recover the damages sustained.

We conclude that plaintiff's offer to sell her bonds, as evidenced by her letter of October 24, 1903, the defendant's answer thereto under date of November 2, 1903, and the plaintiff's reply, dated November 3, 1903, taken together, constituted a valid contract, which was enforceable by either party; but, the defendant having made default, the plaintiff is entitled to recover the amount of damages sustained by the breach of such contract, she having been at all times ready and willing to perform.

It follows that the judgment and order appealed from should be affirmed, with costs.

**Judgment and order affirmed, with costs. All concur, except WILLIAMS and KRUSE, JJ., who dissent.**

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## PERSONS et al. v. GARDNER et al.

**(Supreme Court, Appellate Division, Fourth Department. May 2, 1906.)**

**BANKS AND BANKING—STOCKHOLDERS—LIABILITY—TRANSFER OF STOCK—EFFECT.**

**Under Const. art. 8, § 7, making stockholders of banking corporations individually responsible to the amount of their respective shares for the debts of the corporations, and Banking Law, §§ 52, 53 (Laws 1892, p. 1869, c. 689), making a stockholder of a banking corporation liable to the amount of his stock in addition to the amount invested therein, and declaring that no person, who has in good faith transferred his stock "on the books of the corporation when solvent" shall be subject to any personal liability, the transfer of bank stock to relieve the transferror from liability for the debts of the bank must be made in good faith and while it is solvent.**

Appeal from Special Term, Erie County.

Action by Henry Persons and another, as receivers of the Bank of Commerce in Buffalo, against William H. Gardner and others. From a judgment for plaintiff, certain of the defendants appeal. Affirmed.

Argued before McLENNAN, P. J., and SPRING, WILLIAMS, NASH, and KRUSE, JJ.

Moot, Sprague, Brownell & Marcy, for appellants.

Morey & Bosley and Wadsworth, Blackmon & Wadsworth, for respondents.

WILLIAMS, J. The judgment should be affirmed, with costs. The action was brought by the receivers of the Bank of Commerce of Buffalo against the appellants, Gardner, Chard, Miller, and the estate of Gratwick, with many others, as stockholders of the bank, to recover amounts sufficient to make good a deficiency in the assets. The capital stock of the bank was $200,000. After the trial had continued for some time, a stipulation was made by the parties that the deficiency

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in the assets was $100,000, and that plaintiffs were entitled to recover 50 per cent. of the par value of the stock to make up such deficiency. There was no dispute as to most of the shares of stock, and what persons were liable on account thereof. There was controversy, however, as to certain shares, and this was the only matter determined by the court and here appealed from. The bank closed its doors October 14, 1896, and was legally dissolved December 3, 1896. The appellants had been stockholders for some time, and before the bank failed made the following transfers of stock: Gardner, June 19, 1896, 15 shares to Hefford; Gardner, September 30, 1896, 100 shares to Otto; Gratwick, June 19, 1896, 20 shares to Hefford; Gratwick, July 15, 1896, 95 shares to Graves; Miller, September 23, 1896, 75 shares to trustees, etc.; Chard, June 19, 1896, 15 shares to Hefford. The bank was insolvent when these transfers were made, and had been for some time before. The question in dispute was whether by such transfers the appellants relieved themselves from liability on account of the shares of stock so transferred. The court held that they were not relieved from liability, and ordered judgment against them accordingly.

Some complaint is made on behalf of the appellants because the court did not pass upon the question of good faith in making the transfers, but based their liability solely upon the fact that the bank was insolvent when the transfers were made. If such basis was sufficient, then the judgment must be affirmed. If it was not, then the judgment must be reversed, and the question of good faith be passed upon by the trial court. This question arises under sections 52, 53, of the banking law of this state. Chapter 689, p. 1869, Laws 1892.

The Constitution (article 8, § 7) provides:

"The stockholders of every corporation and joint stock association for banking purposes shall be individually responsible to the amount of their respective share or shares of stock in any such corporation or association, for all its debts and liabilities of every kind."

And then the sections of the banking law referred to provide:

"Sec. 52. Except as prescribed in the stock corporation law, the stockholders of every such corporation (bank) shall be individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such corporations, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares. The term 'stockholder,' where used in this chapter, shall apply not only to such persons as appear by the books of the corporation to be stockholders, but also to every owner of stock, legal or equitable, although the same may be on such books in the name of another person; but not to a person who may hold the stock as collateral security for the payment of a debt."

By amendment to this section (chapter 441, p. 579, Laws 1897) it is provided that where a corporation has been dissolved and a permanent receiver appointed, the action can only be maintained by such receiver, etc. Persons v. Gardner, 42 App. Div. 490, 56 N. Y. Supp. 822, 59 N. Y. Supp. 463.

"Sec. 53. No person who has, in good faith and without any intent to evade his liability as a stockholder, transferred his stock, on the books of the corporation, when solvent, to any resident of this stock, of full age, previous to any default, in the payment of any debt or liability of the corporation, shall be subject to any personal liability on account of the non-

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**payment of such debt or liability of the corporation, but the transferee of any stock so transferred previous to such default, shall be liable for any such debt or liability of the corporation to the extent of such stock in the same manner as if he had been the owner at the time the corporation contracted such debt or liability."**

The exception at the commencement of section 52 refers to certain limitations of the stockholder's liability under section 55 of the stock corporation law (chapter 688, p. 1841, Laws 1892). Those limitations are not material to the questions we are here considering. The statute is perfectly plain, and the construction given to it by the trial court in this case is entirely correct. The transfer of stock, in order to be effectual in relieving the transferror from liability for the debts of the corporation, must not only be made in good faith and without any intent to evade his liability as a stockholder, but must be made while the corporation is solvent. The statute so provides in unmistakable language, and no judicial construction can relieve the section of the words "when solvent," nor can it import into the statute the idea that the stockholder must know, or have reason to know, of the insolvency in order to deprive him of the benefit to be derived from the transfer of the stock. The case of Earle v. Carson, 188 U. S. 44, 23 Sup. Ct. 254, 47 L. Ed. 373, was a case arising under the national banking act (Act June 3, 1864, c. 106, § 5139, 13 Stat. 102 [U. S. Comp. St. 1901, p. 3461]), which differs from the sections in our state banking law. A reading of these provisions all together shows how the cases under the national act are distinguishable from and inapplicable to cases arising under our state law. No such provision as we are considering is contained in the national act. The fact of insolvency at the time these transfers were made is not controverted. That these transferrors knew, or had reason to know, of such insolvency when they made the transfers was not determined by the trial court.

We are of the opinion that the conclusion arrived at by the court below was correct, and that the judgment should be affirmed.

**Judgment affirmed, with costs. All concur.**

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## In re ROBERTS' WILL.

**(Supreme Court, Appellate Division, Fourth Department. May 2, 1906.)**

**PERPETUITIES—SUSPENSION OF ALIENATION.**

**Testatrix's will provided that all money remaining in the hands of the executrix after the payment of certain legacies should be deposited in a savings bank to the credit of the executrix, and the interest paid to P. until her child E. should become 21 years of age, or would have become such age if living, when the money should be paid to the sons of A., and she bequeathed to E. certain bonds, to be delivered to her on reaching her majority, but provided that, in case of E's death before majority, the bonds should go to the sons of A. or to the survivor of them. *Held*, that such provisions did not create a trust, but the time for payment or distribution only was postponed, and not the vesting of the title to the testamentary disposition, and hence the provisions did not offend Personal Property Law, Laws 1897, p. 507, c. 417, § 2, providing that the absolute ownership of personal property shall not be suspended for a**

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**longer period than during the continuance and till the termination of not more than two lives in being at the death of testator.**

Appeal from Surrogate's Court, Jefferson County.

Judicial proceedings on the settlement of the estate of Roxanna M. Roberts, deceased. Appeal from so much of the decree of the surrogate as adjudged that the fourth and fifth clauses of the will of decedent did not suspend the absolute ownership of personal property, in violation of section 2 of the personal property law (Laws 1897, p. 507, c. 417). Affirmed.

Argued before McLENNAN, P. J., and SPRING, WILLIAMS, NASH, and KRUSE, JJ.

G. S. McCartin, for appellants.

H. L. Hooker, for respondents.

Joseph Nellis, special guardian, for infant defendants.

KRUSE, J. The provisions of the will which are attacked are as follows:

**"(4) All the money and other personal property which, by said last Will and codicils I gave to said George W. Prentice, and which, except for his death, and the foregoing revocation, would go to him, I give and bequeath to said Mariette Prentice and her three children, Roswell Prentice, Earl Prentice and Esther Prentice, in the manner following:**

**"After my just debts and funeral expenses are paid, and after all the legacies and gifts set forth in said last Will and codicils (not including any gift or bequest to said George W. Prentice in said Will or codicils) are paid and satisfied, and after all expenses attending the execution of my said last Will and codicils, and the administration of the affairs of my estate, are paid, such moneys as may remain in the hands of my executrix shall be deposited in some Savings Bank or other bank in the City of Watertown, N. Y., to the credit of the executrix named in my said will.**

**"The interest accruing on such deposit shall be paid by my said executrix, semi-annually, to said Mariette Prentice, until said Esther becomes, or would become, if living, 21 years of age. When that time arrives, the money so remaining on deposit, less proper charges and commissions, shall be paid, share and share alike, to the two sons of Austin E. Prentice, deceased, or to the survivor of them.**

**"(5) I give and bequeath to Esther Prentice, daughter of Austin E. Prentice, deceased, five bonds of $1,000 each of the Chicago, St. Paul M. & C. Consolidated Mortgage, principal due 1 June 1930, numbered severally 3971, 3972, 3973, 3974 and 3975, left for safe keeping with the National Bank & Loan Company, Watertown, N. Y., to be delivered to her, with the coupons then attached thereto when she becomes 21 years of age. In case of her death, before she becomes 21 years of age, then I give and bequeath said five bonds to the two sons of Austin E. Prentice, share and share alike, or to the survivor of said two sons; no delivery of said bonds to be made until said Esther becomes, or would become if living, 21 years of age."**

The ground upon which their validity is challenged is that these provisions offend against section 2 of the personal property law (Laws 1897, p. 507, c. 417), which reads as follows:

**"(2) Suspension of ownership. The absolute ownership of personal property shall not be suspended by any limitation or condition, for a longer period than during the continuance and until the termination of not more than two lives in being at the date of the instrument containing such limitation or condition; or, if such instrument be a will, for not more than two lives in being at the death of the testator; in other respects limitations of future or contingent interests in personal property, are subject to the rules prescribed in relation to future estates in real property."**

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Our conclusion is that the surrogate rightly decided that the provisions of this will under review do not create a trust, and that the ownership of personal property is not suspended thereby, contrary to the provisions of the personal property law. No trust is created thereby in express terms, nor is one implied, for a trust is unnecessary to carry out these provisions. The testatrix specifically and in express terms bequeathed to the legatees these bequests, and their interest vested immediately upon her death. The mere fact that the time of payment was fixed at a future time, beyond the period for which the ownership of the property may be suspended, does not contravene the provisions of the statute against perpetuities. It is not like a case where the only provision making the disposition of the property is contained in the direction to pay or distribute in the future. The power of alienation of real estate and the absolute ownership of personal property is suspended when there are no persons in being by whom an absolute estate in possession can be conveyed or transferred (Real Property Law, Laws 1896, p. 565, c. 547, § 32; Sawyer v. Cubby, 146 N. Y. 192, 196, 40 N. E. 869), and there are but two ways in which this suspension may be accomplished: (1) By the creation of a trust which vests the estate in trustees; (2) by the creation of future estates, vesting upon the occurrence of some future and contingent event (Steinway v. Steinway, 163 N. Y. 183, 57 N. E. 312; Wilber v. Wilber, 165 N. Y. 451, 59 N. E. 264).

We think the time for payment or distribution only was postponed, and not the vesting of the title to this testamentary disposition, and that the case comes within the rule applied in the Wilber Case, supra, and Matter of Embree, 9 App. Div. 602, 41 N. Y. Supp. 737.

The decree of the surrogate should be affirmed, with costs to the adult respondents, and a separate bill of costs to the special guardian for the infant respondents, payable out of the estate. All concur.

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(49 Misc. Rep. 171.)

## DE LIMA v. MITCHELL et al.

(Supreme Court, Special Term, Westchester County. January, 1906.)

1. COVENANTS—USE OF PREMISES—BREACH.

Where certain lots were deeded to plaintiff and defendant from a common owner with covenants that they should not be used for barrooms, saloons, or for any business purpose whatsoever, the covenant is broken by the use of a building on defendant's land for a restuarant and drinking saloon, and such use should be enjoined where there has been no such change in the general neighborhood since the property was bought by defendant as would make such enforcement inequitable.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Covenants, § 169; vol. 27, Cent. Dig. Injunction, §§ 124, 125.]

2. INJUNCTION—BREACH OF COVENANTS—ACQUIESCENCE.

Where lots were sold by a common owner with restrictions against their use for business purposes or for saloons, but there have been infrequent violations of said covenant, not generally known or acquiesced in by plaintiff or other residents of the district, will not prevent an enforcement of such restriction.

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3. SAME.

**Where lots are sold by a common owner with covenants restrictive or their use for business purposes, or for saloons, a purchaser of one lot is entitled to restrain the use of a neighboring lot as a saloon, as against the interest of a subsequent mortgagee of such lot.**

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, § 124.]

Action by Elias S. A. De Lima against Harriet E. Mitchell and others to restrain the use of certain premises as a saloon. Judgment for plaintiffs.

Lewis L. Delafield (Carsten Wendt, of counsel), for plaintiff.
Henry T. Dykeman, for defendant.

BURR, J. The plaintiff and the defendant Harriet E. Mitchell are respectively owners of plots of land with buildings erected thereon, situated in the village of Larchmont. The plaintiff acquired title to his land in the spring of 1902, and thereafter erected a dwelling house thereon which he occupies with his family. The defendant Mitchell acquired title to her land in October, 1887. At that time there were two small buildings on the property. Subsequently she erected two additional buildings, one of considerable size.

In the deeds to plaintiff and defendant, respectively, were restrictive covenants which, among other things, provided that the premises owned by them should not be used nor occupied for certain specified purposes. Among other things, they could not be used for a "bar-room, lager beer saloon, restaurant, ale house, liquor saloon, store, warehouse, or any erections known as nuisances, or any noxious or dangerous use, purpose, trade, business, or establishment, or for any business purpose whatsoever." Covenants the same, or very similar, in form were included in very many of the deeds conveying lots or parcels of land contiguous to that in question. All the grantees claimed through a common source of title, and the effect was to establish a general restriction over a large tract of land familarly known as "The Larchmont Manor Tract." Down to about June, 1905, the defendant had used the premises owned by her for a private hotel or boarding house for the entertainment of gentlemen and their families, who desired to spend the heated term in the country. The large majority of the patrons of the house were permanent guests, who not only lodged and took their meals there, but remained for a considerable period of time. In addition to the house kept by the defendant, three similar establishments were kept and maintained upon the restricted tract.

The covenant above referred to has received judicial construction. Murray v. Charman, 23 App. Div. 626, 48 N. Y. Supp. 1110. In that case, the court held that the maintenance of a private hotel or boarding house in which the furnishing of food and liquor to its guests, to be served with their meals or in their private rooms, was only incidental to the principal business there carried on, and was not a violation of the covenants in question. In June, 1905, in one of the buildings upon defendants' premises, a decided change in the manner of conducting the business took place. This building, known as "The Mitchell House Annex," was fitted up and equipped so as to be complete in itself. It was conducted almost entirely indepedently of the main house. It had no

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facilities for entertaining guests permanently, or affording them lodgings even for a single night. It was conducted, openly and notoriously, as a place where any respectable person might obtain food and liquor, or food without liquor, or liquor without food; and this without regard to whether such person was a guest of the main house, or a resident of the place, or not. This was not only the principal, but the only business that was there carried on. It was, to all intents and purposes, a restaurant and drinking saloon, and nothing else.

Both as an original question, and in view of the decision above referred to construing this covenant, I have no hesitation in holding that such use was a clear violation of the covenant in question, and should be enjoined; unless the plaintiff, has in some way, lost the benefit of the said covenant and the right to enforce the same. There has been no such change in the general character of the neighborhood since the defendant acquired her property as would make it inequitable to enforce the same. On the contrary, the change has been in the direction of making the surrounding territory more and more a residential neighborhood, improved with expensive dwellings, and occupied by people of wealth and refinement. If there have been some violations of the covenant in question, they have not been so general in character, neither has there been such general acquiescence therein by the plaintiff or others residing within the restricted territory, as would prevent an enforcement of the same.

Proof of the existence of hotels or boarding houses of the character above referred to does not establish a breach of such covenant. Murray v. Charman, supra. If, occasionally, at these places food and liquor have been sold to other than the permanent guests of the house, it was generally to residents of Larchmont, whose houses were temporarily closed and, even then, so rarely that such use of the property may be termed incidental, and not general. Some evidence was also introduced of acts committed at some of these houses, particularly in the sale of liquor to strangers, which were undoubtedly violations of the covenant. The evidence would indicate that such violations, particularly at the Manor House, were far more frequent before the defendant purchased her property than since; and it is conceded that, for 10 or 12 years, there have been no violations of the covenant at the place in question, which has ceased to be used for anything, but strictly private purposes. The use of its property by the Hoboken Turtle Club, if it could be deemed a violation of the covenant, has long since ceased. The furnishing of food and liquor by the Larchmont Yacht Club and the occasional giving of entertainments by it to its own members and their invited guests, and restricted to them, is entirely different from creating a place for the sale to all persons indiscriminately. If this could be deemed a technical violation of the covenants, it is of such a character that the plaintiff could, in his discretion, take no notice of it without losing his right to enjoin the carrying on of such a business as the defendant Mitchell permitted.

In order to have the benefit of restrictive covenants, it is not necessary that the plaintiff should take notice of every violation thereof. He may take no notice of violations not especially offensive to him

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without losing his right to enforce the restrictions in the case of especially offensive violations. Levy v. Halycon Casino Hotel Co., 45 Misc. Rep. 289, 92 N. Y. Supp. 231; Rowland v. Miller, 139 N. Y. 93, 34 N. E. 765, 22 L. R. A. 182. The plaintiff is quite right in his position that, to permit the defendant Mitchell, either herself or through her representatives and persons claiming under her, to conduct such a place of business as was carried on in the Mitchell House Annex would speedily result in destroying the secluded and residential character of the neighborhood, which it was the purpose and object of the covenantors to secure and maintain. Neither is the plaintiff estopped by reason of his own acts or those of other residents of the Larchmont Manor tract from maintaining this action. If all of the evidence as to the sales of food and liquor indiscriminately at the old Manor House was accepted as true, such sales were discontinued shortly after the defendant Mitchell acquired her property, and long before the plaintiff acquired his.

It does not appear that the defendant Mitchell knew of such general selling, or that she was induced to purchase her property in the belief that she could there conduct such a business; and her management of the property purchased by her, for a period of nearly 18 years after she acquired the same, would indicate that she did not suppose that she could use it for any purpose except that of a private hotel and boarding house. As has been before suggested, such sales as took place at the other places referred to, were generally more or less secret and quite infrequent. Acquiescence presupposes knowledge, and there is no sufficient evidence that the breaches of the covenant thus committed were generally known. So with rgard to the other things which defendant claimed constituted the carrying on of a business, they were either intended to promote the general purpose of making the territory in question a desirable residential district, such as furnishing light, water, and street railway transportation, or, like the garage, the carpenter shop and the blacksmith's shop, were either of so trifling a character, or situated so near the boundary line of the restricted territory, that the persons interested might take notice of them or not as they chose.

The protest against the particular use of the defendant's property which began in June, 1905, was promptly and sincerely made, and her continued use of the property after that time was in the face of and notwithstanding such protest. The plaintiff is therefore entitled to a judgment against the defendant Harriet E. Mitchell, perpetually enjoining and restraining her and her servants, agents, and all persons claiming through or under her, from carrying on upon the premises owned by her the business of a restaurant, or saloon for the sale of intoxicating liquors, or from carrying on upon the said premises the business of furnishing and selling to persons indiscriminately food or liquor, or from furnishing or selling to any person either food or liquor, except to persons who are regular guests of a private hotel or boarding house carried on upon said premises, or their invited friends; such liquors to be served only to such guests with their meals or in their private rooms. The plaintiff is entitled to judgment against the defendant Dale, declaring that her right and interest as the mortgagee of said premises is subject to the said covenants and the right of the plaintiff

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to enforce the same. As, during the pendency of this action, the right and interst of the defendant Ford in the said premises has terminated, affirmative relief will not be granted against him.

The plaintiff shall recover costs against the defendant Mitchell. Findings and judgment may be settled on notice.

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## BALL et al. v. LOVETT.

(Supreme Court, Appellate Term. April 24, 1906.)

HUSBAND AND WIFE—AGENCY OF WIFE—NECESSARIES—PRESUMPTION.

Where there is no open separation, the presumption of the wife's agency to pledge her husband's credit for necessaries still exists.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Husband and Wife, § 133.]

Appeal from Municipal Court, Borough of Manhattan, Eighth District.

Action by Thomas R. Ball and others against George E. Lovett. From a judgment for plaintiffs, defendant appeals. Affirmed, with costs.

Argued before SCOTT, P. J., and TRUAX and BISCHOFF, JJ.

Henry A. Powell, for appellant.

Charles H. MacLaren, for respondents.

BISCHOFF, J. The goods in question were, in their character, such as would properly be described as necessaries for the defendant's children, and the testimony generally supported the inference that the station in life of the parties justified the purchase by the defendant's wife. While it appears that the defendant had left his home shortly before the period of these purchases, there was no overt separation, and the wife continued to reside in the home provided for her. Her agency to purchase the goods was supported by a course of dealing, apart from the strict relation of husband and wife, since the defendant had continuously paid bills rendered by the plaintiffs in the wife's name for similar purchases, and there was nothing to apprise the plaintiff of any claim that the agency, apparently continuing, had been terminated. Again, since there was no open separation of the parties, the presumption of the wife's agency to pledge her husband's credit for necessaries still existed, and the defendant's evidence did not require the court to find that he had made sufficient provision for these particular needs, as against the inferences to be drawn from the other evidence in the case.

The judgment should be affirmed, with costs. All concur.

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(49 Misc. Rep. 162.)

## TRAIN v. DAVIS et al.

(Supreme Court, Special Term, New York County. January, 1906.)

1. DEEDS—CONSTRUCTION—REMAINDERS—VESTED OR CONTINGENT.

Land was conveyed to a father to hold in trust and pay the income to a daughter for life, and then to the daughter's daughter for life, after which the property was to be sold and the proceeds divided among four other designated children of the trustee and the children of the first life beneficiary representing their mother. It was further provided that, in case of the death of any of the four named children before that of the life beneficiaries, the heirs of the deceased child should take the parent's share per stirpes. One of the four children did so die, leaving his father his only heir, and the father died before the death of the other life tenant. *Held*, that remainders in the fund were contingent and not vested, and hence the brothers and sisters of the remainderman who died before the trustee were entitled to such remainderman's share of the fund, instead of the devisee under the last will of the father, who because of his previous death was not an heir of the remainderman at the time fixed for distribution.

2. SAME—REMAINDER—PERSONS DESIGNATED—"CHILDREN."

The word "children," in the provision giving the second life tenant's children a fifth of the fund, could not be regarded as extending to grandchildren.

3. SAME—HEIRS.

A grandson of the first life tenant was an heir of the child of the trustee, who predeceased the life tenants and was entitled to take his mother's fractional portion of the remainder, which descended to the heirs of the deceased remainderman.

4. DESCENT AND DISTRIBUTION—HEIRS—NEXT OF KIN.

The term "heirs at law," when used with respect to personal property, may properly be regarded as meaning next of kin.

5. DEEDS—CONSTRUCTION—STATUTES APPLICABLE.

Where a deed creating a trust established contingent remainders, and provided that at the time fixed for distribution of the trust fund the heirs of any deceased remainderman should take his share, the question of who were to be regarded as heirs was to be determined by the statutes in force at the time of the distribution, and not those in force at the time the trust was created.

6. TRUSTS—PURPOSES FOR WHICH CREATED—STATUTE LIMITATION—POWER IN TRUST—RIGHTS OF REMAINDERMEN.

Land was conveyed to a father to hold in trust and pay the income to a daughter for life, and then to the daughter's daughter for life, after which the property was to be sold and the proceeds divided among four other designated children of the trustee and the children of the first life beneficiary representing their mother. It was further provided, in case of the death of any of the four named children before that of the life beneficiaries, that the heirs of the deceased child should take its parent's share per stirpes. One of the four children did so die, leaving his father his only heir, and the father died before the death of the other life tenant. *Held*, that the trust was an express trust, within Real Property Law, Laws 1896, p. 571, c. 547, § 76, and that on the death of the life tenants the property passed to the remaindermen, subject to the execution of the power to sell and distribute.

7. SAME—APPLICATION OF STATUTE.

The provision of the statute of uses and trusts that every valid express trust shall vest the whole estate in a trustee is limited to the trust estate, and has no application to future legal estates in lands covered by the trust to take effect in possession on the termination of the trust.

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8. CONVERSION—RECONVERSION.

Where a deed creating a trust in land for the lives of two beneficiaries provided that after their death the trustees should sell the land and divide the proceeds among certain named remaindermen, the bringing of an action for partition by all the parties interested, after the death of the life beneficiaries, authorized the court to treat the property as real estate, and to enter a judgment for the sale and partition thereof.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Conversion, §§ 66–69.]

9. GUARDIAN AND WARD—AUTHORITY OF GUARDIAN.

Where, under the terms of a trust deed, an infant was entitled to share in the proceeds of trust property, which the trustees were authorized to sell, the guardian ad litem and testamentary guardian of the infant had power, with the approval of the court, to file for the infant an election to join in an action of partition and to treat the property as real estate.

10. TRUSTS—EXECUTION—SUBSTITUTED TRUSTEE.

Where a trust deed authorized the trustees, upon the death of the persons entitled to the income for life, to sell the property and distribute the proceeds among certain persons, who at the time fixed for distribution elected to treat the property as real estate, it is not necessary for the court to appoint a trustee to execute the power of sale.

11. SAME—EXECUTION OF POWER—AUTHORITY OF COURT.

Where trustees were given power to dispose of real estate which remained unexecuted at the time the trustees died, the court had the power, without the appointment of a substituted trustee, to execute the power.

12. PARTITION—INCIDENTAL RELIEF—IMPROVEMENTS—COMPENSATION.

Land was conveyed in trust to pay the income to certain persons for life, and after their death to be sold and the proceeds to be distributed. The trustee died before one of the life tenants did, and thereafter the surviving life tenant executed a lease; both she and the lessee believing at the time that she would be appointed substituted trustee. Before being so appointed she died. *Held* that, upon partition of the property among the persons then entitled thereto, the lessee was not entitled to be compensated for improvements made by him upon the premises.

13. SAME—ASSUMPTION OF LEASE.

Land was conveyed in trust to pay the income to certain persons for life, but after their death to be sold and the proceeds to be distributed. The trustees died before one of the life tenants did, and thereafter the surviving life tenant executed a lease; both she and the lessee believing at the time that she would be appointed substituted trustee. Before being so appointed she died. *Held*, that the action of a receiver, appointed in partition proceedings, in receiving rent from the lessee, did not amount to an assumption by the remaindermen of the lease executed by the life tenant.

Action by Eliza Willing Train against Elizabeth G. Davis and others. Judgment for plaintiff.

Holt & Gaillard, for plaintiff.
Carter, Ledyard & Milburn, for defendant Wetmore.
Moffat & Webb, for defendant Scotti.
Philo P. Safford, for defendant Charles C. Davis.
Geo. W. Van Slyke, for defendant Hollister.
Richard A. Irving, guardian ad litem of infant defendant Gulager.

O'GORMAN, J. The action is brought for the sale and partition of real estate. With the exception of a question as to the extent of the share of one of the tenants in common, dependent upon a disputed construction of the instrument, the owners are all in accord, and unite



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in the plaintiff's prayer for a sale and distribution. The only party who opposes the maintenance of the action is the defendant Wetmore, who is occupying the premises under a lease made with a deceased life tenant. He claims that the title to the property is now in the Supreme Court, owing to the death of the trustees, and that the only remedy of the parties in interest is to procure the appointment of a substituted trustee in an appropriate proceeding brought for that purpose; that in this case, where a sale was directed, the persons beneficially interested cannot take the land by election; and that, in any event, the infancy of one of the beneficiaries, and consequent incapacity to elect, is an insuperable bar to a reconversion. The rights of the parties are derived through a deed dated October 18, 1862, which conveyed the land in question to one George T. M. Davis and another, in trust, to apply the income to the use of Willie Davis Train, the daughter of George T. M. Davis, during her life, and thereafter to the use of her daughter Susan during her life, and, upon the death of the life beneficiaries, "to sell the same and to divide the proceeds" equally between the following named children of the said George T. M. Davis, share and share alike, to wit, James Webb Davis, Carey H. H. Davis, Emma Josephine Learned, wife of Parker Crawford Learned, and George T. M. Davis, Jr., and the children of the said Willie Davis Train, said children of Willie Davis Train to have and receive only one equal fifth part of said proceeds and avails of said sale, to be divided between them, share and share alike, so that, in such distribution of such proceeds and avails of said sale, the said children of said Willie Davis Train shall represent her, the said Willie Davis Train; and, in case of the decease of any or either of the above named four children of said George T. M. Davis before the death of both the said Willie Davis Train and Susan Minerva Train, then the heirs at law of such deceased child shall receive the share of such proceeds and avails of sale to which such deceased child would have been entitled if living, such heirs at law to take per stirpes and not per capita. George T. M. Davis, Jr., died before the termination of the life estates. His only heir surviving him was his father, George T. M. Davis, one of the trustees, who with his co-trustee died several years before the death of his granddaughter, Susan, the second life tenant, whose death occurred on April 5, 1904, a short time before the commencement of this action.

The first question presented is whether the grantors intended to create vested remainders in the children of George T. M. Davis at the date of the execution of the conveyance. It will be perceived that there is no direct devise or gift of the principal of the trust estate. There are no words or provisions which import a present or vested gift, or indicate such an interest. There is merely a direction to divide and distribute the proceeds at the end of two life estates, which brings the case within the rule that, where the only gift is in the direction to pay or distribute, futurity is annexed to the gift, and the remainder is contingent, not vested. Geisse v. Bunce, 23 App. Div. 289, 48 N. Y. Supp. 249; Vincent v. Newhouse, 83 N. Y. 511. It is claimed, however, that the postponement of the payment was for the purpose of letting in two intermediate estates, and that this rule is inapplicable; but, as was said in Dougherty v. Thompson, 167 N. Y. 485, 60 N. E. 764:

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**"In determining whether the future gift to a class is postponed to let in the intermediate estate, or in order ultimately to bestow the corpus or remainder upon persons who shall then be living to enjoy it, and cannot be ascertained at the testator's death, the testator's intention is as decisive as it is in other questions of construction."**

The general rules of construction are not inflexible and must always be subordinated to the primary canon of construction that the intent to be collected from the whole instrument is paramount. The scheme of the trust provisions discloses an intention to vest the title in the trustees during the lives of the two persons named, and to limit the gift over to the children of George T. M. Davis and the heirs of any deceased child, who should be alive upon the termination of the life estates. The language employed cannot be construed as a gift over previous to that time. It is expressly provided that, upon the death of Willie Train Davis and her daughter, Susan, there shall be a sale of the property, and that the children of Willie Davis Train shall receive one-fifth of the proceeds of the sale. The plain import of this language is that the children of Willie Davis Train then alive shall receive this share. The gift over could become operative only upon the death of Susan, and she cannot be included among the children who were to share in the distribution of the proceeds of the sale after her death. If it should be held that these remainders vested upon the delivery of the deed, the evident design of the creators of the trust would be defeated, and the estate of Susan would share, after her death, in the distribution which could not be effected while she lived.

The claim of a vested remainder is also negatived by the provision that, in the event of the death of either of the other four children of the trustee before the expiration of the life estates, the heirs of the persons so dying "shall receive the share of such proceeds to which such deceased child would have been entitled if living." The direction to sell the property worked a conversion, and the proceeds could not exist until the termination of the precedent estates. That was the time fixed for the distribution, and until then it would be impossible to ascertain who would answer to the description of heirs at law of a deceased child. Matter of Baer, 147 N. Y. 348, 41 N. E. 702. When George T. M. Davis, Jr., died, his father, the trustee, was his sole heir at law; but the persons who were to succeed to this share were the persons who answered to this description at the termination of the life estates, when the distribution was to occur. They were his surviving brothers and sister and the living descendants of his deceased sister. The parties therefore who claim title to this share as devisees under the last will and testament of George T. M. Davis, Sr., must be excluded from participation in the property. The infant defendant, Gulager, is a grandson of Willie Davis Train and cannot be included in the term her "children," as used in the trust deed. There are two children in existence who answer to the description, and the word cannot be extended to include a grandchild, as there is nothing in the deed indicating an intention to give the word other than its common and ordinary meaning. Matter of Truslow, 140 N. Y. 603, 35 N. E. 955. If the word "children" were held to embrace grandchildren, it would result, under the direction in the deed, that they share equally, in permitting

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children, however numerous, to take equally with children per capita and not per stirpes (Bisson v. West Shore R. R. Co., 143 N. Y. 128, 38 N. E. 104), a design which should not be imputed to the creators of the trust in the absence of direct and unequivocal language. But, while Willie Davis Train's one-fifth share of the property passes to her two surviving children who were alive at the time fixed for the sale and distribution, the infant defendant, as the heir of her daughter Susan M. Train Gulager, is one of those who answer the description of heirs of George T. M. Davis, Jr., and, in the division of the latter's share, he is entitled to his mother's one-third of her mother's fourth of the fifth of George T. M. Davis, Jr., which makes him the owner of an undivided one-sixtieth share in the property in suit.

It will be noted that the deed provides that, in case of the death of a child of the trustee, his share of the proceeds of the sale shall pass to his "heirs at law." The words "heirs at law," in their technical sense, relate to the right of succession to real estate; but, when erroneously used in connection with the succession to personal property, they will be construed as meaning next of kin or persons who would take under the statute of distribution. Tillman v. Davis, 95 N. Y. 17, 47 Am. Rep. 1; Woodward v. James, 115 N. Y. 346, 22 N. E. 150. At the time of the delivery of the deed, in 1862, the doctrine of representation under the statute of distribution did not apply to collaterals beyond brother's and sister's children, which would exclude the infant defendant from sharing in the portion intended for his mother's uncle, George T. M. Davis, Jr., as the infant is a sister's grandchild. Matter of Suckley's Estate, 11 Hun, 344. Chapter 367, p. 728, Laws 1903, however, amended subdivision 5 of section 2732 of the Code of Civil Procedure, to take effect September 1, 1903, by extending representation in the distribution of personal property to "descendants in whatever degree" of deceased brothers and sisters. The statute, as amended, would include the infant, and whoever fell within the class of a deceased child's next of kin at the termination of the life estates was within the general intention. Kemp v. New York Produce Exchange, 34 App. Div. 178, 54 N. Y. Supp. 678. Until that time the rights of the beneciaries were but contingent, not vested, and statutory enactments are inoperative only when they disturb vested rights.

The defendant Wetmore's objection to the maintenance of the action is untenable.

The trust created in the deed is defined in the classification of express trusts in section 76 of the real property law (Laws 1896, p. 571, c. 547), as:

"(3) To receive the rents and profits of real property, and apply them to the use of any person, during the life of that person, or for any shorter term, subject to the provisions of law relating thereto."

It will be observed that the direction to sell and distribute was no part of the express trust and was not a purpose for which a trust could be created under the provisions of the statute. Such a direction is but a mere power in trust, and, notwithstanding its existence, the land, upon the termination of the life estate, will descend to the remanidermen, subject to the execution of the power. The distinction between express

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trusts and powers in trust is that in the former the trustee takes the legal title, which, however, does not pass to the trustee of the power. Fowler's Real Prop. Law (2d Ed.) §§ 76–81; Moore v. Appleby, 36 Hun, 368; affirmed 108 N. Y. 237, 15 N. E. 377; Cooke v. Platt, 98 N. Y. 38; Embury v. Sheldon, 68 N. Y. 227.

The provision of the statute of uses and trusts, declaring that every valid express trust shall vest the whole estate in the trustee, is, by settled construction, limited to the trust estate, and has no application to future legal estates in lands covered by the trust, to take effect in possession on the termination of the trust. The trustees had an estate during the lives of the two life beneficiaries, and it was this estate, and this only, which vested in the trustees. Losey v. Stanley, 147 N. Y. 568, 42 N. E. 8. While the language of the deed effected an equitable conversion as of the time fixed for the sale (Trowbridge v. Metcalf, 5 App. Div. 322, 39 N. Y. Supp. 241), the subsequent conduct of the parties worked a reconversion. Where land is directed to be turned into money under a power and paid over to designated persons, and these persons are of lawful age, and, upon the sale of the land, at once entitled to the money, they may elect to take the land, and when they have so elected, and the election has been made known, the power of the trustee for conversion ceases and becomes extinguished, and he cannot thereafter lawfully proceed to execute the power. This doctrine arises from the principle that equity will not compel the execution of a trust against the wishes of the persons beneficially interested. Mellen v. Mellen, 139 N. Y. 220, 34 N. E. 925. The prayer in this action for a partition of the real estate, in which all the parties join, is, apart from other circumstances, a sufficient election. Mellen v. Mellen, supra. As to the infant party, his guardian ad litem and testamentary guardian, with the sanction of the court hereby expressed, may file a formal election for him, if this has not already been done. McDonald v. O'Hara, 13 Misc. Rep. 527, 34 N. Y. Supp. 692; Id., 144 N. Y. 566, 39 N. E. 642.

The trustees never acted, and the life tenants enjoyed the property direct, as real estate, with the consent of all the persons in interest. The trustees are dead, and, as all the persons having an interest in the property are now before the court and unite in treating the property as real estate, a valid judgment may now be entered for the sale and partition of the same. The statutory provisions for the appointment of a trustee of an express trust apply also to trustees of powers in trust. (Greenland v. Waddell, 116 N. Y. 242, 22 N. E. 367, 15 Am. St. Rep. 400) and the court in this action could appoint a trustee to execute the power, as was done in Delaney v. McCormack, 88 N. Y. 174; but, as the election of the parties has defeated the power, this is quite unnecessary. Even if the power in trust were still in force, the appointment of a substituted trustee and his presence as a party would not be essential to give the court complete jurisdiction of the action. The Supreme Court has inherent power to execute a trust, and, in the absence of a trustee, it may take upon itself its execution. Kirk v. Kirk, 137 N. Y. 514, 33 N. E. 552.

The demand of the defendant Wetmore for compensation for alleged improvements made upon the premises cannot be entertained. When

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he entered upon the premises he was aware of Mrs. Gulager's want of authority to execute a lease. She was not a trustee, and no authority was conferred upon her to demise the premises beyond the period of her life estate. With a view to securing her appointment as substituted trustee, she procured certain consents to her appointment, and the defendant Wetmore doubtless believed that her appointment would in due course be effected. Her death, however, ended the negotiations, and he can assert no valid claim, as lessee or otherwise, against the beneficial owners of the property. His agreement with Mrs. Gulager was effective, if at all, only as against her, personally, and became inoperative upon the termination of her life estate. The appointment of a receiver in this action, and his acceptance of rent from Wetmore, cannot be regarded as an assumption, by the owners of the property, of the agreement made with the deceased life tenant.

Judgment accordingly.

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## McBRIDE v. KORFF.

(Supreme Court, Appellate Term. April 24, 1906.)

APPEAL—VERDICT CONTRARY TO EVIDENCE.

Where, in an action for breach of contract, there was a total failure of proof upon the subject of damages, and no possible basis for those allowed, the judgment will be reversed.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error. § 3933.]

Appeal from Municipal Court, Borough of Manhattan, Eleventh District.

Action by Walter B. McBride against Hermann Korff. From a judgment for plaintiff, defendant appeals. Reversed, and new trial ordered.

Argued before SCOTT, P. J., and TRUAX and BISCHOFF, JJ.

H. V. Rutherford, for appellant.

PER CURIAM. The proof disclosed that the defendant took two furniture covers from the plaintiff's home, at his request, to alter them, and it may be that a cause of action for the breach of the implied agreement to return the articles repaired or altered within a reasonable time was established. We may also assume that, while the action was described by the oral pleadings as in conversion, the parties had consented to litigate the cause as one for the breach of a contract, since the variance was not suggested at this trial; but there was a total failure of proof upon the subject of damages, and no possible basis was afforded for a recovery of $25, within any measure of damages which might have been deemed applicable, whatever the cause of action.

Judgment reversed, and a new trial ordered, with costs to the appellant to abide the event.

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## HELLTHALER v. TEFT WELLER CO.

(Supreme Court, Appellate Term. April 24, 1906.)

1. APPEAL—QUESTION NOT RAISED BELOW.
A question not raised below cannot be raised for the first time on appeal.
[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 1018, 1121.]

2. TRIAL—INSTRUCTIONS—BURDEN OF PROOF.
An instruction that "the burden of proof is upon plaintiff to prove his version of the transaction" was properly refused, as his "version" was but one element of the proof, and not the ultimate fact to be proven.

3. APPEAL—ESTOPPEL TO ALLEGE ERROR.
Defendant cannot urge that the refusal of an improperly worded instruction requested by him may have led the jury to misconceive the rule as to the burden of proof.

Appeal from Municipal Court, Borough of Manhattan, Second District.

Action by Henry J. Hellthaler against the Teft Weller Company. From a judgment for plaintiff, defendant appeals. Affirmed, with costs.

Argued before SCOTT, P. J., and TRUAX and BISCHOFF, JJ.

Gennert & Gennert, for appellant.
Julius Fischer, for respondent.

BISCHOFF, J. The claim in suit was for the balance of wages for 20 weeks, at the rate of $9 per week; it being alleged that the plaintiff was employed by the defendant during the period at the agreed rate of $18 per week, half of which sum only was paid to him. It appeared from the plaintiff's proof that he had been employed by the defendant for about a year at $18 a week, when on June 27, 1903, he found in his pay envelope $9; that he asked for an explanation, and was told that it had been arranged by his employers, at his father's request, to hold back half of his wages. The plaintiff's father testified that he had requested the defendant's superintendent, Mr. Bogue, to pay the plaintiff only half of his regular wages, holding the balance for six months, in order that the plaintiff, a minor, might have less to spend each week, and become less open to the temptations which attend the possession of money by one of his age. The testimony produced for the defendant was to the effect that the wages were to be reduced to $9, subject to the defendant's election to give a bonus to the plaintiff at the end of six months, should his behavior be deemed good in the defendant's estimation, and not otherwise.

No question was raised at the trial as to the plaintiff's emancipation, and the defendant evidently deemed the father's testimony, that the plaintiff was entitled to his own earnings, sufficient. The question of emancipation cannot, therefore, be raised now.

It is urged, however, that the justice erred in refusing to charge at the defendant's request that "the burden of proof is upon the plaintiff to prove his version of the transaction." Necessarily, the burden of proof was upon the plaintiff to establish that his agreed wages were

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$18 per week for the period for which he sought a recovery, and his "version of the transaction" was given to support the ultimate fact of the agreement. What he was bound to prove was the agreement, and his "version," taken with all the surrounding circumstances, as well as with the inferences which the jury might draw, even from the testimony of the adverse witnesses favorable to the finding of the continuance of the employment at $18 a week, would together be elements in the proof, the burden of which was on the plaintiff. His "version" was one element of the proof, but was not the ultimate fact to be proven, and there was no error in the refusal of the instruction which was thus invoked to alter the actual issue, and to circumscribe the functions of the jury. The possibility that the refusal of this request led the jury to misconceive the actual rule as to the burden of proof arises solely from the defendant's choice of words to frame the proposition of law, and the party's own mistake cannot operate to take from his adversary the fruits of a properly conducted trial.

The judgment is therefore affirmed, with costs. All concur.

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## SULLIVAN v. WOLFF et al.

(Supreme Court, Appellate Term. April 24, 1906.)

APPEAL—REVIEW—EVIDENCE.

**Where there was a sharp conflict of testimony as to whether defendants had agreed to give plaintiff possession of certain horses, or whether possession was to wait his payment of the balance of the purchase price, and notwithstanding that the justice indorsed a memorandum on the summons to the effect that he did not believe plaintiff's story, he made a finding for plaintiff, on which judgment was rendered, it will be reversed on appeal.**

Appeal from Municipal Court, Borough of Manhattan, Sixth District.

Action by Michael Sullivan against Jules Wolff and others. From a Municipal Court judgment for plaintiff, defendants appeal. Reversed.

Argued before SCOTT, P. J., and TRUAX and BISCHOFF, JJ.

J. Levy, for appellant.

P. C. Talman, for respondent.

PER CURIAM. The issue was simply whether the defendants, when receiving $100 from the plaintiff, had agreed to give him possession of the horses purchased, or whether that possession was to await his payment of the balance of the purchase price. There was a close and sharp conflict of testimony upon the question of the terms of the contract, and, if the plaintiff's version was accepted, judgment was properly rendered in his favor. The justice, however, while finding for the plaintiff, indorsed a memorandum upon the summons to the effect that he did not believe the plaintiff's story. We cannot reconcile this statement with the judgment, and substantial justice requires that a new trial be had.

Judgment reversed, and a new trial ordered, with costs to the appellant to abide the event.

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## SALZMAN v. MANDEL.

(Supreme Court, Appellate Term. April 24, 1906.)

1. WITNESSES—BIAS—HOSTILITY—CROSS-EXAMINATION.
In an action for assault defendant was entitled to show the probable bias of a witness for plaintiff through hostility to defendant, and to bring out the reasons why witness, a former customer of defendant's, had ceased dealing with the latter, and whether witness had not once been ordered out of defendant's place of business.
[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 1189.]

2. APPEAL—REVIEW—HARMLESS ERROR.
Error in excluding such evidence was not rendered harmless by the fact that defendant himself afterwards testified that he had no trouble personally with witness; this not touching the question of witness' own state of mind.

Appeal from City Court of New York, Special Term.

Action by Yetta Salzman against Adolf Mandel. From a judgment and order denying a motion for new trial, defendant appeals. Reversed.

See 97 N. Y. Supp. 298.

Argued before SCOTT, P. J., and TRUAX and BISCHOFF, JJ.

Joseph Wilkenfeld, for appellant.

Frederick Wiener, for respondent.

BISCHOFF, J. Substantial error was committed in the exclusion of certain evidence offered for the defendant, and the motion for a new trial should have been granted. The action was for an assault suffered by the plaintiff at the hands of the defendant, a banker, at his place of business, and the issue was whether the assault had ever taken place. The testimony of the plaintiff was corroborated by an apparently disinterested witness, Grief, but upon cross-examination the defendant's counsel was not permitted to bring out the reasons why the witness, a former customer, had ceased dealing with the defendant, and whether he had not once been ordered out of the defendant's place of business. The defendant was entitled to show the probable bias of the witness through hostility to the party against whom he testified (People v. Milks, 70 App. Div. 438, 74 N. Y. Supp. 1042; Schultz v. R. R. Co., 89 N. Y. 242), and the questions excluded had a direct and material bearing upon the witness' credibility.

The error in the ruling was not rendered harmless by the fact that the defendant afterward himself testified that he had no trouble personally with Grief, since this did not touch the question of Grief's own state of mind.

It appears, also, that the court did not give sufficient latitude to the defendant upon the plaintiff's cross-examination, in the attempted inquiry whether her alleged injuries were not caused by a fire which occurred at her home.

The judgment and order must therefore be reversed, and the motion for a new trial granted, with costs to the appellant to abide the event. All concur.

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## CITIZENS' CENTRAL NAT. BANK OF NEW YORK v. TOPLITZ.

(Supreme Court, Appellate Division, First Department. May 11, 1906.)

1. EXECUTORS AND ADMINISTRATORS—ACCOUNTING—PARTIES ENTITLED TO ACCOUNTING.

One having a valid assignment of a portion of a legacy or distributive share may go into the Surrogate's Court, and call the executor or administrator to account.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 1980.]

2. SAME—ACTION FOR ACCOUNTING.

An actual or probable attack upon the validity of an assignment of a legacy or distributive share concerning which the Surrogate's Court has no power to adjudicate, authorizes the supreme court to entertain an action against the executor or administrator for an accounting.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 2008.]

3. SAME—ACTION AGAINST ADMINISTRATOR—COMPLAINT—SUFFICIENCY.

A complaint in an action against an administrator with the will annexed alleged that two legatees executed a note to plaintiff, and by a written instrument assigned to plaintiff the amount of the note out of their respective shares in the personal estate of decedent, thereby authorizing the administrator to retain from any distribution such sum, and in case the note was not paid when due, to pay the amount to the holder, which assignment was presented to the administrator and accepted by him, and that he thereupon "promised and agreed" that the same would be complied with by him; that the note was not paid when due of which defendant was notified, and that more than sufficient money to pay the note had come into the hands of the administrator which he had paid over to the legatees. *Held*, that the allegation as to defendant's agreement was a mere conclusion and by the acceptance of the order, the administrator did not bind himself personally, and the complaint was properly dismissed as not framed for an accounting which under the circumstances was necessary.

Appeal from Trial Term, New York County.

Action by the Citizens' Central National Bank of New York against Henry L. Toplitz. From a judgment dismissing the complaint, and from an order denying a motion for a new trial, plaintiff appeals. Affirmed.

Argued before O'BRIEN, P. J., and PATTERSON, McLAUGHLIN, LAUGHLIN, and HOUGHTON, JJ.

Charles Blandy, for appellant.
Richard L. Sweezy, for respondent.

HOUGHTON, J. The plaintiff's complaint was dismissed on the trial, on the ground that it failed to state a cause of action. The defendant is the administrator with the will annexed of the last will and testament of Lippman Toplitz, deceased. Two of the testator's sons were Solomon B. and Samson L., and each was entitled under such will to one-twelfth of the residuary estate.

The complaint alleges these facts, and, in addition, that Solomon and Samson made their joint and several promissory note for the sum of $10,000 payable six months from date, and procured it to be discounted

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by the Ninth National Bank of the city of New York; and that on the day of the date of the note they assigned and set over to the bank, by an instrument in writing duly executed the sum of $5,000 each, out of their respective shares in the personal estate of said testator, thereby authorizing and directing the defendant to retain from any distribution he might make such sum, and in case the note was not paid when due to pay said amounts to the holder of such note, charging the amount against them, which assignment was presented to the defendant personally and accepted by him; and that the defendant thereupon "promised and agreed that the same would be complied with by him, and the amount so assigned to said Ninth National Bank, as aforesaid be paid to said bank when the moneys to pay the same came into his hands"; that the note was not paid when due, of which defendant was notified, and from whom payment out of such distributive shares was demanded and refused; that the makers had paid $4,000 thereon, and that $6,000 remained due; that there came to the hands of defendant as such administrator, for distribution under said will, belonging to the assignors more than sufficient moneys to pay the balance due on the note, and that instead of applying such moneys thereto, the defendant, notwithstanding his notice of such assignment, and his acceptance thereof, and without notice to the bank and in disregard of its rights, paid over to Solomon and to Samson $4,000 each. The complaint further alleges that defendant, as such administrator with the will annexed, "now has in his hands the sum of over $42,000 of moneys belonging to said estate of Lippman Toplitz, deceased, for further distribution, and in and to which said Solomon B. Toplitz and Samson L. Toplitz are entitled to share in the proportions aforesaid." Then follow allegations of demand of payment of defendant, and refusal, bankruptcy of Solomon, and insolvency of Samson, and assignment of the claim of the Ninth National Bank of the city of New York to this plaintiff, with a demand of judgment for $6,000, and interest.

The theory of the plaintiff is that the defendant having been notified of the assignment, and having accepted it, or assented to it, became personally liable to pay whatever might remain unpaid on the note, particularly when he distributed $4,000 to each of the assignors in disregard of the assignment. If the defendant individually had had dealings with Solomon and Samson out of which a particular fund had become due, or was to grow due to them, an order given by them to another upon him would have operated as an assignment pro tanto of the fund and an action thereon at law would lie. The rule is that where, for a valuable consideration received from the payee, an order is drawn upon a third person payable out of a particular fund then due or to grow due from him to the drawer, the delivery of the order to the payee operates as an assignment pro tanto of the fund; the drawee is bound after notice thereof, to apply the fund, as it accrues, to the payment of the order, and the payee may by action compel such application. Brill v. Tuttle, 81 N. Y. 454, 37 Am. Rep. 515; Lauer v. Dunn, 115 N. Y. 405, 22 N. E. 270. So too, if the defendant in the present case, in disregard of the assignment of which he had notice, had paid to the assignor legatees, the full amount of their legacies, certainly in Surrogate's Court on an accounting, and possibly in an action at law, he

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would have been liable to repay the amount which he had wrongfully paid to those who had parted with their title.

Conceding, but not deciding that an action at law might be maintained under such a state of facts, the complaint cannot be sustained on that theory, because it alleges that the defendant now has in his hands as administrator with the will annexed more than $42,000, two-twelfths of which would be more than sufficient to pay the plaintiff's claim. From the allegations of the complaint it therefore appears that at the time the plaintiff's assignor received its assignment there was in the defendant's hands belonging to the assignor legatees, the $8,000 which was paid to them, and the $7,000 which remains in the defendant's hands belonging to them. The assignment is not alleged to have provided that the first distribution of the estate should be applied to it, or that the agreement was that nothing should be paid to the legatees until the plaintiff's claim should have been satisfied. Distribution by the defendant to the legatees did not operate as a breach of trust or implied agreement on the part of the defendant so long as he retained in his hands a sufficient amount to satisfy the plaintiff's demand. The most that the defendant was obliged to do by the strictest interpretation of the implied agreement which arose when he received and accepted notice of the order drawn upon him, was to retain enough moneys to satisfy the plaintiff's claim out of the shares of the assignor legatees. While it is alleged that the defendant agreed to pay the note in case it was dishonored, from the funds belonging to the two legatees who had given the order, the fair interpretation of the complaint is that he agreed to pay this amount, only out of the funds coming to his hands as administrator with the will annexed of the estate of the deceased, belonging to such legatees. If he received nothing, he was to pay nothing. If he received more than enough, he was to retain enough for that purpose. The allegation that he agreed to make the payment is a mere conclusion of law flowing from the facts stated. It was with respect to his management and distribution of the estate that the defendant contracted if he contracted at all. A determination of this fact would require an inquiry into his acts as administrator. This would involve an accounting to the extent of ascertaining how much of the estate there was for distribution to the two legatees, and how much had been paid to them individually, and how much remained to be applied upon the order or assignment which they had given to plaintiff's assignor. This inquiry would necessitate a form of action in which an accounting could properly be had. Such is not the form of action which the plaintiff has seen fit to bring. If the complaint had alleged that the defendant had paid out all the funds in his hands, and that none remained belonging to the legatee assignors, with which plaintiff could be paid, on a motion to dismiss, that allegation would necessarily be taken as true. Nevertheless, on coming to trial the plaintiff would have been compelled to prove that fact, if the defendant should not admit it, and that issue would involve the whole question of how much money the plaintiff received as administrator, and how much he had paid out, which would be in effect, an accounting of his acts as such officer. Eliminating, therefore, the allegation of the complaint that the defendant still retains in his hands moneys sufficient to satisfy the

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plaintiff's demand, as the plaintiff urges us to do, still an accounting is a necessity and the complaint is fatally defective, because it is not framed for that relief.

A valid assignment of a portion of the legacies of the two legatees is plead. Having that assignment, the plaintiff could go into the Surrogate's Court, which is the appropriate tribunal for that purpose (Hard v. Ashley, 117 N. Y. 606, 23 N. E. 177), and call the defendant to account as administrator with the will annexed. If it was fearful that the assignment to it was to be attacked, and that the surrogate would have no jurisdiction to determine its validity, it could bring an action for an accounting in the Supreme Court. The Supreme Court has concurrent jurisdiction with the Surrogate's Court to call an executor or administrator to account, and will entertain an action for that purpose when it is shown that the circumstances of the case are such as to require relief of a nature which could not be obtained in the Surrogate's Court. Haddow v. Lundy, 59 N. Y. 320, 326; Sanders v. Soutter, 126 N. Y. 193, 27 N. E. 263. An actual or probable attack upon the validity of the assignment of a legacy or distributive share, concerning which the Surrogate's Court has no jurisdiction to adjudicate, would constitute a circumstance authorizing the Supreme Court to entertain the action. But such an action would be one in equity for that specific purpose. The present complaint is framed at law, and seeks to charge the defendant personally with payment of the order which operated as an assignment of a portion of the legacies coming to plaintiff's assignors from the estate which it was the defendant's duty as administrator with the will annexed to administer. By acceptance of the order he did not bind himself personally and absolutely to pay it, but only to pay in case sufficient funds should be received by him in his official capacity. Aside from the allegation that he still holds sufficient funds to satisfy the plaintiff's demand, we think no action lies against him until an accounting, and that the complaint not being framed for that purpose was properly dismissed.

The judgment and order should be affirmed, with costs. All concur.

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## TULLY, Commissioner of Public Charities, v. LEWITZ.

(Supreme Court, Appellate Term. April 24, 1906.)

1. HUSBAND AND WIFE—ABANDONMENT—BOND FOR SUPPORT—ACTIONS—AUTHORITY TO TAKE BOND—EVIDENCE.

   The police magistrates of the city of New York having jurisdiction generally within the city of proceedings against one as a disorderly person, in that he had abandoned his wife without adequate support, it is not necessary, in an action on a bond purporting to have been given on a conviction before such a magistrate in such a proceeding, that the particular facts which authorize the magistrate to act be averred or proved as part of plaintiff's case in the first instance.

2. ACKNOWLEDGMENT—DEFECTIVELY ACKNOWLEDGED INSTRUMENTS—ADMISSIBILITY IN EVIDENCE.

   A police magistrate of the city of New York, not being a judge, within Laws 1892, p. 1487, c. 677, declaring the term to mean a judicial officer authorized to hold or preside over a court of record, and not being within

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any of the other classes authorized by Laws 1896, p. 609, c. 547, § 248, to take an acknowledgment of a conveyance of real estate, an acknowledgment to an instrument before such a magistrate does not authorize its admission in evidence, under Code Civ. Proc. § 937, providing that an instrument, if otherwise admissible, may be read in evidence, without further proof of its due execution, if acknowledged in the manner and form prescribed by law for the acknowledgment of conveyances of real estate to entitle them to be recorded.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Acknowledgment, § 56.]

3. EVIDENCE—RECORDS—EVIDENCE OF PRODUCTION.

To authorize its admission in evidence as a record, a bond taken in proceedings before a magistrate against one as a disorderly person, in that he had abandoned his wife with adequate support, and conditioned that he make certain payments for her support, must be shown to have been produced from the possession of its lawful custodian, the magistrate's court, in the absence of any law requiring the record to be kept elsewhere.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 1521–1522½.]

4. HUSBAND AND WIFE—ABANDONMENT—BOND FOR SUPPORT—REQUISITES AND VALIDITY—SEAL.

An undertaking given pursuant to Laws 1897, p. 239, c. 378, § 686, providing that one convicted as a disorderly person shall as a condition of discharge enter into a bond to the people, conditioned to make payments for the support of his wife, is not invalid because having no seal; the Statutory Construction Law, Laws 1892, p. 1488, c. 677, § 16, providing that when a bond is required by law, such requirements shall be deemed to have been complied with on execution of an undertaking to the same effect.

5. SAME—MISDESCRIPTION OF OFFICIAL PAYEE.

The commissioners of public charities of the boroughs of the city of New York having by law been superseded by the commissioner of public charities of the city of New York at the time of execution of a bond conditioned for payment to the commissioner of public charities for the boroughs of Manhattan and Bronx, the commissioner of the city, the payee designated by law to receive payments, will be presumed to have been intended, and the misdescription will not invalidate the instrument.

6. PRINCIPAL AND SURETY—FAILURE OF PRINCIPAL TO SIGN—EFFECT ON SURETY.

Where a bond required by Laws 1897, p. 239, c. 378, § 686, to be entered into, with sufficient surety, by one convicted of being a disorderly person, in that he had deserted his wife, conditioned that he make payments for her support, is prepared in form to be signed by principal and surety, but is in fact signed only by the surety, it is not binding on the surety, in the absence of evidence that her conduct led the officiating magistrate to believe that the instrument should be effectual without the principal's signature, and that he acted on its delivery to him.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Surety, § 46.]

7. WITNESSES—COMPETENCY.

A witness in an action on a bond, given under Laws 1897, p. 239, c. 378, § 686, conditioned for payments for support by one convicted of abandoning his wife without adequate support, is not competent to testify to what had been paid on the bond; it not appearing that he had any knowledge on the subject, but merely that he was the "alimony clerk" in the office of the commissioner of public charities, to which commissioner the payments were to be made.

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8. OFFICERS—DE FACTO AND DE JURE—ACTIONS.

In an action on a bond required to be brought by the commissioner of public charities of the city of New York, it need not be shown that plaintiff is the commissioner de jure, but it is enough to show that he is the de facto commissioner.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Officers, § 173.]

Appeal from Municipal Court, Borough of Manhattan, Third District.

Action by James H. Tully, commissioner of public charities of the city of New York, against Ida Lewitz. From a judgment for plaintiff, defendant appeals. Reversed, and new trial ordered.

Argued before SCOTT, P. J., and TRUAX and BISCHOFF, JJ.

Charles Goldzier, for appellant.

John J. Delaney, Corp. Counsel, and Herman Steifel, for respondent.

BISCHOFF, J. The action was against the alleged surety upon an instrument, partly written and partly printed, dated the 30th day of March, 1905, which recited that one Sam Lewitz was "duly convicted by Joseph Pool, one of the city magistrates in and for said city" of New York, "of being a disorderly person; that is to say, a person who has threatened to abandon, and has abandoned, his wife in said city without adequate support, and left her in danger of becoming a burden upon the public, and has neglected to provide according to his means for his said wife;" and that "by an order made by said city magistrate, convicting, as aforesaid, on the 28th day of March, 1905, it was determined that the above-named Sam Lewitz should pay to the commissioner of public charities for the borough of Manhattan and the Bronx, of the city of New York, the sum of four ($4) dollars weekly, and every week, for and towards the support of his said wife, for the period of one year next ensuing." In form the instrument purported to bind the said Sam Lewitz and the defendant, Ida Lewitz, separately, each in the sum of $208, to the people of the state of New York for the payment to the said commissioner of the weekly sum for the period mentioned. It purported to have been signed by the defendant Ida Lewitz only, and to have been acknowledged by her before the magistrate therein named in form as required for conveyances of real property to entitle them to be recorded, and bore no seal, or the equivalent of a seal, of the party who executed it.

Upon the trial the plaintiff called but one witness, Frank Kelly, who deposed that he was the "alimony clerk" in the office of the commissioner of public charities of the city of New York, and produced the instrument in suit from the files of his office. It was admitted in evidence over the defendant's objection (1) that the magistrate's authority to require the instrument to be given did not appear; (2) that the defendant's execution of the instrument was not proven, the magistrate being without authority to take the acknowledgment; (3) that the instrument was without a seal, and therefore not a bond, as required by law; (4) that it was conditioned for the payment of the weekly sum therein mentioned to the commissioner of public charities for the boroughs of Manhattan and the Bronx, there being at the time no such official known to the law; and (5) that the instrument was ineffectual,

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in that it was not executed by the principal, Sam Lewitz. The witness also was permitted, over the defendant's objection, to testify to the amount of the weekly sum claimed to be due and unpaid, without having been shown to be competent in that respect. No further proot was attempted by either party, and the justice rendered judgment for the plaintiff in the amount claimed, $28, and costs.

As we view it, the judgment is wholly unsupported by any competent proof of the execution by the defendant of the alleged instrument sued upon. Proceedings for the prosecution of one charged with being a disorderly person, in that he has abandoned his wife, may be instituted under the provisions of the charter of the city of New York (Laws 1897, p. 1, c. 378, as amended by Laws 1901, p. 1, c. 466), or those of the Code of Criminal Procedure; the difference between the several provisions being that, if the proceedings are under the charter, the security for the support of the wife must be taken in the name of the people of the state; that it must be in the form of a bond, into which the offender must enter with good and sufficient surety, to be approved by the magistrate; that it can be required after conviction only; that for a breach of its condition the instrument must be prosecuted in the name of the commissioner of public charity of the city (sections 686, 687); and if under the provisions of the Code of Criminal Procedure, the security can be required only before conviction, or after conviction and commitment (Code Cr. Proc. §§ 901, 902, 907); that it must be an undertaking, with one or more sureties approved by the magistrate, in which the offender is not necessarily required to join (section 901); and that, if forfeited, it must be prosecuted, if in the city of New York, in the name of the corporation of that city (section 905). Bearing these differences in mind, it is obvious that the instrument in suit purports and is claimed to have been given in proceedings instituted under the charter provisions. It was given after the conviction of the offender. The convicted person is named as a party thereto. The obligors are in terms bound to the people of the state, and it is prosecuted in the name of the commissioner of public charities of the city of New York.

The police magistrates of the city of New York have jurisdiction generally within the city of cases of the kind in which the instrument in suit purports to have been given, and it was not necessary, therefore, that the particular facts which authorized the magistrate to act in the proceedings recited in the instrument should be averred or proved as a part of the plaintiff's case in the first instance. As was said, per Bronson, C. J., in People v. Kane, 4 Denio, 530, 545:

"It is undoubtedly a well-settled and highly important principle that, before any one can be affected by the judgment or order of a court or officer of special or limited jurisdiction, it must not only appear that the court or officer had authority to act in cases of that kind, but that jurisdiction had been required in the particular case. But there is an obvious distinction between cases where a charge or burden is attempted to be fastened upon a party by a proceeding in invitum, and those where the charge or burden springs from his own voluntary act. Here the defendant went before an officer duly authorized to let to bail, and subscribed a recognizance for the appearance of Murray to answer a charge of forgery, and the instrument has been filed of record, and I cannot think the recognizance void because it fails to recite the particular facts which led to the taking of it, nor that it

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**is necessary in declaring to make any averment by way of fortifying or upholding the record."**

The case cited overruled People v. Koeber, 7 Hill, 39, and People v. Young, 7 Hill, 44, and was approved in Champlain v. People, 2 N. Y. 82, where the court (per Ruggles, J.) said:

**"But where, as in the case of a recognizance, it appears to be the voluntary act of the party, the presumption is and ought to be in favor of the regularity of the proceeding which led to it, and of the validity of the instrument itself, until the contrary be shown, or unless the want of authority to take it appear upon the paper itself. In this case the commissioner had a general authority to take bail in all cases, and, the condition being that the defendant appear and answer to an indictment to be preferred against him for forgery, sufficiently shows that he was charged with that crime."**

The instrument in suit, however, was not shown to have been executed by the defendant. By section 937 of the Code of Civil Procedure, any instrument, except a promissory note, a bill of exchange, or a last will, if otherwise admissible, may be read in evidence, if acknowledged in the manner and form prescribed by law for the acknowledgment of conveyances of real property to entitle them to be recorded, without further proof of its due execution; and by section 248 of the real property law (Laws 1896, p. 609, c. 547) such acknowledgments, if taken within the state, must be before a justice of the Supreme Court, a judge, clerk, deputy clerk, or special deputy clerk of a court within the district where such judge, clerk, deputy clerk, or special deputy clerk is authorized to perform official duties, a notary public, or the mayor or recorder of a city, a justice of the peace, surrogate, special surrogate, special county judge, or commissioner of deeds. Section 6 of the statutory construction law (Laws 1892, p. 1487, c. 677) provides that the term "judge" shall be construed to mean "every judicial officer, authorized alone, or with others, to hold or preside over a court of record;" and as a police magistrate of the city of New York answers the description of neither class of persons authorized to take acknowledgments, it necessarily follows that the attempted acknowledgment to the instrument in suit was ineffectual to render the instrument admissible in evidence. Again, a recognizance is part of the record of the proceedings in which it is taken. "A bond in such a proceeding is not to be considered merely as a contract between the parties. It is something more. It is a part and parcel of a judicial proceeding, and unless the officer who required the party to give it * * * had jurisdiction of the person and of the case it is void." People v. Higgins, 151 N. Y. 570, 577, 45 N. E. 1033. A recognizance is an obligation of record, and thus imports verity. 3 Am. & Eng. Ency. of Law, 686. Moreover, the security prescribed by the provisions of the charter and Code of Criminal Procedure is the magistrate's warrant for the discharge of the offender from custody. Thus it must necessarily be a part of the record of the proceedings in the magistrate's court. If relied upon as a record, it must be shown to have been produced from the possession of its lawful custodian, the magistrate's court, in the absence of any provision of law requiring the record to be kept elsewhere. Proof, therefore, that it was produced from the files of the commissioner of public charities



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was not competent for the admission of the instrument sued upon in evidence.

We attach no importance to the objection that the instrument is not a bond, as required by the charter, because without a seal (Tiffany v. Lord, 65 N. Y. 310), in view of the provision of the statutory construction law (Laws 1892, p. 1488, c. 677, § 16), that whenever a bond is by law authorized or required to be given, such authority or requirement shall be deemed to have been complied with upon the execution of an undertaking to the same effect. Furthermore, the instrument is not to be invalidated because of a misdescription of the officer to whom the weekly payments therein provided for were required to be made. The commissioners of public charities of the several boroughs comprising the city of New York having by law been superseded at the time of the execution of the instrument by the commissioner of public charities of the city of New York, it will be presumed that the latter was intended by the defendant as the person or official to whom the payments were to be made; there being no other person or official to answer the description. He alone was authorized by law to prosecute the instrument, and to receive payment of any sum or sums to grow due and payable thereunder. In such a case an omission or mistake in the name of the obligee or payee is cured by the provision of law, and the obligee or payee designated by law will be presumed to have been intended as the person or official to receive payment. 4 Am. & Eng. Ency. of Law, 645; Bay County v. Brock, 44 Mich. 45, 6 N. W. 101; cited with approval in State v. Wood, 51 Ark. 206, 10 S. W. 624; N. Y. African Soc. v. Varick, 13 Johns. 38; Wiser v. Blachly, 1 Johns. Ch. 607.

The errors in the admission in evidence of the instrument in suit, and hereinbefore pointed out, imperatively call for reversal of the judgment, and reference, therefore, to other errors may seem mere supererogation. However, we shall briefly notice such for the guidance of the court below and counsel should it be deemed advisable to proceed further with the action.

As contained in the record, the instrument sued upon appears ineffectual because not executed by the defendant's principal. That the principal did not "enter" into the obligation in conformity with the charter provision is of no importance except as bearing upon the intention of the defendant, hereinafter noticed. Her recourse to the principal, in the event of an actual liability, was complete without his joinder, and the provision requiring him to join in the execution of the instrument was obviously intended only as additional security to the obligee, which could be waived, and was waived, if the instrument was delivered by the defendant knowing or intending that her principal's discharge from custody would follow, without more, and such delivery was acted upon by the magistrate. In that case the defendant would be estopped from thereafter questioning the validity of the instrument for her principal's nonjoinder therein. As to this, however, the record is entirely mute. Ordinarily, the burden is upon the surety to show that delivery of the obligation to the obligee, executed by the surety only, was conditioned upon its execution also by others named as parties thereto (Chouteau v. Suydam, 21 N. Y. 179, 181); and such,

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we think, appears from fair inference from the facts, so far as they are contained in the record. Presumptively, the magistrate and the defendant knew of the charter provision which required the principal to join, and intended to comply therewith. The instrument was prepared to be signed, in form, by both principal and surety; evidence of such intention. Execution by the one had necessarily to precede that of the other. So far it appears to have been the mutual intention of the magistrate and the defendant that the instrument should be signed by the principal as well. Without anything, therefore, to show that the officiating magistrate in any way acted upon the delivery to him of the instrument in its apparently incomplete condition, we are unable to say that it was the defendant's intention, or that her conduct led the magistrate to believe that the instrument should be effectual without the principal's signature.

The question asked of the plaintiff's witness, Kelly, "Upon this undertaking, can you tell how much has been paid by the defendant"? was so obviously incompetent that comment thereon seems unnecessary. It nowhere appeared that the witness had any knowledge upon the subject, and we cannot infer from the fact alone that he was the "alimony clerk" in the office of the commissioner of public charities that he had.

A further objection to the judgment is made that the plaintiff was not shown to be the commissioner of public charities of the city of New York de jure. No such objection was taken upon the trial, and it was sufficient that it appeared that the plaintiff was the de facto commissioner. His title to the office was not triable in this action.

The judgment should be reversed, and a new trial ordered, with costs to the appellant to abide the event. All concur.

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## DINSMORE v. BUTLER.

(Supreme Court, Appellate Term. April 24, 1906.)

SALES—ACTION FOR PRICE—EVIDENCE—SUFFICIENCY.

In an action for the price of goods sold and delivered, evidence considered, and *held* insufficient to show delivery.

Appeal from Municipal Court, Borough of Manhattan, First District.

Action by Elizabeth R. Dinsmore against Wilson W. Butler. From a judgment in favor of plaintiff, and from an order denying a motion for a new trial, defendant appeals. Reversed, and new trial ordered.

Argued before SCOTT, P. J., and TRUAX and BISCHOFF, JJ.

J. Park Henderson, for appellant.

Charles Fisher, for respondent.

PER CURIAM. The plaintiff seeks to recover for goods "furnished the defendant's wife as agent of the defendant, at the request of said defendant, necessaries for her use," of the value of $110. The answer, among other things, is a general denial. We shall treat the action as one for goods sold and delivered. In order to maintain such an action

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it is necessary to show that the goods were in fact delivered. This the plaintiff has failed to do. She attempted to prove delivery of the goods by one witness, Miss Mahoney, who testified as follows:

"Q. What do you mean by 'delivery'? A. By sending them to the hotel where she lives. Q. Where did you give them to her? A. They were delivered at the office. Q. At the hotel? A. Yes, sir. Q. Do you remember ever having given them to her personally? A. Yes; because Mrs. Butler called afterwards to say that she would not receive any goods, so she must have had some inkling of it. Q. But you don't know yourself of her having received them? A. Yes; because the clerk told me that there were no goods left at the office. Q. But you don't know of having delivered these goods to Mrs. Butler do you? A. No, sir; but Mrs. Butler knows that she received them."

It is evident from this evidence that this witness did not deliver the goods to the defendant, and that she of her own knowledge did not know about the delivery of such goods. Another witness for the plaintiff (Miss Gillen) said that she packed the goods and sent them to Mrs. Butler; "sent a man with it to deliver it."

Judgment reversed, and a new trial ordered, with costs to the appellant to abide the event.

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## ROSENBLUM v. LIENER.

(Supreme Court, Appellate Term. Febuary 27, 1906.)

1. PAYMENT—RECOVERY—FALSE REPRESENTATIONS—EVIDENCE.

The plaintiff paid $50 to defendant, from whom he obtained a receipt reciting: "Brooklyn, N. Y., May 8, 1905. Received from" plaintiff "$50 on account of contract No. 145 Central avenue, Brooklyn; $850 to be paid by signing over contract on the 9th day of May, 1905, at 44 Court street, at Mr. C.'s office. Commission to be paid by signing over the contract." The paper was signed by both plaintiff and defendant. In an action to recover the amount paid, on the ground that defendant had falsely represented to plaintiff the rental value of the property at $1,300 per annum, it appeared that the parties met May 9th, when plaintiff told defendant that the rentals amounted to $1,200 and not $1,300 a year, and plaintiff testified that the defendant, when confronted with plaintiff's statement, did not deny that the rentals were $1,200, but answered that he had told plaintiff that the property could be made to rent for $1,300. *Held*, that defendant was put to his proof to deny the facts as to the alleged misrepresentations, and it was error to dismiss the complaint, on the ground that plaintiff failed to show that the actual rents were not $1,300 per annum.

2. VENDOR AND PURCHASER—CONTRACT OF SALE—VALIDITY.

The receipt did not constitute a valid contract for the sale of the lands, there being nothing in it, aside from its uncertainty of meaning, which obligated the defendant to assign the contract or give a deed of the premises.

Appeal from Municipal Court, Borough of Manhattan, Fourth District.

Action by Hyman Rosenblum against Henry Liener. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Argued before SCOTT, P. J., and GIEGERICH and GREENBAUM, JJ.

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Charles B. Harris, for appellant.
Everett Caldwell, for respondent.

GREENBAUM, J. The plaintiff paid $50 to defendant, from whom he obtained a receipt therefor, as follows:

"Brooklyn, N. Y., May 8, 1905.

"Received from Hyman Rosenblum fifty dollars on account of contract No. 145 Central avenue, Brooklyn; eight hundred and fifty dollars to be paid by signing over the contract on the 9th day of May, 1905, at 44 Court street, at Mr. Caldwell's office. Commission to be paid by signing over the contract.

"[Signed] Henry Liener.
[Signed] Hyman Rosenblum."

Plaintiff sued to recover the $50 so paid, on the ground that he had agreed to purchase of defendant the house 145 Central avenue for $11,200, by taking from defendant an assignment of a contract of purchase of said premises which defendant then had; that said $50 had been paid as a deposit for such assignment, upon the representations of defendant that the rentals of said house aggregated annually $1,300, and that said representations were untrue. The parties met on May 9th, when plaintiff told defendant that the rentals amounted to $1,200 and not $1,300 a year, and, according to plaintiff's testimony, the defendant when confronted with plaintiff's statement did not deny that the rentals were $1,200, but answered that he had said that he had told the plaintiff that the property could be made to rent for $1,300. This the plaintiff stated was not the representation, and, although defendant was ready to assign the contract, plaintiff refused to accept it because of the alleged misrepresentation, and demanded the return of the deposit. At the conclusion of plaintiff's case, the complaint was dismissed, on the ground that plaintiff failed to show that the actual rents were not $1,300 per annum, and plaintiff duly excepted.

I think the learned justice was in error. The conversation between the plaintiff and defendant, as detailed by plaintiff, clearly indicated that defendant's answers and conduct when plaintiff claimed that the premises only rented for $1,200 instead of $1,300 were such as to establish an acquiescence or admission of the truth of these assertions. The defendant was put to his proof to deny the facts as to alleged misrepresentations.

It also seems to me, irrespective of the foregoing considerations, that the receipt did not constitute a valid contract for the sale of the lands. Aside from the uncertainty of its meaning, there is nothing in it which obligated the defendant to assign the contract or give a deed of the premises. The deposit was given rather with a view to bind the plaintiff to accept an assignment of the contract, provided defendant was ready to deliver it. The situation is somewhat analogous to that presented in the case of Weinberg v. Greenberger, 47 Misc. Rep. 117, 93 N. Y. Supp. 530. This case may be distinguished from Lawrence v. Miller, 86 N. Y. 131, 139, in that the money there sought to be recovered was paid under a valid enforceable contract, whereas here the plaintiff had no contract enforceable in law. The receipt fails to indicate what

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contract affecting 145 Central avenue is meant, or what the nature of the contract was. It might have been a building contract, or one for a lease, or any other conceivable contract that might exist with reference to the property in question, and there is nothing in it which bound defendant to execute an assignment.

The judgment must be reversed, and a new trial ordered, with costs to appellant to abide the event. All concur.

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## SOLOMON et al. v. BOK et al.

(Supreme Court, Appellate Term. February 27, 1906.)

1. LIEN—ARTISAN'S LIEN—LOSS.
   Under Laws 1897, p. 532, c. 418, § 70, providing that a person who makes, alters, or repairs an article of personal property at the request of the owner has a lien on such article while lawfully in possession thereof, where several articles are manufactured under an entire contract, the lien is not lost by delivery of a part thereof.

2. SAME—ENFORCEMENT—BURDEN OF PROOF.
   Where an artisan, after delivering certain manufactured articles, claims a lien on the articles retained for the full amount earned, on the theory that they were all manufactured under an entire contract, the burden is on him to prove that the contract was entire.

3. SAME—SUFFICIENCY OF EVIDENCE.
   Where an artisan, after delivering certain articles, claimed a lien on those retained for the cost of manufacture of the whole number, *held* that the evidence was insufficient to show that the articles were manufactured under an entire contract.

Appeal from Municipal Court, Borough of Manhattan, Second District.

Action by Maurice Solomon and another against Samuel Bok and another. From a judgment for defendants, plaintiffs appeal. Reversed.

Argued before SCOTT, P. J., and GIEGERICH and GREENBAUM, JJ.

Maurice M. Greenstein, for appellants.

Abraham I. Vilkomirson, for respondents.

GREENBAUM, J. This is an appeal from a judgment of the Municipal Court, Second district, finding an artisan's lien in favor of the defendants for $43.50 in an action brought by plaintiffs to recover chattels. The plaintiffs, merchant tailors, had since August, 1905, employed defendants, coatmakers by trade, to make up part of plaintiffs' coats. Some time between October 4 and 11, 1905, the defendants had in their possession in process of manufacture nine coats belonging to plaintiffs. On October 11th and 12th defendants delivered three coats and one coat, respectively, to plaintiffs, and on the last-named date demanded payment for the work done on the four coats, which the plaintiff Solomon refused, saying to the defendant David Bok, so the latter testifies: "You spoiled my coat. I will not give you any money at all;" and "Get out. That he would give me no money until I bring

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him the other coats that I am now on"; meaning by the other coats "the other five coats from the nine coats." On October 14, 1905, plaintiff Solomon called at defendants' place of business, demanded the remaining five coats still in their possession, and tendered $24 in payment for the work and labor performed on those particular five coats. Defendants refused to surrender the same until they had been paid $43.50 due them for the work done on all nine coats, claiming an artisan's lien on the five coats in their possession for the full amount of their claim.

There appears to be no dispute as to the amount due to defendants. Plaintiffs' claim is that defendants were entitled to no lien on the five coats in their possession for the amount due on the four coats already delivered, basing this contention on the theory of a separate contract with the defendants for each garment, and that, having tendered the amount due for the work actually performed on the remaining five, any lien claimed by defendants as to those could not be enforced. If the contract is separate as to each garment, plaintiffs are correct in their contention, and the lien was lost as to the four garments voluntarily relinquished. If, on the other hand, as the defendants claim, it was a contract covering the nine garments, the lien was not lost as to those already voluntarily delivered. Lien Law, Laws 1897, p. 532, c. 418, § 70; Morgan v. Congdon, 4 N. Y. 552; Wiles Laundry Co. v. Hahlo, 105 N. Y. 234, 11 N. E. 500, 59 Am. Rep. 496; Blumenberg Press v. Mutual, etc., 77 App. Div. 86, 91, 78 N. Y. Supp. 1085.

The burden of proving their lien was on defendants, which necessarily involved proof of the entirety of the contract. Defendants offered no evidence that the nine coats were given them at the same time, nor of the exact terms of the contract, nor of the usual course of business dealings between themselves and plaintiffs. On the other hand, there is proof that there was attached to each garment a separate ticket, upon which was marked a separate price for which the work was to be performed. Furthermore, the demand made by defendants, according to their own story, for payment of the four coats at the time of their delivery tends to show that the contract was not entire, but that each coat was a separate transaction.

In view of the defects in defendants' proof and the evidence above indicated, in my opinion defendants failed to sustain the burden of proof cast upon them, and the judgment appealed from should be reversed, and a new trial ordered, with costs to appellants to abide the event. All concur.

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## KAMBER v. ROSEN et al.

(Supreme Court, Appellate Term. February 27, 1906.)

GUARANTY—CREATION—ACCEPTANCE.

Guarantors were entitled to recall the guaranty any time before its acceptance.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Guaranty, § 8.]

Appeal from Municipal Court, Borough of Manhattan, Fourth District.

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Action by Bernard Kamber against Max Rosen and another. From a judgment for plaintiff, defendants appeal. Reversed.

Argued before SCOTT, P. J., and GIEGERICH and GREENBAUM, JJ.

Isaac V. Schxavrien, for appellants.

PER CURIAM. We do not think that the guaranty ever became effective, because it was never accepted by plaintiff. The original guaranty was returned for the addition of a clause. Up to this time it certainly had not been accepted, and the guarantors had a right to recall it. This they unmistakably did. We do not consider that the minds of the parties ever met on the subject. Judgment reversed, and new trial ordered, with costs to appellant to abide the event.

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## SCHLESSINGER v. MANHATTAN RY. CO.

(Supreme Court, Appellate Term. March 12, 1906.)

1. CARRIERS—PASSENGERS—UNSAFE APPROACHES.

The duty of a railway company towards its passengers extends to the exercise of reasonable care in affording them safe approaches to the stations and platforms, and this duty applies not only to such approaches as may have been constructed and owned by the company, but to those constructed and owned by the city, if constantly and notoriously used by passengers as a means of approach.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1142, 1145.]

2. SAME.

Though approaches to the stations of a railway company are owned by the city, and the company has no right to make repairs without permission, and is not called on to seek such permission, it should at least provide against injury to its passengers by erecting barricades, or giving such warning as will guard against accidents.

Appeal from City Court of New York, Special Term.

Action by Alfred Schlessinger against the Manhattan Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Argued before SCOTT, P. J., and GIEGERICH and GREENBAUM, JJ.

Charles A. Gardiner (G. Tarleton Goldthwaite, of counsel), for appellant.

Wm. Victor Goldberg, for respondent.

SCOTT, P. J. The plaintiff tripped upon the step of a stairway leading from one of defendant's platforms to the street. There is no doubt of the injury, or of the defective conditions from which the injury resulted. The main defense relied upon is that the stairway upon which the accident happened had been constructed by, and was owned and maintained by, the city of New York. The evidence on this subject showed that in 1896 or 1897, after defendant's platform had been constructed for some years, the city of New York erected an elevated viaduct

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over 155th street at right angles to the avenue upon which defendant's road ran. This work necessitated certain changes in defendant's platform and the approaches thereto, including the stairway in question, and it is said that these changes were made by the city, or, if made by defendant, were so made at the expense of the city, under a written contract between the defendant and the city, which was referred to, but not produced. There were other means of getting from the platform to the street. The defendant maintains a sign on its property pointing in the direction of the stairway, and indicating that it affords a means of access to the street. Assuming that the stairway was constructed by the city, and remained its property, and should have been, and perhaps to some extent is, cared for by the city, I am of the opinion that this does not excuse the defendant from liability. The duty of a railway company towards its passengers extends to the exercise of reasonable care in affording them safe approaches to the stations and platforms, and this duty, in my opinion, applies not only to such approaches as may have been constructed and owned by the company, but to those constructed and owned by other persons, if constantly and notoriously used by passengers as a means of approach. Such use indicates the express or implied invitation by the carrier, and more especially when the carrier indicates the approach by signs as one to be used. The adoption and indication of such an approach as one to be used casts upon the carrier the duty of exercising a reasonable amount of care and inspection to see that the approach is kept in a safe condition, and, even if it has no right to make repairs without permission, and is not called upon to seek such permission, it can at least provide against injury to its passengers by erecting such barricades or giving such warning as will guard against accidents. D., L. & W. R. R. Co. v. Trautwein, 52 N. J. Law 169, 19 Atl. 178, 7 L. R. A. 435, 19 Am. St. Rep. 442; G., C. & Santa Fé R. R. Co. v. Glenk, 9 Tex. Civ. App. 599, 30 S. W. 278; E. Tenn. R. R. v. Watson, 94 Ala. 634, 10 South. 228. That the stairway was in a defective condition, and had been for some time, was sufficiently proven, and no contradiction was attempted. The damages, though ample, were not excessive.

Judgment affirmed, with costs.

GIEGERICH, J., concurs.

GREENBAUM, J. (concurring). The stairway upon which plaintiff tripped led directly to defendant's station at 155th street, and constituted an entrance thereto. Such a condition could not have existed without the consent of defendant. Indeed, the various stairways that led to the station—most of them concededly the property of defendant—had the same general appearance. Notices and signs on the defendant's structure directed and advised passengers as to the use of the stairways, including the one in question, as means of ingress to and egress from defendant's station. Plaintiff's case, therefore, presented prima facie a situation from which it might be inferred that the defendant corporation, which admittedly operated the railroad upon which plaintiff was a passenger, also maintained the defective stairway used by him as a

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passenger when he stumbled. Defendant argues that the evidence introduced by it conclusively established that it did not own or maintain this stairway, but that it was the property of, and was maintained by, the city of New York. The only testimony of defendant bearing upon these points was that furnished by one McManus, a clerk employed by the city of New York in the Bureau of Highways, and one Reeves, an assistant engineer employed by the defendant. The former on his direct examination testified that the city of New York constructed this stairway, kept it in repair, and swept it from time to time. Upon his cross-examination it developed that he had never seen anybody repair or sweep it, that he had no personal knowledge as to whether the city or the defendant had constructed it, and that all his testimony upon the matters referred to was pure hearsay. The testimony of the witness Reeves was no more valuable or enlightening than was that of McManus. Reeves' testimony, however, was very illuminative in other respects. It established the fact that prior to 1896 the defendant maintained stairways, which it had constructed, and that by reason of the viaduct built by the city at 155th street it became necessary to rearrange and reconstruct two of the stairways, of which the stairway in question was one, to adapt them to the changed conditions, and that the new stairways were built under a written contract between the city of New York and the defendant, which either provided that the city should build them or pay defendant for building them. The contract was not produced, nor was any explanation proffered for its nonproduction. A legal inference was therefore properly deducible that the ownership in defendant of the original stairways, for which the new ones were substituted, continued in the new stairways in part or whole, and that the original obligation of defendant to maintain them in good repair still subsisted. It was peculiarly within the power of the defendant to produce convincing and incontrovertible proof of the actual facts as to the ownership and maintenance of the stairway, and its failure to do so would scarcely warrant the court in indulging in ingenious and subtle inferences favorable to the defendant in respect of these matters.

It seems to me wholly unnecessary to discuss the rights of defendant upon an assumed state of facts that it did not own nor in any wise control the stairway.

The judgment should be affirmed, with costs.

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## M. D. WILLIAMSON CO. v. COOPER.

(Supreme Court, Appellate Term. March 2, 1906.)

EVIDENCE—HEARSAY.

**Where, in an action for the price of coal ordered by a third person, the latter was not defendant's agent, a declaration by the third person that the coal was ordered in behalf of defendant and another was inadmissible.**

Appeal from Municipal Court, Borough of Manhattan, Eleventh District.

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Action by the M. D. Williamson Company against Jacob Cooper. From a judgment for plaintiff, defendant appeals. Reversed.

Argued before SCOTT, P. J., and GIEGERICH and GREENBAUM, JJ.

Hyman Cohen, for appellant.

Ovitt & Graves (George D. Graves, of counsel), for respondent.

GREENBAUM, J. The order for coal, the price of which is here sought to be recovered, was given by Smith, an engineer. Testimony was taken to the effect that Smith stated that the coal was ordered in behalf of Cooper and Gottlieb. Smith denies that he so stated, and both Cooper and Gottlieb testify that Gottlieb with two others operated the theater for which the coal was used, and that Cooper had nothing whatever to do with the management of the theater; his relation thereto being that of lessor of the building. Smith and Gottlieb both testified that Smith was not, and had not been, in the employ of Cooper, but that he was employed by Gottlieb and his associates, and that Gottlieb always paid him his salary. It was thus incontrovertibly shown that Smith was not Cooper's agent, and therefore any declaration made by him was inadmissible, and the motion to strike out this testimony should have been granted. Smith v. Bradhurst, 18 Misc. Rep. 546, 41 N. Y. Supp. 1002; Ronk v. Lord, 65 N. Y. 604. The only connection of Cooper, against whom judgment was entered, with the transactions in suit was that on one occasion a check of Cooper & Feeder was sent to plaintiffs for a bill of coal delivered on these premises. The explanation of Cooper and Gottlieb as to this check is that Gottlieb obtained it in exchange for cash which Gottlieb gave Cooper. It is difficult to see how, under all these circumstances, Cooper can be justly mulcted for the payment of plaintiff's claim.

Judgment reversed, and new trial ordered, with costs to the appellant to abide the event.

SCOTT, J., concurs. GIEGERICH, J., concurs in the result.

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## LYONS v. DORF.

(Supreme Court, Appellate Term. February 27, 1906.)

PARTITION—SALE—OPERATION OF DEED.

**On the sale of land on partition by heirs, a referee's deed did not transfer to the purchaser the right to recover from the tenant of the land water rents accrued before the death of the ancestor who had owned the land, whose legal representatives were the only ones who could maintain an action for the unpaid rents.**

Appeal from Municipal Court, Borough of Manhattan, Eleventh District.

Action by William J. F. Lyons against Max Dorf. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Argued before SCOTT, P. J., and GIEGERICH and GREENBAUM, JJ.

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Spiro & Wasservogel, for appellant.
Wallace & Van Hoevenberg, for respondent.

GREENBAUM, J. A judgment for unpaid accrued water rents payable by the defendant as lessee under a lease was recovered against defendant by the plaintiff as assignee of the purchasers of the fee of the leased premises under a referee's sale in partition. Plaintiff's assignors merely obtained a referee's deed, which it may be assumed carried with it an assignment of an existing lease of said premises. There was no proof adduced that the plaintiff or his assignors had paid these arrearages, or had obligated themselves to pay them. It cannot be said that such assignment transferred any arrearages of rent or water rates payable by the tenant. Such past claims were personalty, and, as these claims had accrued prior to the death of the owner, from whom those holding title as heirs became entitled to maintain partition, it would seem that the legal representatives of the deceased or their assigns alone could maintain an action for their recovery.

The judgment must be reversed, and a new trial ordered, with costs to appellant to abide the event. All concur.

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## MANHATTAN DELIVERY CO. v. SIMON et al.

(Supreme Court, Appellate Term. March 2, 1906.)

EVIDENCE—OPINION EVIDENCE—QUALIFICATION OF WITNESS.

It was error to permit a witness to testify as to the value of certain work done on garments, without having previously qualified himself as competent to so testify.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 2361.]

Appeal from Municipal Court, Borough of Manhattan, First District.

Action by the Manhattan Delivery Company against Abraham Simon and another. From a judgment in favor of plaintiff, defendants appeal. Reversed.

Argued before SCOTT, P. J., and GIEGERICH and GREENBAUM, JJ.

Manheim & Manheim, for appellants.
Guthrie, Cravath & Henderson, for respondent.

GREENBAUM, J. It appears to me that the preponderance of evidence is so great in defendant's favor that the judgment should not be permitted to stand. Silverblatt, to whose rights the plaintiff is subrogated, is an interested witness, and he alone testifies that he packed up the 45 garments, and delivered them to the plaintiff. So far as the record shows, there were others present when Silverblatt packed the goods, and yet not one of these persons is produced to corroborate him. In behalf of the defendant, witnesses both interested and disinterested testify that the packages actually delivered by plaintiff did not contain 45 garments, and that when the goods were originally delivered to Silverblatt by defendants, to be made up into garments, the price per

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garment was fixed between the parties at $1.55, and that Silverblatt signed a memorandum in one of the defendant's books to that effect. Silverblatt made no denial of his signing such a memorandum, and gave no explanation in reference thereto. It also seems strange that Silverblatt should have gone to the expense of hiring a wagon to take the garments to an express company, and should have accompanied the wagon, and instructed the company to deliver the goods to defendants C. O. D. Why so unusual procedure should have been pursued, instead of the seemingly natural one of taking the garments to defendants in the hired wagon, is unexplained. It is also a suspicious circumstance that Silverblatt should have undertaken to make up the garments without first having a price fixed for the work to be done. The course alleged to have been pursued by the defendants and their witnesses is the probable and likely one. Silverblatt was permitted, under objection, to give testimony as to the value of the work done, without having previously qualified himself as one competent to so testify. This was error.

For this and the reasons stated, the judgment is reversed, and a new trial ordered, with costs to appellant to abide the event.

SCOTT, P. J., concurs. GIEGERICH, J., concurs in the result.

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## KORIN et al. v. RUTZ.

(Supreme Court, Appellate Term. March 2, 1906.)

1. CONTRACTS—ACTION FOR BREACH—BURDEN OF PROOF.

**Where damages were claimed for breach of a contract to embroider waists within the time specified, on the ground that plaintiff lost money by the cancellation of the order because of nondelivery on time, plaintiff was bound to show that he had an enforceable contract with the person giving the order, and that such person was legally entitled to cancel the order.**

2. SAME.

**Plaintiff was also bound to show that defendant's undertaking to embroider the waists was with knowledge of plaintiff's alleged contract, under circumstances which would charge defendant with any damages for any loss plaintiff might sustain on the order if the waists were not embroidered within the time agreed.**

Appeal from Municipal Court, Borough of Manhattan, First District.

Action by Addie S. E. Korin and another against Albert Rutz. From a judgment in favor of plaintiffs, defendant appeals. Reversed.

Argued before SCOTT, P. J., and GIEGERICH and GREENBAUM, JJ.

Albert H. Meyer, for appellant.

GREENBAUM, J. Plaintiff asserts a contract with defendant under which the latter obligated himself to embroider 1,000 waists within a time specified. For failure to do this work within this time plaintiff demanded a return of the unfinished garments, which had previously been delivered to defendant, and the goods were all duly returned in the original packages, without any work having been done upon them.

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Damages were awarded plaintiff upon the theory that plaintiff lost upwards of $300, the profits of which he was deprived, in consequence of defendant's breach, in that a certain customer from whom plaintiff had obtained an order for these waists had canceled the order because of their nondelivery on time. The precise nature and terms of the alleged order of plaintiff's customer were not disclosed on the trial, and whether or not plaintiff had an enforceable contract with said third party, or whether or not said party was legally entitled to cancel the order, was not made to appear. The evidence, too, is meager and unsatisfactory as to whether defendant's undertaking to embroider the waists with knowledge and understanding of plaintiff's alleged contract with the third party under such circumstances would charge him with any damages for any loss that plaintiff might sustain upon the order with the third party if the waists were not embroidered within the time agreed.

The judgment must be reversed, and a new trial ordered, with costs to appellant to abide the event. All concur.

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## LAVERTY v. INTERURBAN ST. RY. CO.

(Supreme Court, Appellate Term. March 12, 1906.)

CARRIERS—INJURY TO PASSENGER—NEGLIGENCE.

Where a passenger, without any signal to the conductor, attempted to alight from a car when it stopped at a point other than its usual stopping place, the starting of the car, causing her injury, was not negligence for which the company was liable.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1228½.]

Appeal from City Court of New York, Trial Term.

Action by Emily Laverty against the Interurban Street Railway Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Argued before SCOTT, P. J., and GIEGERICH and GREENBAUM, JJ.

Bayard H. Ames, for appellant.

Thomas J. O'Neill, for respondent.

GIEGERICH, J. The action is to recover damages for personal injuries alleged to have been sustained by the plaintiff on the evening of the 13th day of April, 1903, while alighting from one of the defendant's cars. According to the plaintiff's own testimony, she started to get off the car without any signal to the conductor. She claims the car stopped, and as she was about to descend, or in the act of descending, from the rear platform, the car started suddenly, and she fell and was injured. By other evidence, which is uncontradicted, it is shown that the conductor at the time was in the car collecting fares and transfers. There is nothing to indicate that either he or the motorman knew of the plaintiff's intention to get off the car. At the close of the case the plaintiff testified: "There is the regular transfer station, and I know that, and that car stopped without notice." She does not, how-

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ever, state that the car had yet reached its regular stopping place. The contrary seems to have been the fact. The witness Sinclair fairly well explained the situation, and his testimony shows, not only that the car had not yet reached its regular stopping point, but why it slowed down, or, if we accept the testimony of the plaintiff and her witness, stopped, where it did. Sinclair testified:

"I looked out to see if it was near the stopping place at Eighth Avenue Circle, and I saw a car standing in front, and the motorman slowed down until the car in front would have a chance to pull up, and while coming to a slow down the car in front started, and he put on a little increased power to get to the stopping place. While he was slowing down I heard a commotion," etc.

—The commotion referred to being caused by the fall of the plaintiff and the movement and outcry of her fellow passengers and of persons on the street.

Conceding the truth of the evidence on behalf of the plaintiff (namely that the car came to a full stop and then started again suddenly), there is no proof of negligence on the part of the conductor or motorman. They were not aware of the plaintiff's purpose to descend, and the car had not yet reached its regular stopping place. We are not prepared to hold that a quick start, under such circumstances, is of itself negligence.

The judgment should be reversed, and a new trial ordered, with costs to appellant to abide the event.

GREENBAUM, J. (concurring). The case was tried by plaintiff upon the theory that defendant's car had been brought to a full stop when it neared or reached the Columbus Monument on Fifty-Ninth street, and that the plaintiff while in the act of alighting, after the car had come to a full stop, was suddenly and without warning to her started, with the result that she was thereby thrown to the ground and injured. On the part of defendant it was shown that the plaintiff did not attempt to get off after the car had stopped, but that she stepped off while the car was in motion and before it had been brought to a stop. The clear cut issue of fact thus presented was whether the car had actually come to a stop when the plaintiff had begun to alight, or whether it was then in motion and slowing up.

Unless we are prepared to reverse the judgment because it is against the weight of evidence, it seems clear to me that the circumstances under which the plaintiff asserts she attempted to get off the car were sufficient to warrant a jury in finding that the conductor of the car should have anticipated that a passenger might attempt to alight. The proofs in the case do not establish that the car came to a momentary stop by reason of a temporary exigency, nor that the place where plaintiff claims the car stopped when she attempted to alight was not at or near the place where defendant's cars customarily stopped. There is nothing in the record to indicate that the defendant desired the trial justice to explain to the jury that actual or implied notice of the passenger's intention to alight must be established by the plaintiff, or to have the jury pass upon the question as to whether or not the place

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where plaintiff claims that the car came to a full stop was the regular stopping place. No issue was presented that the car had been momentarily stopped before reaching the customary stopping place, and that the accident to plaintiff happened in her attempt at that instant to leave the car.

Both parties tried the case upon the theory that the issue between them was as to whether the car had first stopped and then suddenly started up before plaintiff could safely alight, or whether it was in continuous motion at the time plaintiff started to get off the car, and that it did not come to any stop until after plaintiff fell; and I do not think that this court should now hold, as matter of law, that plaintiff failed to establish any cause of action. I am, however, of the opinion that the evidence largely preponderates in favor of defendant, and for that reason the judgment should be reversed.

SCOTT, P. J. (concurring). I am unable to find any evidence of negligence on the part of the defendant. The negligence alleged is that "the conductor in charge of said car failed to give the plaintiff a reasonable opportunity to alight from the same." The conductor can scarcely be charged with negligence in this regard unless he had notice that a passenger intended to alight, or the stoppage was under such circumstances that he should have anticipated that a passenger might attempt to alight. Grabenstein v. Met. St. Ry. Co. (Sup.) 84 N. Y. Supp. 261. There is no contention in this case that the conductor had any actual notice that plaintiff proposed to alight from the car. If the car did actually stop, and the stoppage was under such circumstances that the conductor or motorman should have anticipated that a passenger might attempt to alight, the burden was on the plaintiff to show that such circumstance existed. This she failed to do. For all that appeared, the stoppage may have been merely a momentary check, resulting from some exigency of the traffic. I am also of the opinion that the evidence largely preponderated in favor of defendant's contention that the car had not in fact come to a stop when plaintiff undertook to alight.

I agree that the judgment and order should be reversed.

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## GOLDEN v. METROPOLITAN ST. RY. CO.

(Supreme Court, Appellate Term. February 27, 1906.)

STREET RAILWAYS—COLLISIONS—EVIDENCE—CARE OF PLAINTIFF.

In an action for damages for injuries sustained by plaintiff's truck in a collision with one of defendant's cars, evidence that plaintiff looked for approaching cars before crossing a track *held* to be incredible, as a matter of law, as being in contradiction of matters of common knowledge.

Appeal from Municipal Court, Borough of the Bronx, Second District.

Action by John J. Golden against the Metropolitan Street Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

Argued before SCOTT, P. J., and GIEGERICH and GREENBAUM, JJ.

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William E. Weaver, for appellant.
Frayer, Stotesbury & Gregg, for respondent.

GREENBAUM, J. Plaintiff claims damages for injuries sustained by his truck in a collision with one of defendant's cars. The accident happened at the junction of Park Row and Pearl street. Plaintiff was driving in an easterly direction through Pearl street, and as he reached Park Row preparatory to crossing defendant's tracks he claims he looked in a southerly direction, to see if any car was approaching on the uptown track, and that, although he could see for a distance of 200 feet down the track, he observed no car coming. He also claims that the wagon was struck in its middle—that is, midway between the first and rear wheels—by a north-bound car, and that he was thrown by the impact on the track in front of the colliding car. It seems to be undisputed that the plaintiff's horse was swung around to the easterly side of the car, and defendant's motorman testifies that the wagon was struck at about the front wheel. The mere fact that plaintiff testified that he looked in the direction of the approaching car and did not see it is not sufficient to absolve him from the charge of negligence. It is improbable that if he looked he would not have seen the car. It is also improbable that his wagon could have been struck as he describes, and that he should have been thrown upon the track. The consequences are rather in accord with the fact that he failed to look for a car, and that his wagon was struck just as he reached the track. The mere statement that the plaintiff looked is "in such contradiction of matters of common knowledge or the law of nature as to be incredible as a matter of law." Fiddler v. N. Y. Cent. R. R. Co., 64 App. Div. 95, 100, 71 N. Y. Supp. 721; Swart v. N. Y. Cent. R. R. Co., 81 App. Div. 402, 407, 80 N. Y. Supp. 906; Hebron v. New York City Railway Co. (Sup.) 94 N. Y. Supp. 341.

The judgment must be reversed, and a new trial ordered, with costs to appellant to abide the event. All concur.

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## MARGOLYS et al. v. MOLLENICK.

(Supreme Court, Appellate Term. February, 1906.)

EVIDENCE—PAROL EVIDENCE—MODIFICATION OF WRITTEN CONTRACT.

Evidence that a party to a written contract went into possession on November 1st instead of October 1st, as provided in the contract, shows what was done under the contract, and is admissible as proving a subsequent modification thereof by the acts of the parties and by mutual consent.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 2052.]

Appeal from Municipal Court, Borough of Manhattan, Fifth District.

Action by Henry Margolys and another, partners doing business under the name of H. Margolys & Co., against Sarah Mollenick. From a judgment for plaintiffs, defendant appeals. Affirmed.

See 94 N. Y. Supp. 301.



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Argued before SCOTT, P. J., and GIEGERICH and GREENBAUM, JJ.

Charles Soble, for appellant.
Emanuel Klein, for respondents.

PER CURIAM. We think the evidence of the assignment was sufficient, especially as no specification of any defect in that respect was made in the motion to dismiss, when there was still an opportunity for the plaintiffs to give further evidence on the point. The same may be said of the claim that there was not sufficient evidence that the work for which $100 was awarded was done for the defendant.

There is no merit in the contention that it was error to admit evidence that the plaintiffs' assignor went into possession on November 1st instead of October 1st, which latter date was provided for in the contract. This is not evidence to vary a writing, but to show what was in fact done under it. It was tantamount to proving a subsequent modification, made by the acts of the parties and by mutual consent.

The judgment should be affirmed, with costs.

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## MORRISON et al. v. STEMBER.

(Supreme Court, Appellate Term. February 27, 1906.)

1. COURTS—CITY COURT OF NEW YORK—EXECUTION—SUPPLEMENTARY PROCEEDINGS—DEFAULT OF DEBTOR.

   Where a judge of the City Court of New York took the default of the debtor in supplementary proceedings, he had jurisdiction to entertain a motion to open the default, and upon a denial of the motion hear a reargument, and nullify his previous determination by opening the default.

2. EXECUTION—SUPPLEMENTARY PROCEEDINGS—ORDERS—CONSTRUCTION.

   Where a motion to open the default of a judgment debtor in supplementary proceedings was based upon an order to show cause, granted by the same judge who had taken the default and denied the motion to open it, the fact that the order to show cause was made returnable "before me or one of the justices of this court, at a Special Term chambers thereof," did not affect the validity of the proceedings, as the words "one of the justices of this court," etc., might be regarded as surplusage.

3. EXECUTION—SUPPLEMENTARY PROCEEDINGS—ADJOURNMENT.

   In supplementary proceedings it is within the discretion of the judge to deny a motion to adjourn the examination.

   [Ed. Note.—For cases in point, see vol. 21, Cent. Dig. Execution, § 1152.]

Appeal from City Court of New York, Special Term.

Examination in supplementary proceedings of Jacob Morrison and another against David Stember. From orders made at the special term of the City Court of New York the judgment creditors appeal. Orders modified and affirmed.

Argued before SCOTT, P. J., and GIEGERICH and GREENBAUM, JJ.

Gustavus A. Rogers, for appellants.
Max Brown, for respondent.

GREENBAUM, J. The judge of the City Court who made the order from which this appeal is taken had jurisdiction to entertain the

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proceedings supplementary to execution, notwithstanding the original order had been granted by another judge. Section 26, Code Civil Proc. Assuming, therefore, that the proceedings were therefore regular, said judge had power to take the default of the debtor, and therefore jurisdiction to entertain a motion to open the default, and, upon a denial of said motion, to hear a reargument, and nullify his previous determination by opening the default, and setting down the examination for another day. The motion to open the default of the judgment debtor was based upon an order to show cause granted by the same judge who had taken the default, and who had denied the motion to open it, and the fact that the order to show cause was made returnable "before me or one of the justices of this court, at a Special Term chambers thereof," etc., did not affect the validity of the proceedings, as the words "one of the justices of this court," etc., may be regarded as surplusage. In Bitting v. Vandenburgh, 17 How. Prac. 81, cited by the appellants, the motion was made returnable "at a Special Term of this court," and not before the justice who had entertained original jurisdiction of the special proceedings.

The point here raised that the order opening the default is erroneous in form, in that it appears to be a court, instead of a judge's, order, is well taken, and to that extent the order should have been resettled. The action of the learned judge in refusing to resettle the order in the form proposed will not, however, be disturbed. The order opening the default will be modified, so as to be in form a judge's order, and for that purpose the matter is remitted to the justice who decided the motion, and, as thus modified, the order will be affirmed, without costs.

Appeal from the order denying a motion to resettle, known as "Appeal No. 2," will be modified to the extent that the costs therein allowed may be offset against the judgment by plaintiffs, instead of being absolute.

Appeal No. 3 presents the situation which fully justified the entry of the order made by the learned justice. It was entirely within the exercise of his discretion to deny the motion to adjourn the examination, and no abuse of the exercise of that discretion is apparent. That order is affirmed, with $10 costs and disbursements to respondent, to be offset against plaintiffs' judgment.

Appeal No. 4 is from an order of the Special Term denying a motion to resettle the order opening the judgment debtor's default, made by a justice of that court. If, as plaintiffs' counsel contends, the order sought to be resettled was a judge's order, then it was improperly made returnable before the Special Term, and the court was justified in denying the motion; and, if the Special Term had the power to entertain it, then the exercise of its discretion should not be here disturbed. The order is affirmed, with $10 costs to respondent, to be offset against plaintiffs' judgment.

**Order opening default modified, and, as thus modified, affirmed, without costs. Appeal No. 2: Order modified. Appeal No. 3: Order affirmed, with $10 costs and disbursements to respondent, to be offset against plaintiffs' judgment. Appeal No. 4: Order affirmed, with $10 costs to respondent, to be offset against plaintiffs' judgment. All concur.**

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## COCHRAN v. MacRAE.

(Supreme Court, Appellate Term. February 27, 1906.)

PRINCIPAL AND AGENT—ACTS OF AGENT—LEASE—ACTION FOR RENT—PARTIES ENTITLED TO SUE.

Where the name of the owner of premises was affixed to a lease thereof by the owner's agent, the owner's name being followed by a seal and that by the signature of the agent, the owner might sue to recover the rents as though he had made the lease personally.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Agent, §§ 692-694.]

Appeal from Municipal Court, Borough of Manhattan, Seventh District.

Action by Alexander Smith Cochran against Gustavus Fulton MacRae. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Argued before SCOTT, P. J., and GIEGERICH and GREENBAUM, JJ.

Frank Trenholm, for appellant.

Arlington C. Kendall, for respondent.

GIEGERICH, J. This action is for rent upon a lease under seal, bearing date the 14th day of September, 1904, which recites that it is made "between Alex Smith Cochran [the plaintiff] of the first part and G. F. MacRae [the defendant] of the second part," and that the party of the first part has let to the party of the second part, and that the latter has taken from the former, the premises in suit upon certain specified terms. Then follow covenants, not necessary to be quoted for the present purposes, that are assumed by each of the parties to the lease, which ends with the following recital: "In witness the parties have hereunto set their hands and seals the 14th day of and year first above written." The lease is signed as follows: "Alex Smith Cochran. [L. S.] M. R. Thompson, Supt. G. F. MacRae. [L. S.]"

The defendant entered into possession of the demised premises, and remained there until the latter part of August, 1905, when he vacated them. In an action to recover the rent for that month and the following one, the defendant resists payment on the ground that, "since the plaintiff had not personally signed and sealed the lease, he had not legal capacity to sue." The point is untenable. The lease, as above shown, was executed in the name and under the seal of the principal, viz., the plaintiff, and not of Thompson, the superintendent, and purports to be the former's deed. It is therefore immaterial in what form the signature is, whether "principal by agent" or "agent for principal." Rand v. Moulton, 72 App. Div. 236, 76 N. Y. Supp. 174; 1 Am. & Eng. Enc. of Law (2d Ed.) 1037. The case of Henricus v. Englert, 137 N. Y. 488, 33 N. E. 550, relied on by the defendant, is not opposed to these views. There the bond was given under the name of "M. Henricus & Son, Agents," no other person being described or named in any other way as obligee, and the court applied the general rule that, the instrument being under seal, the obligees were the only persons authorized to sue upon it.

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Here, however, we have an entirely different situation; the lease being directly between the plaintiff, the owner of the real property and the real party in interest, and the defendant, the lessee, the name of the superintendent not appearing in the body of the lease. The lease having thus been made for and in the name of the plaintiff, the principal, he had a right to enforce it, and to maintain the action in his own name to the same effect and in the same manner as though he had made such lease personally, which, in legal effect, was made by and with him, and not by or with the agent. Bayley v. Onondaga County Mutual Insurance Co., 6 Hill, 476, 41 Am. Dec. 759; 1 Am. & Eng. Enc. of Law (2d Ed.) p. 1168.

Judgment should be affirmed, with costs. All concur.

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## BURSTEIN v. LEVY et al.

(Supreme Court, Appellate Term. February 27, 1906.)

1. LIMITATION OF ACTIONS—PLEADING AS DEFENSE.

Under Code Civ. Proc. § 381, allowing 20 years as the limitation on instruments under seal, an answer setting up that the cause of action, alleged by the complaint to be based on an instrument under seal, did not accrue within 10 years, was subject to demurrer, notwithstanding the suggestion by defendant that plaintiff would fall short in his proof on the trial, and that the conveyance relied on would be found not to have a seal, and that plaintiff would then fall back on an implied contract.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Limitation of Actions, §§ 683-686.]

2. PLEADING—CLERICAL ERRORS.

Where the inappropriate use of the word "plaintiff" in one place is obviously a clerical error, "defendant" being intended, it does not affect the sufficiency of the pleading.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, §§ 51, 421.]

3. PLEADING—DEMURRER—GROUNDS—PLEADING GOOD IN PART.

Where an executor is sued both individually and as executor, the complaint is good as against demurrer, even though the court in which the action is brought has no jurisdiction against defendant purely in his representative capacity.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 486.]

Appeal from City Court of New York.

Action by Maurice J. Burstein against Barnett Levy, as executor of the last will and testament of Louis Levy, deceased, impleaded with Barnett Levy, individually. From a judgment sustaining a demurrer to defendant's answer, he appeals. Affirmed.

Argued before SCOTT, P. J., and GIEGERICH and GREENBAUM, JJ.

Rosenberg & Greenberg (K. Henry Rosenberg, of counsel), for appellant.

J. Charles Weschler and S. S. Myers, for respondent.

GIEGERICH, J. The complaint alleges a breach of covenant of an instrument under seal. The answer, among other things, sets up the

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statute of limitations, pleaded in three ways: First, that the cause of action set forth in the complaint did not accrue within three years before the commencement of the action; second, that it did not so accrue within six years; and, third, that it did not so accrue within ten years. The action being on an instrument under seal, 20 years is allowed as the limitation. Code Civ. Proc. § 381; Dwinelle v. Edey, 102 N. Y. 423, 7 N. E. 422; Hulbert v. Clark, 128 N. Y. 295, 28 N. E. 638, 14 L. R. A. 59; Murdock v. Waterman, 145 N. Y. 55, 39 N. E. 829, 27 L. R. A. 418.

The suggestion that the plaintiff will fall short in his proof upon the trial, and that the conveyance relied upon will be found not to have a seal, and that he will then fall back upon an implied contract or a breach of warranty, need not be seriously considered. The plaintiff has pleaded a sealed instrument. If he does not prove one, he will have to amend, and then it will be time enough for the defendant to set up the defense based on shorter periods of limitation than 20 years. Such leave to amend the answer would doubtless be granted as a condition to granting leave to amend the complaint.

None of the grounds urged against the sufficiency of the complaint are well taken. The inappropriate use of the word "plaintiff" in one place is so obviously a clerical error, "defendant" being intended, that it needs no discussion.

The objection that the City Court has no jurisdiction in an action against an executor in his representative capacity is equally ineffectual. The defendant is sued both individually and as executor, and the complaint is good against demurrer (Darling v. Powell, 20 Misc. Rep. 240, 45 N. Y. Supp. 794), even though the court have no jurisdiction against the defendant purely in his representative capacity; which is a point that need not be considered now. As to pleading the existence of the lien of the unpaid water tax, I do not think it was necessary to aver anything more than was averred.

The interlocutory judgment should be affirmed, with costs. All concur.

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## WINDELS v. INTERBOROUGH RAPID TRANSIT CO.

(Supreme Court, Appellate Term. February 27, 1906.)

CARRIERS—INJURY TO PASSENGER ALIGHTING—NEGLIGENCE—EVIDENCE—SUFFICIENCY.

In an action against a street railroad company by a passenger who was injured by falling through a space between the car and the station platform while alighting, evidence *held* to justify submission to the jury of the question of defendant's negligence.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1153, 1315.]

Appeal from Municipal Court, Borough of Manhattan, Sixth District.

Action by Henry Windels against the Interborough Rapid Transit Company. From a judgment for defendant, plaintiff appeals. Reversed.

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Argued before SCOTT, P. J., and GIEGERICH and GREENBAUM, JJ.

David Paine, for appellant.
Charles A. Gardiner, for respondent.

GREENBAUM, J. The plaintiff brought this action for damages resulting from injuries alleged to have been sustained by falling through a space of the width of about a foot between the car and station platforms while alighting as a passenger from one of the cars of defendant at the subway station at Fourteenth street in this city. The accident happened during the "rush hours," and while plaintiff was surrounded by a considerable number of passengers, who were pushing their way from the car to the station. Plaintiff testified that he had alighted at this station about three or four times before, was not aware of the existence of the space or opening of the width of a foot, and that no warning of any danger from the opening was given by defendant. The complaint was dismissed after plaintiff rested.

It seems to me that upon the facts established this was error. There was no evidence of a negligent construction (Ryon v. Manhattan Ry. Co., 121 N. Y. 126, 23 N. E. 1131), but, considering that the plaintiff testified that he had no knowledge of the existence of such an opening, that the accident happened while many passengers were crowding upon and around him, and that no warning was given to passengers as to the peculiar danger that was lurking at the place of alighting, it was the duty of the court to submit to the jury the question of defendant's negligence in failing to guard this space, or warn passengers of the danger incident to its existence, and the question of plaintiff's contributory negligence. Langin v. New York & Brooklyn Bridge, 10 App. Div. 529, 42 N. Y. Supp. 353.

The judgment must be reversed, and a new trial ordered, with costs to appellant to abide the event. All concur.

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## FEDERAL SIGN SYSTEM ELECTRIC v. EPPS et al.

(Supreme Court, Appellate Term. February 27, 1906.)

DAMAGES—BREACH OF CONTRACT—LIQUIDATED DAMAGES—EFFECT OF PROVISION IN CONTRACT.

Plaintiff agreed to install an electric sign on premises leased by defendant. The contract was in writing, and provided that, if the lessee failed to pay the rents stipulated, the plaintiff would have the right to remove the sign, and the defendant would thereupon become obligated to pay, in addition to the agreed rental, the sum of $75 as liquidated damages to cover the expense of installing the sign on the premises. *Held*, that the provision was one for liquidated damages, and not one for a penalty.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, §§ 154-178.]

Appeal from Municipal Court, Borough of Manhattan, Tenth District.

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Action by the Federal Sign System Electric against Norman S. Epps and another. From a judgment in favor of defendants, plaintiff appeals. Reversed.

Argued before SCOTT, P. J., and GIEGERICH and GREENBAUM, JJ.

David Paine, for appellant.

Wilford H. Smith, for respondents.

GREENBAUM, J. This action was brought to recover the sum of $75 as liquidated damages for breach of contract. The plaintiff agreed to install an electric sign on the premises leased by the defendant. The contract was in writing, one of the provisions thereof being that, in case of the lessee failing to pay the rents stipulated thereunder, the plaintiff would have the right to remove said sign, and the defendant would thereupon become obligated to pay, in addition to the agreed rental, the sum of $75 as liquidated damages, to cover the company's expense in installing the sign upon the premises.

The plaintiff attempted to prove, in conformity with the allegations in its complaint, a failure on the part of the tenant to pay the rental, as provided for under the contract, and the removal of the sign by it in consequence of such default. The record shows that the trial court evidently confused the claim of the plaintiff with one that might have arisen out of another clause of the contract, which provided for indemnity to the plaintiff for any expense it may have been put to in case of being compelled to remove the sign on account of the failure of the lessee to secure the consent of the landlord, which the lessee was obligated to procure under the contract.

During the course of the cross-examination of the plaintiff's witnesses, it was attempted to be shown that the sign was removed because of the landlord's refusal to consent to its retention. Plaintiff, however, absolutely disclaimed that it removed the sign for any such reason, and it should have been permitted to try the case upon its theory. The provision for the payment of $75 was clearly one for liquidated damages, and not one for a penalty. The provision of the lease affording indemnity to the plaintiff for any expense it incurred previous to receiving notice that the proper permits for hanging the signs could not be obtained stands on an entirely different ground, and should not be confused with the rights of the plaintiff demanded under the clause for liquidated damages. If, after hearing the proofs pro and con, the court would have come to the conclusion that the removal of the sign was due to the act of the landlord, and not because of the nonpayment of rent under the contract by the lessee, then it would have been proper for the trial justice to have dismissed the complaint, upon the ground that the plaintiff had not established the cause of action as pleaded.

The judgment should be reversed, and a new trial ordered, with costs to the appellant to abide the event. All concur.

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## BRETTNER v. WESTCHESTER ELECTRIC RY. CO.

(Supreme Court, Appellate Term. February 27, 1906.)

CARRIERS—INJURY TO PASSENGER—ACTION—QUESTION FOR JURY.

In an action against a street railway company for injuries to a passenger, the questions of defendant's negligence and plaintiff's contributory negligence *held* for the jury.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1315-1325, 1402.]

Appeal from Municipal Court, Borough of Manhattan, Ninth District.

Action by Henrietta Brettner against the Westchester Electric Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Argued before SCOTT, P. J., and GIEGERICH and GREENBAUM, JJ.

William E. Wezver, for appellant.

Max Sheinart, for respondent.

GREENBAUM, J. It seems to me that this case is distinguishable from Clark v. Metropolitan Street Railway Company, 68 App. Div. 49, 74 N. Y. Supp. 267. In the latter case the plaintiff attempted to board the defendant's open car before the step had been lowered, and it there also appeared that "he knew that the step had to be lowered before the car could proceed uptown," and that he assumed that it had been lowered because the bar was raised, but there was nothing to justify that assumption. In the case before us the testimony of plaintiff was that, when the car reached the station, and when she attempted to board the car, the upper cross-bar was up and the step of the car was down; that the side on which she boarded the car was on the track nearest to the building where she and other passengers were waiting for the car; that the other side of the car was next to another track, upon which were cars; that other passengers were boarding the car, without objection on the part of the car officials, on the same side that she was getting on; that the bar was down on the other side; and that she did not know, nor does she now believe, that she was getting on the car on the wrong side. The accident happened at what is known as the "Mount Vernon Transfer Station," in a car bound for New Rochelle. It was not shown that plaintiff had any familiarity with cars at this point, and indeed no evidence was introduced tending to show that it was not entirely proper to board the car on the side where plaintiff was injured. Where all the conditions were such as to justify a passenger in assuming that she may safely board a car, where no warning is given by the officials, and where before a passenger is fully seated the conductor in charge, without warning, lowers the upper bar, so that it injures a passenger, who has her hand on one of the upright stanchions while in the act of taking a seat, the question of defendant's negligence and plaintiff's freedom from negli-

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gence were properly questions of fact for the court, sitting as a jury, to pass upon.

Defendant submitted no proof as to the details of the accident, and no good reason exists for disturbing the judgment.

Judgment affirmed, with costs and disbursements to respondent. All concur.

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## STATE BANK v. KAHN.

(Supreme Court, Appellate Term. March 2, 1906.)

1. SUBROGATION—SURETIES—RIGHTS.

Where in an action on a note S. became one of the sureties on an undertaking given by the judgment debtors on appeal, and as surety paid the amount of the judgment to plaintiff, he became subrogated to the rights of the plaintiff as against the judgment debtors, and became entitled to enforce all appropriate remedies against them that might have been available to plaintiff.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Subrogation, § 28.]

2. BILLS AND NOTES—INDORSERS—LIABILITY—ORDER—NEGOTIABLE INSTRUMENTS LAW.

Under the express provision of Negotiable Instruments Law, Laws 1897, p. 735, c. 612, § 118), indorsers, as respects one another, are liable prima facie in the order of which they indorse.

[Ed. Note.—For cases in point, see vol. 7, Cent. Dig. Bills and Notes, §§ 612, 613.]

3. SAME—TENDER OF PAYMENT—EFFECT.

Under the express provision of Negotiable Instruments Law, Laws 1897, p. 744, c. 612, § 201, subd. 4, a valid tender of payment made by a prior party discharges one secondarily liable on the instrument.

4. SAME—DISCHARGE OF ACCOMMODATION INDORSER.

Where defendant, an accommodation indorser, was the last indorser on the note sued on, and he was not a judgment debtor when judgment was rendered against other parties to the note, which was satisfied by a surety on the appeal bond of such judgment debtors, such payment operated to discharge defendant's liability on the note.

Appeal from City Court of New York, Trial Term.

Action by the State Bank against Samuel Kahn. From a City Court judgment in favor of plaintiff, defendant appeals. Reversed.

Argued before SCOTT, P. J., and GIEGERICH and GREENBAUM, JJ.

Wasserman & Jacobus, for appellant.

Nathaniel Levy, for respondent.

GREENBAUM, J. The defendant, Samuel Kahn, was an accommodation indorser, and the last indorser of the note in suit. Plaintiff entered judgment against the maker and the indorsers other than the defendant, Samuel Kahn. One Silas Schwartz became one of the sureties on an undertaking given by the judgment debtors on appeal from said judgment, and as such surety paid the amount of the judgment to the plaintiff. Thereupon Schwartz became subrogated to the right of the plaintiff as against the judgment debtors, whose debts he was compelled to pay, and he became entitled to enforce all appropriate

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remedies against said judgment debtors that might have been available to the plaintiff. Sheld. Subr. § 11; Smith v. National Surety Co., 28 Misc. Rep. 631, 59 N. Y. Supp. 789. But the defendant, Samuel Kahn, was not a judgment debtor when judgment was entered against the other defendants, and Schwartz gave no undertaking in behalf of him. Schwartz was therefore in no position to assert any claim against Samuel Kahn by reason of his suretyship. "As respects one another, indorsers are liable prima facie in the order in which they indorse." Section 118 of the negotiable instruments law (Laws 1897, p. 735, c. 612). By section 201, subd. 4, Negotiable Instruments Law, Laws 1897, p. 744, c. 612, a valid tender of payment made by a prior party discharges one secondarily liable on the instrument. In the case before us the payment by Schwartz as surety for the maker and prior indorsers was a payment in their behalf, which operated to discharge the note against the defendant, Samuel Kahn. There was no assignment of the notes or of plaintiff's claim to Schwartz shown, and indeed if there were the circumstances under which Schwartz claims to succeed to the rights of the plaintiff would simply establish a subrogation in favor of Schwartz as against the other defendants. This action must be treated as though continued against Samuel Kahn by the plaintiff, and, as plaintiff concededly admits the payment of the notes, the judgment should be reversed, and the complaint dismissed, with costs to appellant in this court and the court below.

SCOTT, P. J., and GIEGERICH, J., concur.

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## SOUTHACK v. GLEASON et al.

(Supreme Court, Appellate Term. March 12, 1906.)

1. PARTIES—AMENDMENTS—REPRESENTATIVE OR INDIVIDUAL CAPACITY.
   Where an action is prosecuted against defendants as trustees, the court has power to turn the action into one against them individually.
   [Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Parties, § 165.]

2. PROCESS—AMENDMENT—NECESSITY.
   Where an action is prosecuted against defendants as trustees, but is turned into one against them individually, the summons should be amended as well as the complaint.

Appeal from City Court of New York, Special Term.

Action by Eugene Southack against Olin F. Gleason and others as trustees, etc. From an order granting leave to file an amended complaint, defendant appeals. Reversed.

Argued before SCOTT, P. J., and GIEGERICH and GREENBAUM, JJ.

Robertson, Harmon & Davies, for appellants.

Cheevey & Rogers, for respondent.

PER CURIAM. The court had power to so amend the proceedings as to turn the action into one against the defendants individually. Boyd v. U. S. Mortgage & Trust Co., 84 App. Div. 466, 82 N. Y. Supp. 1001. The summons, however, should have been amended

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as well as the complaint, and an amendment of the latter alone is ineffectual, and cannot be sustained.

Order reversed, with $10 costs and disbursments, and motion denied, with leave to plaintiff to make such motion in the court below as he may be advised.

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## McNAMARA v. KEENE.

(Supreme Court, Appellate Term. March 2, 1906.)

CONSTITUTIONAL LAW—CORPORATIONS—FOREIGN CORPORATIONS—CONTRACTS—SUIT BY ASSIGNEE.

Laws 1901, p. 1326, c. 538, amending General Corporation Law, § 15, by extending the provision prohibiting a foreign corporation not complying with the statute from suing on a claim to the assignee thereof, will not be held applicable to an action by an assignee on a contract made prior to the amendment, where such a holding would violate the constitutional prohibition against impairing the obligation of contracts.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Constitutional Law, § 46.]

Appeal from City Court of New York, Trial Term.

Action by William F. McNamara against Foxhall Keene. From an order setting aside a verdict directed by the court, plaintiff appeals. Reversed.

Argued before SCOTT, P. J., and GIEGERICH and GREENBAUM, JJ.

Niles & Johnson (John J. Cunneen, of counsel), for appellant.

Russell H. Landale (George Gordon Battle, of counsel), for respondent.

GIEGERICH, J. The learned trial judge first directed a verdict for the plaintiff as a matter of convenience, there being no question of fact, and later, after considering the question at law involved, granted a motion to set aside the verdict and to dismiss the complaint. The plaintiff is the assignee of a foreign corporation. The cause of action assigned arose on contracts made in 1900. At that time, and until the amendment of 1901 to section 15, General Corporation Law, Laws 1901, p. 1326, c. 538, the assignee of a foreign corporation could sue upon a claim, although the corporation might not be able to do so because of its failure to comply with the provisions of that section. Lindheim v. Sitt, 33 Misc. Rep. 62, 68 N. Y. Supp. 145; Box Board & Lining Co. v. Vincennes Paper Co., 45 Misc. Rep. 1, 90 N. Y. Supp. 836. The amendment of 1901 extended the prohibition to the assignee, and it was subsequent to such amendment that the assignment herein to the plaintiff was made.

The question is whether such amendment can be made applicable to contracts in existence at the time it was passed without violating the constitutional provisions protecting contract obligations from impairment. In People ex rel. Reynolds v. Common Council, 140 N. Y. 300-307, 35 N. E. 485, 486, 37 Am. St. Rep. 563, it was said:

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"All contract obligations are protected from impairment by state legislation by the provisions of the federal Constitution. The obligation of a contract is impaired in the constitutional sense by any law which prevents its enforcement, or which materially abridges the remedy for enforcing it which existed when it was contracted, and does not supply an alternative remedy equally adequate and efficacious"—citing McGahey v. Virginia, 135 U. S. 662, 685, 10 Sup. Ct. 972, 34 L. Ed. 304.

In Lewis Publishing Co. v. Lenz, 86 App. Div. 451–454, 83 N. Y. Supp. 841, 842, in speaking of the prohibition against the corporation itself bringing the action under the statute in question, the court said:

"If this provision, enacted subsequent to the making of the contract in this case, be read as retroactive, then it is vicious as impairing the obligation of such contract."

The respondent relies on the following language used in Neuchatel Asphalte Co. v. Mayor, 155 N. Y. 373, 377, 49 N. E. 1043, viz.:

"This statute was simply declaratory of the policy of the state that foreign stock corporations should not carry on any business in this state, which similar corporations organized under its laws could not lawfully conduct. Its purpose was not to avoid contracts, but to provide for an effective supervision and control of the business proposed to be carried on here by foreign corporations. It provided no penalty in the event of a noncompliance, other than the suspension of civil remedies. Such, and only such, were the consequences of the violation of the statute, and none others will be implied as intended by the Legislature."

All that was necessary, as the statute stood when the last case arose, was for the foreign corporation to comply with the law and then begin its action. As the statute was amended later, however, and as it stands now, such power of subsequent compliance was taken away from the delinquent company; the act now requiring such compliance not only before suit brought, but before the contract is made. All the Court of Appeals decided in that case was that a suspension of civil remedies until the company had complied with the act was not an avoidance of the contract. The present case is quite different. If the act be construed and applied in the manner it was in the court below, then we have not a case of suspension of remedy nor of an alternative remedy (namely, by assignment), but a case of absolute withdrawal of all remedy in our courts. This I think brings the case within the principle enunciated in People ex rel. Reynolds v. Common Council, 140 N. Y. 300, 35 N. E. 485, 37 Am. St. Rep. 563, and above quoted.

The order appealed from should be reversed, and judgment entered on the verdict, with the costs in this court and the court below.

GREENBAUM, J. (concurring). The allegation of the defense is:

"That prior to the making of said contracts and agreements, the said Locomobile Company [plaintiff's assignor] had not procured from the Secretary of State the certificate required by section 15 of the general corporation law."

The contract upon which the action is based is alleged to have been made in 1900, at which time section 15 of the general corporation law provided inter alia:

"No foreign stock corporation doing business in this state without such certificate shall maintain any action in this state upon any contract made

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by it in this state until it shall have procured such certificate." Laws 1892, p. 1805, c. 687.

Under this provision an action was maintainable by a foreign corporation if at any time before bringing an action it procured the certificate. Neuchatel Asphalte Co. v. Mayor, etc., 155 N. Y. 373, 49 N. E. 1043. The amendment to section 15 of the general corporation law made by chapter 96, p. 267, of the Laws of 1901, after the decision in the Neuchatel Case, supra, provided:

"No foreign stock corporation in the state shall maintain any action in this state upon any contract made by it in this state unless prior to the making of such contract it shall have procured such certificate."

Manifestly, by its very language, this amendment had no application to contracts made prior to April 25, 1901, the date of the passage of the amendment. To hold otherwise would result in an impairment of the contract obligation into which the corporation entered in the year 1900. "The obligation of a contract is impaired in the constitutional sense by any law which prevents its enforcement, or which materially abridges the remedy for enforcing it which existed when it was contracted, and does not supply an alternative remedy equally adequate and efficacious. McGahey v. Virginia, 135 U. S. 662, 10 Sup. Ct. 972, 34 L. Ed. 304;" People ex rel. Reynolds v. Common Council, 140 N. Y. 300, 35 N. E. 485, 37 Am. St. Rep. 563; Lewis Publication Co. v. Lenz, 86 App. Div. 452, 83 N. Y. Supp. 841.

There is no allegation in the answer that the Locomobile Company did not, subsequent to the making of the contract and before the commencement of the action, obtain the authority to do business. Such omission is fatal. Assuming all that the pleader set forth, no valid defense is alleged.

It was error to set aside the judgment upon the ground that plaintiff cannot maintain the cause of action. Such a defense is an affirmative one, unless the facts upon which it may be predicated are declared in the complaint, in which case a demurrer would lie. Emmerich v. Sloane, 108 App. Div. 330, 95 N. Y. Supp. 39; C. R. Parmele Co. v. Haas, 171 N. Y. 583, 64 N. E. 440.

Order reversed, and judgment directed to be entered in favor of plaintiff, with costs and disbursements to appellant in this court and the court below.

SCOTT, J., concurs in the result.

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## GOLDSTEIN v. METROPOLITAN ST. RY. CO.

(Supreme Court, Appellate Term. February 27, 1906.)

CARRIERS—INJURY TO PASSENGER—ACTION—VARIANCE.

In an action against a street railway company for injuries to a passenger, in which plaintiff alleged negligence in starting the car after it had been stopped and after plaintiff had started to alight, plaintiff was not entitled to recover if the car was moving at all, no matter how slowly, when she tried to get off.

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Appeal from City Court of New York, Trial Term.

Action by Sarah Goldstein against the Metropolitan Street Railway Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Argued before SCOTT, P. J., and GIEGERICH and GREENBAUM, JJ.

Bayard H. Ames, for appellant.

Bennett E. Siegelstein, for respondent.

GREENBAUM, J. The complaint alleges the negligence of the defendant in starting the car after it had been stopped and after plaintiff had started to alight. Under such a pleading the defendant was entitled to the charge which he asked the court to make to the jury that, "if plaintiff alighted from the car when it was moving, no matter how slowly, provided it had not already stopped, she cannot recover." The court declined to charge as requested, and added: "It is a question for you to determine if the car was moving so slowly that the plaintiff could have gotten off without any accident happening, you have a right to consider that."

The instructions of the court as above quoted constituted reversible error. Coleman v. Metropolitan St. Ry. Co., 82 App. Div. 435, 81 N. Y. Supp. 836. The action was not brought upon the theory that the plaintiff stepped from a moving car under such circumstances which would absolve her from negligence, but upon the clear cut allegation that the car had been brought to a full stop and had been started before she had an opportunity to alight.

The judgment must be reversed, and a new trial ordered, with costs to the appellant to abide the event. All concur.

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## PEOPLE v. JOYCE.

**(Supreme Court, Appellate Division, Fourth Department. May 2, 1906.)**

PARENT AND CHILD—ABANDONMENT OF CHILD—CRIMINAL RESPONSIBILITY.

**Pen. Code, § 287, provides that a parent or other person having the care or custody, for nurture or education, of a child under the age of 14 years, who deserts the child in any place with intent wholly to abandon it, is punishable by imprisonment for not more than 7 years. *Held*, that the words "in any place" are not mere surplusage, but are important in construing the statute, and to make out a crime thereunder it is necessary to show that the child is deserted in a place, and is so left with intent wholly to abandon it; and a father's leaving his children, two and three years of age, respectively, with their own mother, is not such a desertion and abandonment as the section intends to punish.**

Appeal from Onondaga County Court.

Charles M. Joyce was convicted of abandoning children, and he appeals. Reversed, and defendant discharged.

Argued before McLENNAN, P. J., and SPRING, WILLIAMS, NASH, and KRUSE, JJ.

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Harley J. Crane, for appellant.
William L. Barnum, Dist. Atty., for the People.

KRUSE, J. The defendant was convicted, under section 287 of the Penal Code, of abandoning his two children, both of whom were under the age of 14 years. Defendant and his wife lived together in the city of Syracuse, keeping house. They were married in 1899, and had two children, one aged three years and the other two, who were living with them. He worked as a freight handler for a railroad company, receiving $1.50 a day. The defendant contended that his wages went to his wife; she bought the groceries. She admitted receiving some of his wages, but not all of them. Differences arose between them over matters, most of which seem very trivial, and need not be stated here. So far as the record discloses, both seem to have been of good moral character. On the 2d day of August, 1904, defendant and his wife quarreled about the wife loaning coal to her brother, to which he objected. The defendant states he told his wife that if she wanted to go she was at liberty to do so, and that she proposed that he go and leave her the furniture, to which he assented; and he also states that he agreed to pay her $10 a month for the children. She denies this, although it does appear that he gave her a bill of sale of his interest in the furniture. He left about 5 o'clock in the afternoon of the 2d of August, and remained with his father and mother in Syracuse until August 11th, when he went to Columbus, Ohio. He did not take the children with him, but left them with his wife. She contends that he left her no money or means of support. He obtained employment in Columbus about the 23d of August, and on the 28th of August, 1904, the defendant wrote to his mother from Columbus, advising her that he had found work, and concluded his letter as follows:

"Now I wish you or some of the others would see Nellie [defendant's wife], and find out what arrangements she has made, and what her address is, and let me know, and ask her for me not to dispose of the goods until she hears from me. I am sorry that I came away, but I am not going back unless I cannot make it go here. But I will help Nellie from here, and will make a home here if she will come."

Within two weeks after obtaining employment, and on the 4th of September, he wrote to his wife as follows:

"Columbus, Ohio, September 4th, 1904.

"My wife Nellie: For your are my wife in spite of all that has happened, for the marriage tie is one that is not so easily broken, and I have found it so by experience for I cannot get away from the past. Now Nellie I want to tell you that I am the most sorry and miserable man in the world, and I want to tell you that I am sorry for everything that I have said or done against you. Nellie there is not any time day or night that I do not think of you and the children; I will imagine at night that I hear the children calling for me. Now Nellie I want to ask you to forgive me; I should not have come away from there as I did only your lawyer, Mr. Wortman threatened me that unless I gave you half of my wages that he would bring me before the law, and you know that I couldn't give you that much and leave and pay the debts that I owed, but I am sorry that I came away, but I do not feel that I could come back there, but I would like very much to have you come here and let us start over again and try to live right. I am going to do different than I have done and if you will only come here I will live different in my home and church life than I did before. Now please Nellie decide this yourself

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without any lawyer or anyone else, and please write to me and let me know, and write to me about yourself and the children. Direct to 1194 Rich Street, Columbus, Ohio. From Charlie."

And at the same time he wrote to his mother as follows:

"I received your letter Friday and was glad to get it, but was rather disappointed for you did not write anything that you said to Nellie or what she said to you, nor you did not say anything about the children. I have written a letter to Nellie this morning. I wish you would go to see her as often as you can and write me about them. I have caught one of my bad colds and am nearly sick and am out of money and discouraged to death. I will not get any money to amount to anything until the 15th of October, and I do not know what I am to do from now until then. Could you not let me have five dollars in some way until then and I would pay it back with interest then. Well, mother I am so near sick that I cannot write any more this time."

His wife does not seem to have replied to the letter written by him to her. On the 26th day of October, 1904, the defendant was indicted for the abandonment of his two children, under section 287 of the Penal Code. He was tried in February, 1905, and convicted, and on February 14, 1905, was sentenced to imprisonment in the Onondaga County Penitentiary for one year. From the judgment of conviction, he has appealed to this court.

At the close of the case for the people, the defendant's counsel moved for the acquittal and discharge of the prisoner, upon the ground that no case had been made out against the defendant; that it had not been shown that the defendant abandoned his children, or intended to abandon them. A motion for a new trial was also made upon the grounds, among others, that the court misdirected the jury, that the verdict was not warranted by the evidence and was contrary to law, and upon the exceptions.

Numerous exceptions were taken by the defendant's counsel to rulings upon questions of evidence, some of which we deem so prejudicial to the defendant that of themselves they furnish sufficient grounds for granting a new trial. It is, however, unnecessary to call attention to them, for we think there was such a failure to make out the crime against the defendant of which he was convicted that the judgment should be reversed, and the defendant discharged.

The indictment charges that on the 11th day of August, 1904, at the city of Syracuse, the defendant deserted these two children with the intent wholly to abandon them, but it names no specific place, and the proof does not show that he so deserted them in any place, within the meaning of section 287 of the Penal Code. That section reads as follows:

"A parent, or other person having the care or custody, for nurture or education, of a child under the age of fourteen years, who deserts the child in any place, with intent wholly to abandon it, is punishable by imprisonment for not more than seven years."

Numerous statutes have been passed from time to time in our state for the protection of children. One of the earliest was section 35, art. 2, tit. 2, c. 1, p. 4, Rev. St. 1829. It provided:

"If the father or mother of any child under the age of six years, or any other person to whom any such child shall have been confided, shall expose such child in any highway, street, field, house or outhouse, with intent to wholly



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abandon it, he or she, shall, upon conviction, be punished by imprisonment in a state prison not exceeding seven years, or in a county jail not more than one year."

To which the commissioners added this note: "New, unfortunately proved by some recent instances to be very necessary."

Section 287 of the Penal Code is founded upon and superseded the section contained in the Revised Statutes. It has remained unchanged since its adoption in 1881, except that in 1902 the punishment prescribed was imprisonment for not more than 7 years, and in 1903 the age of children to be protected by its provisions was raised from 6 to 14 years, so that as the section now stands it applies to children under the age of 14 years, and the punishment prescribed for offending against its provisions is imprisonment for not more than 7 years. We are not aware that there is any reported case in which this section of the Penal Code or the section of the Revised Statutes which it superseded has received a judicial interpretation. The Legislature of the state of Michigan adopted, in substance, the section as contained in the Revised Statutes of our own state, and the Supreme Court of that state (Shannon v. People, 5 Mich. 71), in passing upon that section, held that the exposure was the substantive act, and the intent to abandon the secondary ingredient; both must concur to complete the offense, and that the exposure contemplated by the section "must be such as may subject the child to hazard of personal injury, such as may peril the life or health of the child, or produce severe suffering or serious bodily harm; and hence that to leave a child, with the intent wholly to abandon it, 'in a house or other place where it would be certain to be cared for,' would not contemplate the exposure contemplated by the statute." While the words "expose any such child in any highway, street, field, house, or outhouse," as contained in the Revised Statutes, have been changed in the Penal Code to the broader and more comprehensive statement "deserts the child in any place," it still requires more than mere desertion or abandonment of the child or failure to provide for it to make out the crime. That is quite obvious when this section 287 is considered in connection with the following sections of the Penal Code relating to abandonment and other acts of cruelty to children. The next succeeding section makes it a misdemeanor for "a person who willfully omits, without lawful excuse, to perform a duty by law imposed upon him to furnish food, clothing, shelter or medical attendance to a minor. * * *" In an interesting and elaborate opinion by Judge Haight, our Court of Appeals has held that in a proper case it is the duty of a parent to furnish medical attendance to his child, and if he fails he is liable criminally, under the provisions of the Penal Code. People v. Pierson, 176 N. Y. 201, 68 N. E. 243, 63 L. R. A. 187, 98 Am. St. Rep. 666. In 1905 the Legislature added a new section to this chapter. It is placed between sections 287 and 288, and numbered 287a. It provides:

"Sec. 287a. A parent or other person charged with the care or custody for nurture or education of a child under the age of sixteen years, who abandons the child in destitute circumstances and willfully omits to furnish necessary and proper food, clothing or shelter for such child is guilty of felony, punishable by imprisonment for not more than two years, or by a fine not to exceed one thousand dollars, or by both. * * *"

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By the second section of the act making this amendment (Laws 1905, p. 360, c. 168) it is provided that nothing in this act contained shall be deemed or construed to repeal, amend, impair, or in any manner affect the provisions of sections 287, 288, or 289 of the Penal Code, or any other existing provisions of law relating to abandonment or other acts of cruelty to children. The criminal omission to furnish a minor child food, clothing, shelter, or medical attendance is made a misdemeanor by section 288. The criminal abandonment of a child under 16 years of age in destitute circumstances, and the criminal omission to furnish food, clothing, or shelter, is punishable by imprisonment for not exceeding two years or a fine or both, by section 287a; but the severest punishment is prescribed for the offense named in and defined by section 287. Considering these three sections together, the punishment for the different offenses, the language of section 287, as well as its history, the words "in any place" in the sentence "deserts in any place" cannot be regarded as mere surplusage; they are significant, and have an important bearing upon the construction to be placed upon this section. To make out this crime, it is necessary to show that such a child is deserted in a place, and is so left with the intent wholly to abandon it, and leaving these two children, two and three years of age, with their own mother, as is disclosed by the evidence in this case, we think is not such a desertion and abandonment as section 287 intends to punish.

The conviction should be set aside, and in the view we take of the case a new trial should not be ordered. People v. Camp, 139 N. Y., 87, 90, 93, 34 N. E. 755.

The judgment of conviction should be reversed, and the defendant discharged. All concur.

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## DUNCAN v. ST. LUKE'S HOSPITAL.

**(Supreme Court, Appellate Division, First Department. May 11, 1906.)**

1. DEATH—ACTIONS—BREACH OF CONTRACT.

Code Civ. Proc. § 1902, providing that the executor or administrator of a decedent who has left surviving a husband, wife or next of kin, may maintain an action to recover damages for a wrongful act, or default by which the decedent's death was caused, against one who would have been liable to an action in favor of decedent by reason thereof if death had not ensued, does not give a surviving husband a right of action against a hospital to recover for loss of services of plaintiff's wife resulting from her death, by reason of defendant's breach of contract to keep a constant and careful guard over decedent while she was a patient in the hospital, and insane at the time, and who, in the absence of an attendant, jumped from a window of the hospital building and was killed.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Death, § 20.]

2. SAME—RIGHT OF ACTION.

The right to recover for the death of a human being is a right solely given by statute.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Death, § 10.]

Appeal from Trial Term, New York County.

Action by Daniel B. Duncan against the St. Luke's Hospital. From a judgment entered on dismissal of complaint, plaintiff appeals. Affirmed.

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Argued before O'BRIEN, P. J., and McLAUGHLIN, INGRAHAM, CLARKE, and HOUGHTON, JJ.

Paul N. Turner, for appellant.
Hoffman Miller, for respondent.

CLARKE, J. After the jury were impaneled, and before any evidence was offered, the defendant moved to dismiss the complaint upon the ground that it did not state facts sufficient to constitute a cause of action, and, the motion being granted and judgment thereon entered, the plaintiff appeals.

The complaint alleges that the defendant is a domestic corporation organized under the laws of the state of New York, and is engaged in operating and conducting a hospital; that one Gertrude Duncan was the wife of the plaintiff; that she became ill and was, on or about May 1, 1902, removed to said hospital, and remained there until on or about the 7th of May, when, at a time when there was no attendant in the room, she jumped from the window of the hospital building and was killed by the fall upon the pavement below; that while said Gertrude Duncan was at the hospital her mental faculties became impaired, and she became delirious and was at times insane; that the defendant notified the plaintiff of said mental condition, and advised him that in order that said Gertrude Duncan be properly cared for it would be necessary from that time on to keep a constant and continuous watch on her; that, therefore, the plaintiff and defendant entered into a contract wherein and whereby the defendant promised and agreed, for a consideration of $7 a day, to keep, or cause to be kept, a careful and continuous and unceasing guard and watch over the said Gertrude Duncan, until the parties might agree to withdraw the same, and, for aforesaid guard and watch so to be kept, the plaintiff agreed to pay the defendant the sum of $7 a day, and thereafter plaintiff paid the said sum to the defendant for the period of time during which said watch was alleged by defendant to have been kept, and up to the time when the said Gertrude Duncan jumped from the window as aforesaid, and defendant accepted the same; that the defendant failed and wholly refused to carry out or perform said contract, and while said Gertrude was in a delirious condition, and while her mental faculties were impaired, said defendant permitted or caused or allowed the guard to absent himself or herself and take himself or herself away from the person of said Gertrude, and permitted and allowed said watch to be withdrawn, and did not keep the constant and unceasing guard agreed by it to be kept; that while the said guard was absent from said room, said Gertrude rose from her bed, and threw herself from the sill of one of the windows of the room upon the stone pavement below, and, as a result of said fall, was killed; that the escape of said Gertrude and her death were the direct result of the negligence and careless omission of defendant to keep a constant, careful, and continuous guard on the person of said Gertrude, as agreed; and had the constant, careful, and continuous guard and watch agreed by defendant to be kept by it been kept by it, said Gertrude would not have been able to escape, or to throw herself from said window, and would not have been killed; that as a direct result of the breach of the de-

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fendant of its contract with the plaintiff, and as a direct result of its negligence, omission to keep, and cause to be kept, a constant, careful, and continuous watch and guard, as agreed by it, the plaintiff lost his wife and the care, comfort, affection, and services of said wife, and was damaged in the sum of $25,000, for which he demanded judgment.

The appellant contends that this is an ordinary action for breach of contract; that this contract was entered into, having for its object the preservation of the wife of the plaintiff from injury, and there was a breach which resulted in her death; that this was a special contract, requiring the hospital to do more than its legal duty, for which it was paid a special price; and that, having broken its contract, it should pay the damages which naturally flowed from the breach, and which might reasonably have been within the contemplation of the parties when the contract was made. The learned counsel for the appellant admits that "the books are full of cases where in actions sounding in tort it was repeatedly held that the death of a person could not be made the basis of a cause of action, and that, further, while a husband is entitled to the care and services of the wife, yet in case her death is instantaneous, he has lost no services for which he can recover." And he admits that this case does not come within our statute (section 1902 of the Code of Civil Procedure), which provides that:

"The executor or administrator of a decedent, who has left him or her surviving, a husband, wife or next of kin, may maintain an action to recover damages for a wrongful act, neglect or default by which the decedent's death was caused, against a natural person who, or a corporation which, would have been liable to an action in favor of the decedent, by reason thereof if death had not ensued."

But the complaint alleges:

"Her death was the direct result of the negligence and careless omission of defendant to keep a constant, careful, and continuous guard, * * * as a direct result of its negligent omission to keep * * * a constant * * * watch and guard * * * the plaintiff lost his wife as aforesaid."

This is to allege "a wrongful act, neglect or default by which the decedent's death was caused," within the precise language of the statute. And the statute seems to give the cause of action, and to fix its limitations. There seems to be no difference between the negligent breach of this contract as alleged and the negligent breach of the contract of a common carrier to safely transport the passenger. In each case there is a contract, and in each case there is a tort. But the action for such a breach is ex delicto, and not ex contractu. As said in Wheaton on Negligence (2d Ed. § 435):

"Whoever by contract assumes a duty to another is liable to an action on the case to such other person for damages arising from the negligent performance of such duty."

In Crowley as Adm'x v. R. R. Co., 30 Barb. 99, where a wife as administratrix sued under the statute for damages for her husband's death which had occurred on a railroad in New Grenada, the court said:

"Here was an express agreement made in this state safely to transport the plaintiff's intestate over the defendant's road as a passenger, which, if

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Crowley, from the negligence of the defendant's agents or servants had sustained any injury on said railroad, that he had survived, would unquestionably have entitled him to maintain his action therefor in this state. If the cause of action set out in this complaint, therefore, could be considered as arising upon this contract and surviving by force of the statute in behalf of the plaintiff as the representative of the deceased, then most certainly the action could be maintained in this state. But such is not this action. It is not upon the contract. It is founded upon a tort."

Chief Judge Ruger, in Hegerich v. Keddie, 99 N. Y. 258, 1 N. E. 787, 52 Am. Rep. 25, said:

"The actions known as detinue, trespass, trespass on the case, and replevin, were those used in causes of action arising from torts, and were described as actions ex delicto. Trespass on the case was the appropriate form of remedy for all injuries to person or property which did not fall within the compass of the other forms of action."

He cited Green v. Hudson River R. R. Co., *41 N. Y. 294, where the husband sought to recover damages for the instantaneous killing of his wife, and the complaint alleged the legal obligation on the part of the defendant to carry her safely, and Whitford v. Panama R. R. Co., 23 N. Y. 465, where the court had denied to a husband damages for the death of his wife and had said:

"The exceptions are that a husband may maintain a civil action for an injury to the wife, so far as medical service and funeral expenses were incurred, or a parent for the loss of a child's services up to the time of his death, but not for the loss of life."

And proceeded:

"It would seem unnecessary to cite additional authorities to the effect that as the law stood at the adoption of the statute neither a husband nor a wife had such an interest in the life of their respective consorts as subjected a person, through whose negligent act it was taken, to the charge of injuring any property rights possessed by them. * * * Such rights as arise out of the domestic relations clearly do not possess the attributes of property, and are not assignable by the possessor."

In Ohnmacht v. Mt. Morris Elec. Light Co., 66 App. Div. 482, 73 N. Y. Supp. 296, a father brought an action to recover for loss of services of his minor son, who was instantly killed through the alleged negligence of the defendant. Mr. Justice O'Brien, reviewing the authorities, said:

"Evidently, what is sought in this action is to recover for loss of services to which the father would have been entitled had the son lived, but there is no authority either in common law or by statute for such an action. Undoubtedly, the father could recover for the loss of services if the injury had not resulted in death, and he could recover for such loss between the time of the injury and death. He could not, however, at common law recover for loss of services of a minor son owing to his death through another's negligent act, if such death, as in the case at bar, was instantaneous."

The learned counsel for the appellant, with great frankness, stated upon the argument that he desired no decision upon a technical point, that he might be entitled to nominal damages, or to a recovery of the consideration paid, but contended for the broad proposition that for the alleged breach of this contract causing his wife's death, plaintiff was entitled to recover for the value of her society and services. But the contract was to keep a constant watch and guard. It was not to

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prevent the unfortunate patient from committing suicide. Nor could it fairly be held to be within the reasonable intendment of this contract that the hospital agreed to pay to the husband the value of his wife's life to him in case she did commit suicide. There has been no case cited to us, nor have we been able to find one which allows a recovery upon such a complaint or such a state of facts. Nor can we see any reason why there should be any difference in the rule where the tortious act which caused death is alleged to be a breach of an express contract than where it is alleged to be a breach of an implied contract, or where no contractual relation at all existed.

It is settled by innumerable cases that the right to recover for the death of a human being is a right solely given by statute, and as the plaintiff comes not within the statute, the judgment should be affirmed, with costs. All concur.

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## LAWYERS' TITLE INSURANCE & TRUST CO. v. JONES et al.

(Supreme Court, Appellate Division, First Department. May 11, 1906.)

MONEY RECEIVED—ACTION—COMPLAINT—SUFFICIENCY.

Negotiable Instruments Law, Laws 1897, p. 782, c. 612, § 95, provides that, in order to constitute notice of an infirmity in an instrument or defect in the title of the person negotiating the same, the one to whom it is negotiated must have had actual knowledge of the infirmity or defect, or such knowledge of the facts that his action in taking the instrument amounted to bad faith. A complaint, in an action against stockbrokers to recover a sum exacted by them as a condition of returning certain negotiable bonds stolen from plaintiff, which bonds were delivered to the brokers as security for sums due from the thief, alleged that defendants wrongfully refused to return the bonds, except on payment of the amount sued for, which plaintiff paid, believing that the defendants received the bonds as innocent purchasers for value, and that at the time defendants received the bonds, and thereafter they learned facts concerning the thief and his connections with plaintiff, from which they knew or could have ascertained that he was not the rightful owner. *Held*, that the complaint was demurrable, in that the allegations were insufficient to impeach defendants' title to the bonds.

Appeal from Special Term, New York County.

Action by the Lawyers' Title Insurance & Trust Company against Willard H. Jones and others. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Affirmed, with leave to plaintiff to serve an amended complaint.

Argued before O'BRIEN, P. J., and PATTERSON, McLAUGHLIN, LAUGHLIN, and HOUGHTON, JJ.

Lewis H. Freedman, for appellant.

Joseph Larocque, Jr., for respondents.

LAUGHLIN, J. This is an action against a firm of stock brokers to recover $35,213.43, exacted by them as a condition of returning certain corporate bonds which had been stolen from the plaintiff. It is alleged in the complaint that the bonds were stolen by one Thomas G. Wylie, an employé of the owner of some of the bonds and the custodian of the others, and delivered to the brokerage firm of Willard H. Jones & Co., to whose rights and liabilities the defendants have

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succeeded, "to be held as collateral security for the payment of any sums of money that might be or become due to said firm upon open account between the said firm and the said Thomas G. Wylie." The plaintiff sufficiently alleges facts showing its right to the possession of the bonds, and also alleges that the defendants wrongfully refused to return the bonds, except upon payment of the amount for which recovery is demanded, which the plaintiff paid, believing that the defendants' predecessors "believed Wylie to be the rightful owner of said bonds and to have the legal right thereto and the legal right to deliver" the bonds to them, and believing that the defendants' predecessors "received said bonds as innocent purchasers for value."

There is no allegation that the defendants made any representation to the plaintiff which justified or gave rise to this belief on its part; nor is there any allegation that said Wylie did not owe the defendants upon open account, for credit extended on the security of the bonds, the amount which the plaintiff was obliged to pay the defendants as a condition of recovering possession of the bonds, or that they were not accepted in payment and cancellation of an antecedent debt, which would make them bona fide holders for value. Sutherland v. Meed, 80 App. Div. 103, 80 N. Y. Supp. 504; Citizens' State Bank v. Cowles, 180 N. Y. 346, 73 N. E. 33, 105 Am. St. Rep. 765. The only allegations tending to impeach the right of the defendants to hold the bonds as security are, that their predecessors, "at the time they so received the said bonds, and from time to time thereafter, they learned facts concerning the said Wylie and his connection with 'the plaintiff' from which they knew, or could have ascertained, and were bound to ascertain by inquiry from" the plaintiff, "that the said Thomas J. Wylie was not the rightful owner of the said bonds, and had no legal right to the same, and had no legal right to deliver the same to them," and that the plaintiff paid the money demanded by the defendants in ignorance of the fact that the defendants' predecessors, "at the time of receiving said bonds, had knowledge of facts from which they knew, or should have known, that Wylie was not at the time the rightful owners of said bonds."

The bonds in question were negotiable instruments, and the holders thereof were entitled to all the protection accorded the purchasers or pledgees of other commercial paper. The plaintiff, without any fraudulent or other misrepresentation on the part of the defendants, apparently accepted their statement as to the amount for which they held the bonds as security, and paid the same without questioning their right thereto. The action to recover the money thus paid is one for money had and received, and although the payment may not be held to have been voluntarily made in a sense to deprive the plaintiff of a right of recovery (Scholey v. Mumford, 60 N. Y. 498), yet the plaintiff must allege and prove that the defendants were not bona fide holders (Iselin v. Chemical Nat. Bank, 6 App. Div. 532, 40 N. Y. Supp. 390). If the plaintiff had sued for the bonds, doubtless, on showing title and that they were stolen, it would have been incumbent upon the defendants to give evidence that they were bona fide holders for value. Section 98, Negotiable Instruments Law (Laws 1897, p. 733, c. 612). But that is not this case. The plaintiff accepted and re-

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tains the bonds on the terms offered by the defendants, and the burden is now upon it of alleging and proving the facts impeaching the defendants' right to the money they have received, which necessarily involves the allegation and proof of the facts showing that the defendants were not entitled to it. There is no positive allegation that the predecessors of the defendants knew that Wylie did not have the right to pledge the securities. The allegation, and the subsequent recital concerning it, are both in the alternative; and the alternative clause is in each instance a legal conclusion without a statement of the facts upon which it is based. Knowles v. City of New York, 176 N. Y. 430, 68 N. E. 860; Second Nat. Bank of Clarion v. Morgan, 165 Pa. 199, 30 Atl. 957, 44 Am. St. Rep. 652; Stitt v. Garrett, 3 Whart. (Pa.) 281. It is now the well-settled law of the state that the rights of a holder of a negotiable instrument "are to be determined by the simple test of honesty and good faith, and not by a speculative issue as to his diligence or negligence. * * * The holder's right cannot be defeated without proof of actual notice of the defect in title or bad faith on his part evinced by circumstances. Though he may have been negligent in taking the paper, and omitted precautions which a prudent man would have taken, nevertheless, unless he acted mala fide, his title, according to the settled doctrine, will prevail." Section 95, Negotiable Instruments Law (chapter 612, p. 732, Laws 1897); Second Nat. Bank v. Weston, 172 N. Y. 250, 64 N. E. 949; Manhattan Savings Inst. v. N. Y. Nat. Exch. Bank, 170 N. Y. 58, 62 N. E. 1079, 88 Am. St. Rep. 640; Welch v. Sage, 47 N. Y. 143, 7 Am. Rep. 423; Seybel v. Nat. Currency Bank, 54 N. Y. 288, 13 Am. Rep. 583. Tested by this rule, it is evident that the allegations of facts are insufficient to impeach the title of the defendants.

It follows that the judgment should be affirmed, with costs, with leave to the plaintiff, within 20 days from the service of the order to be entered hereon, to serve an amended complaint, on payment of costs in this court and in the court below. All concur.

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## JONES v. ROBERTS et al.

(Supreme Court, Appellate Division, First Department. May 11, 1906.)

MASTER AND SERVANT—COMPENSATION—CONTRACT—CONSTRUCTION.

A so-called partnership contract, but construed to be a contract of employment, contained numerous articles pertaining to the conduct of a business and the compensation of the parties thereunder, and in the eleventh article provided that "anything hereinbefore contained to the contrary notwithstanding, it is expressly provided" that under no circumstances should either of defendants have any right to question the determination of or require an account from the plaintiff of any transaction, determination, or matter in anywise connected with the partnership, or have any other right as between them and plaintiff, except that of receiving such sum or sums as plaintiff should determine to award to them respectively as recompense for their services, which determination should in every instance be final and conclusive. *Held* that, irrespective of whether the other articles were to be construed as operative with respect to the ascertainment of profits only during the continuance of the partnership relation, the eleventh conferred on plaintiff, as master,

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**the right to determine at any time how much and what should be regarded as profit of the business, and, as long as that was done in good faith, the defendants were bound by the stipulation.**

Appeal from Judgment on Report of Referee.

Action by Edward C. Jones against Louis H. Roberts and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Argued before O'BRIEN, P. J., and PATTERSON, McLAUGHLIN, LAUGHLIN, and HOUGHTON. JJ.

Edward W. Hatch, for appellants.

Edmund L. Mooney, for respondent.

PATTERSON, J. The learned counsel for the appellant who argued this cause has, with his usual incisiveness, cut through the mass of immaterial matter printed in the voluminous record now before us and formulated in a few words the determinant question involved in this controversy, namely, what construction should be given to the eleventh article of the agreement between the parties to this action and out of which their contest arises. He urges, however, that in answering that question the eleventh article should be construed in connection with other provisions of the contract, and in the light of the surrounding circumstances in which it was executed.

The plaintiff was in fact the proprietor of a business which had been conducted in a corporate name, and the three defendants had been employed in that business (which was that of dealing in bonds and securities) as clerks or assistants. The defendant Richards had been a cashier and bookkeeper, the defendant Roberts a traveling bond salesman, the defendant Pearson the manager of an office the corporation had in Philadelphia. It may be stated here, parenthetically, that Pearson is not interested in the event of this litigation; he not having answered and apparently being in accord with the plaintiff in his view of the matters in dispute. On the 28th day of January, 1899, the corporation having been dissolved, the plaintiff and the three named defendants entered into a written contract which in form and in fact, and but for what will subsequently appear we should say in law, constituted a copartnership agreement. That copartnership was formed to take over and continue the business which had previously been conducted by the corporation. In the instrument it is declared that the parties agree to become and remain copartners, for the purpose of buying and selling and handling bonds and other securities of corporations, under the firm name of Edward C. Jones & Co., from the 1st day of February, 1899, during the term of 25 years thence next ensuing, subject nevertheless to termination as thereinafter provided. Each of the parties, other than Jones, agreed to devote his whole time and attention to the copartnership business and diligently and faithfully employ himself therein and carry on the same to the greatest advantage of the partnership, being in all things subject to the control and direction of Jones. The capital of the partnership was to be contributed, altered, and withdrawn by Jones alone, in such form and amounts and at such times as he should see fit to contribute, alter, or withdraw the same, and the three defendants were to have no interest whatever in the capital. All the leases, office fixtures, furniture,

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books, records, and documents were to be the property of Jones, and the making of all contracts and business arrangements, including the employment and discharge of employés, was to be under his exclusive control. Jones was to be unrestricted in the matter of withdrawals on account of either capital or profits. The other parties were to be at liberty to withdraw out of the business monthly in anticipation of their expected profits; Richards at the rate of $4,000 per annum, and Pearson and Roberts each at the rate of $5,000. Then follow provisions of the contract which must be set out in extenso, namely:

"Seventh. At the end of every year, that is to say, on the 1st day of February, 1900, and annually thereafter, balance sheets shall be made up and the net profits of the business for that year ascertained. In reaching the amount of such net profits, there shall be charged: First, all expenses of the conduct of the business, including rent; second, a sum to be allowed to the said Edward C. Jones equal to 6 per cent. on $300,000, or upon any greater sum contributed or deemed or estimates by him to have been contributed as capital (the form thereof, whether cash, securities or personal services being immaterial), and in addition thereto the sum of $25,000 as compensation for his personal services.

"Eighth. In case the said balance sheet, as so made up, after the deduction of the items specified in the preceding clause, and any other items which said Edward C. Jones shall direct to be deducted on any ground which he may deem sufficient, shall show a profit, the same shall be divided and distributed as follows: 7½ per cent. thereof to said Richards; 15 per cent. thereof to said Pearson; 15 per cent. thereof to said Roberts; and the remainder to said Jones—provided, however, that in the case of said Richards, Pearson and Roberts, if their respective shares of such net profits shall exceed the sum of $6,000, the excess shall not be subject to withdrawal by them, but shall remain at the risk of the business, pledged as security for the due performance by them of their obligations under this agreement, upon sums they shall be allowed interest at the rate of 6 per cent. per annum, and such reservation and pledge shall continue in each year in the case of each partner until the total amount of his credit on that account shall be $25,000. Should the balance in any year show, or be decided by the said Edward C. Jones to show, either a loss or an unfavorable or unsatisfactory result, then and in that event there shall be charged to each of the other partners, to be paid or made good by him thereafter as said Edward C. Jones shall direct out of said reserve funds or otherwise, such proportion of his drawings during that year as shall be determined by said Edward C. Jones not to have been justified by the result of the firm's business.

"Ninth. In respect to the said several funds provided to be reserved out of the shares of profits of each said Richards, Pearson and Roberts in excess of $6,000, until each shall amount to $25,000. It is further stipulated and agreed that if either of the said three partners shall fail in due performance of any obligation contained in these articles, or if his connection with said firm shall be terminated by said Edward C. Jones in consequence of any act or omission on his part or any other act or thing deemed by said Edward C. Jones to render his further connection with said partnership detrimental to the interests of said Edward C. Jones, his right to any part of such fund shall cease and determine, and said Edward C. Jones is expressly authorized in that event to appropriate and expend the whole or any part thereof in such manner as he shall see fit by the employment of clerks and assistants to perform the duties theretofore incumbent on said partner or otherwise.

"Tenth. It is understood and agreed that in the case of bonds, notes and other securities which may be taken over by the said partnership as on account of capital contributed by the said Edward C. Jones, the difference between the price at which the same are so taken over and the price at which the same shall eventually be sold shall not constitute partnership profits, but shall belong to the said Edward C. Jones individually.

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"Eleventh. Anything hereinbefore contained to the contrary notwithstanding. It is expressly provided not only that the said Richards, Pearson and Roberts shall have no interest whatever in the capital or plant or good will of said partnership, but that irrespective of any balance sheet or account or transaction the said Edward C. Jones may at any time or times, in view of business conditions existing or anticipated, determine an amount to be considered as profit or loss for any period, and may determine the precise amount to be debited or credited to either of his said partners in any case, and at any time, as effectually as if these articles had expressly provided for the particular debit or credit, and that under no circumstances shall either of the said partners, Richards, Pearson or Roberts, have any right to question such determination, or ask or require an account from the said Edward C. Jones in respect to any transaction, determination or matter in any wise connected with the said partnership, or have any other right as between him and the said Edward C. Jones, except that of receiving such sum or sums as Edward C. Jones shall determine to award to him as recompense for his services, which determination shall in every instance be absolutely final and conclusive. Also that the said Edward C. Jones may, at any time or times, alter the interests of any or all of said partners at will; also that on his direction the interest of any partner or partners shall cease at any time, whereupon the said partner or partners shall retire without affecting the obligation of any of the other partners to continue under these articles during the remainder of the term fixed therein for the continuance of such partnership; also that the said Edward C. Jones may at any time take into the said partnership any other person or persons on such terms and conditions as he shall see fit to make without affecting any obligation of said Richards, Pearson and Roberts expressed in these articles.

"Twelfth. In the event of the death of said Edward C. Jones, the person who may be named as executor of his will, or the person who may be appointed as administrator of his estate in case of intestacy, shall have the control and direction of the liquidation of the affairs of the said copartnership as fully and completely as if such person had been the sole surviving partner of said copartnership; the said other partners will lend their best efforts to the most advantageous liquidation of the affairs of the said copartnership controlled and directed in all things by the person so appointed to assume such direction. In case of the death of either of the partners other than the said Edward C. Jones, the effect of the same shall be only to entitle the personal representative of such deceased partner to receive such sum, if any, as the said Edward C. Jones shall determine to be due to him at the date of his death, which determination shall not be subject to question, and the business of the said firm shall continue as if such deceased partner had never been a member thereof."

Under this agreement the parties transacted business from the 1st day of February, 1899, until some time in February, 1902, when the relations existing between them were dissolved. On February 1, 1901, a computation of net profits of the preceding year was made by Richards, of which the sum of $28,602.81 was credited to Pearson, the same amount to Roberts, and $14,301.40 to the defendant Richards; and each of the parties accepted in full satisfaction of his interest for that year the amount thus credited. About the 1st of February, 1902, Roberts and Richards having announced their intended retirement from the arrangement, expert accountants found that the net profits realized in the business for the year ending February 1, 1902, was $306,862.25. The plaintiff thereupon adjusted the accounts of that year's business, after making what is alleged to have been a correction in the account, and the defendant Roberts was allowed and paid, as his 15 per cent., $41,932.30; and the defendant Richards was allowed and paid $14,770.60. In addition to these balances paid, the defend-

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ants Richards and Roberts had drawn the amounts they were authorized to draw during each current year. The final payments made to them, and the acceptance thereof, appear to have been under some reservation of a right to claim that they were entitled to a larger amount of profit than was represented by the amounts so paid them, respectively. The assertion of that right occasioned the institution of the present action. The plaintiff, under the apprehension that he might be sued for an accounting by Richards and Roberts, brought this action against them and Pearson (the last named, as said before, is not an active party to the litigation), and in his complaint he sets forth the making of the agreement; what he claimed to be his and the defendants' relations to the business conducted under that agreement; the dissolution of such relations; his right to determine what amount should be paid to the defendants respectively on such dissolution; his determination of such amounts; the payment thereof to the defendants and their acceptance of the same; the claims of the defendants that they were entitled as partners to share in profits on a different basis from that adopted by him in making the distribution, and that such payments were not final and conclusive, but that they have, and each of them has, a right to question and examine into the accounts and are entitled to the rights of general partners; that the defendants threaten to take proceedings at law to enforce their demands and to take steps for a dissolution of the relations and a sequestration and liquidation of the property and assets of the plaintiff belonging to him individually, and used and employed in the business conducted under the name of Edward C. Jones & Co., and other facts entitling him to equitable relief. He prayed that the agreement be judicially construed by the court, and that it be determined that the defendants and each of them had been fully paid all they were entitled to, and they be enjoined and restrained from asserting in any manner any claims against him based upon any relations existing between him and them; that the payments made by the plaintiff to them and each of them be declared to be final and conclusive; "or failing that, and a judicial determination that a settlement and determination of the said business are necessary or proper, that an accounting between the parties be had forthwith, and that upon said accounting the defendants, other than the defendant Pearson, be adjudged to repay and restore to the plaintiff any sums found to be due to him upon said accounting according to such principles as may be found applicable upon the judicial construction of the said agreement, and that said plaintiff have such further or other judgment or relief in the premises as may be proper."

The attitude taken by the plaintiff in his complaint, and insisted upon during the trial until its completion, and now, is that the agreement in question was not one constituting a general partnership, but was one of employment by him of the defendants as servants, clerks, or assistants in his own personal business. The defendants in their answers insisted that they were partners, with the rights of partners, and were entitled to an account of profits; that they were not precluded by the receipt of the amounts paid them from demanding such an account; that there was no final settlement and adjustment of their respec-

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tive interests; that they were entitled to a larger amount of profits than had been paid them; and they demanded affirmative relief that a full and complete accounting be had between the plaintiff and the defendants in respect of all transactions and of all assets and effects of the business conducted under the name of Edward C. Jones & Co. from the beginning thereof, down to and including the 31st of January, 1901. Counterclaims were also set up, but it is unnecessary to consider them.

Upon an examination of the case, the first inquiry naturally is as to the nature and character of the agreement we have under consideration. The defendants, however, have disposed of that inquiry by the construction of the agreement made by the referee at their request and upon their requirement. They abandoned the contention that the contract constituted a partnership, and they requested the referee to find as matter of law (and he did so find):

"That the articles constituted a master and servant contract, with the plaintiff as master and the defendants as servants, for a compensation to the servants not consisting at all in some kind of salary payable certainly in any event, but consisting solely and exclusively in a percentage upon the net profits of the business of the master, which net profits are to be ascertained by the master in certain defined manners, and according to certain defined methods of successive procedure laid down in the articles."

The effect of this conclusion of law is that the defendants are entitled to compensation for services as servants out of profits to be ascertained by the plaintiff, the employer, in a certain way. They now insist that, in the final adjustment of the amounts to which they were entitled on the termination of the relations existing between them and the plaintiff, he was bound to include as an item of profit certain so-called "bonus or profit stocks," which came into the possession of the plaintiff as the result of various financial transactions, but the cash value of which had not been realized to the disruption of their relations. It is, to say the least, doubtful whether such bonus or profit stocks are to be regarded as capital or profit. It seems that they were received as a bonus upon purchases of bonds, bought with capital belonging to the plaintiff, and in which he alone was interested. Such as were sold during the continuance of the relations between the parties were certainly treated as profit, or, in other words, the money realized upon them was so treated, but from year to year, when accounts were settled and compensation was paid, the so-called profit stocks held over unsold did not enter into the account, and it would seem therefore as if, by the acquiescence of all parties, profit was only predicable of such stocks as were actually sold or disposed of. But those annual statements and settlements would not prevent the assertion of the defendants' present claim, were it not barred by the provision of the eleventh clause of the agreement. We are not in accord with the view of the learned counsel for the appellant that the eleventh clause, read in connection with the seventh and eighth clauses of the agreement, limits or qualifies the power, which, under the former clause, the plaintiff had to determine at any time that which should constitute profit out of which compensation to be paid to the defendants should arise. The

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seventh and eighth clauses undoubtedly refer only to conditions existing during the continuance of the business. The eleventh clause has a much wider application than to the balance sheets or accounts rendered or to be rendered during the continuance of the relations between the parties. It is stipulated, among other things, that "anything hereinbefore contained to the contrary notwithstanding, it is expressly provided" that under no circumstances shall either of the said partners Richards, Pearson or Roberts have any right to question the determination of or require an account from the plaintiff of any transaction, determination, or matter in any wise connected with the said partnership, or have any other right as between them and him, except that of receiving such sum or sums as Edward C. Jones shall determine to award to them respectively as recompense for their services, which determination shall in every instance be final and conclusive; and also that Jones may at any time alter the interest of all or any partners or partner at will, and that on his direction the interest of any partner or partners shall cease at any time, and that Jones might take into the partnership any other person upon such terms as he should see fit. The right to terminate the relations is associated with the power to fix the compensation.

The effect of this eleventh clause is to leave to the plaintiff, Jones, the authority to determine at any time the amount to be considered as profit or loss, thus depriving the defendants of the right to question the plaintiff's act in fixing the amount of their compensation based upon profit, and limits them to receiving such sum or sums as the plaintiff may determine to allow them; and, in every instance, that determination to be absolutely final and conclusive. Of course, this power and right of the plaintiff was one to be honestly exercised, but there is no imputation of fraud made by the defendants, nor is the agreement attacked upon the ground that it is unfair, oppressive, inequitable, or unreasonable. The referee found as conclusions of law, at the request of the defendants, that there is no unconscionableness in the agreement, nor lack of mutuality, nor is there oppressiveness; that the articles contained ample consideration for sustaining and enforcing them upon each party; that the agreement is a valid one; and that the eleventh article must be construed not otherwise than harmoniously with the seventh, eighth, and ninth, and other articles, and all parts are in harmony with each other. If the eleventh clause is to be construed as operating with respect to the ascertainment of profits only during the continuance of the partnership relation, then we would have to consider the nature and character of these so-called profit stocks, and whether the defendants were entitled to have the amounts paid and received by them increased by a percentage to be allowed of their value, if and when ascertained. But we consider the eleventh clause as being so broad, and intended to be so broad, as to confer upon the plaintiff the right to determine at any time how much and what should be regarded as profit of the business; and, as long as that was done in good faith, the defendants are bound by their stipulation. That they received very large sums upon the final adjustment of their interests is apparent.

If our view of the eleventh clause of the contract as above expressed

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is correct, it is unnecessary to consider the other questions raised by the appellants.

The judgment appealed from should be affirmed, with costs.

O'BRIEN, P. J., and LAUGHLIN and HOUGHTON, JJ., concur. McLAUGHLIN, J., concurs in result.

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## COSTELLO et al. v. OUTTERSON et al.

(Supreme Court, Appellate Division, Fourth Department. May 2, 1906.)

CORPORATIONS—LIABILITY OF TRUSTEES—FAILURE TO FILE ANNUAL REPORT.

The trustees of a manufacturing corporation are not liable for failure to file the annual report required by section 30 of the stock corporation law (Laws 1892, p. 1832, c. 688), where all its movable property had been sold on execution, and thereafter no further help was employed, labor done, or business carried on at the factory, no stock or material was purchased, and the company had no money with which to purchase stock or material, no meetings of the directors were held, and there was no intention to resume business.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, § 1462.]

Appeal from Trial Term, Jefferson County.

Action by Thomas M. Costello and another against Charles E. Outterson and others. From a judgment for plaintiffs, defendants appeal. Reversed, and new trial ordered, with costs.

Argued before McLENNAN, P. J., and SPRING, WILLIAMS, NASH, and KRUSE, JJ.

Henry Burcell, for appellants.

Joseph Atwell, for respondents

NASH, J. This action was brought to recover an indebtedness of the Columbian Box Company to the plaintiff because of the failure of the defendants, who were trustees of the corporation, to make and file, as provided by statute, the annual report of the company during the month of January, 1895. The company was organized as a corporation under the business corporations law for the manufacture and sale of fancy boxes, with a capital of $10,000. Its principal office was at Brownville, N. Y. Its capital stock was fully paid in in cash prior to October 5, 1893. Annual reports were filed in 1893 and 1894. The last was on the 31st day of January, 1894. The defendants were elected trustees in January, 1894. In addition to the recovery of the judgments by the plaintiffs, judgments amounting to $1,850.45 were recovered against the corporation in the months of July and August, 1894, upon which executions were issued to the sheriff of Jefferson county and returned unsatisfied, except as to sums amounting to less than $100. On August 7, 1893, the corporation placed a mortgage upon its plant and real property for $6,000, to secure bonds issued thereon, and bonds to that amount were issued, upon which default in the payment of interest occurred in December, 1894, at which time an action was commenced to foreclose the mortgage. The action pro-

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ceeded to judgment on the 26th of January, 1895, and to a sale on the 16th of March, 1895. The mortgage covered the entire real estate of the company, and a deficiency judgment arose upon foreclosure of the mortgage for $4,588.46, which was docketed in the Jefferson county clerk's office June 29, 1895. A receiver of the corporation was appointed June 1, 1895. The defendants upon the trial gave proof, which was not in any manner controverted, to the effect that all of the movable property of the company was sold prior to August, 1894, on executions upon the judgments recovered against the corporation; that after the sale on execution no further help was employed, labor done, or business carried on at the factory, and the business was not at any time thereafter resumed. No stock or material was purchased by the company after the sales on execution, and the company had no money or means to make purchases of stock or material with which to conduct its business. The company had a boiler and engine, which had been purchased conditionally of the Watertown Steam Engine Company, which was removed by that company in the summer or fall of 1894. That after this property was removed there was no power with which to turn the machinery. After the sales of the movable property on executions, no meeting of the directors of the company was held, the corporation had no property or means of resuming business, and there was no intention on the part of the company, or any of its trustees, to resume business after August, 1894.

The contention of the appellants is that section 30 of the stock corporation law (Laws 1892, p. 1832, c. 688), relative to the filing of annual reports, which was in force in the year 1895, and since repealed, never was intended to apply, and did not apply, to a corporation where all of its property had been seised on execution and sold, where it had become insolvent, had ceased doing business, had no ability to raise funds to carry on business, had been entirely abandoned by its incorporators, and there was no intention on its part, or on the part of its incorporators, to resume business; that under the facts proven the corporation was in fact dissolved, had become defunct, and could not be called upon by creditors to file an annual report. So far as the public was concerned, or those with whom it was doing business, inclusive of the plaintiffs, whose debt accrued March 22, 1894, it was just as effectually dead as if dissolved by legal procedure. The authorities were reviewed by Judge Danforth in his opinion in Bruce v. Platt, 80 N. Y. 379, and the decision of the court formulated thereon is as follows:

"Where it appeared that in December, 1874, the entire property of such a corporation was sold under execution; that before January 1, 1875, every person interested in it as a corporator had abandoned it; that it was carrying on no business, had no means of procuring money, and intended to do no further act in pursuance of the object of its incorporation—held, that the statute did not require the filing of a report for the year 1875; that for every practical purpose the corporation might be deemed to have been dissolved; and so that its obligation to file a report had ceased before the arrival of the time when the report was required."

The question was again before the court in Kirkland v. Kille, 99 N. Y. 390, 2 N. E. 36, where it was held that:

"When the condition of such a company is such that the end and object for which it was formed is destroyed, and there is neither ability nor in-



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tention on its part at any time to further prosecute business, it is no longer required to make the report mentioned in section 12, c. 40, p. 57, of the general manufacturing act of 1848."

In the case of First National Bank v. Lamon, 130 N. Y. 366, 29 N. E. 321, cited by respondents' counsel, in which it was held that the trustees were not, under the circumstances, relieved from the duty of filing the report, Judge Brown, writing the opinion, said:

"This court has decided that on the appointment of a receiver of a manufacturing company the corporation is so far dissolved that thereafter the duty is no longer upon the trustees to make the report (Huguenot Bank v. Studwell, 74 N. Y. 621), and that when the corporation has been practically abandoned, the requirement as to filing reports does not apply to the trustees (Losee v. Bullard, 79 N. Y. 404; Bruce v. Platt, 80 N. Y. 379; Van Amburgh v. Baker, 81 N. Y. 46). In Losee v. Bullard the default was alleged to have been made in 1873, and it appeared that the corporation had suspended business in 1865, and had never resumed, and had contracted no debts during that time. In Bruce v. Platt the alleged default was in January, 1875, but more than a year previous all of the property of the corporation had been sold under execution, and from that time the corporation had no property or business, no means of procuring money, and no ability or intention of resuming business. The result of these cases is summed up by Judge Danforth in Kirkland v. Kille, 99 N. Y. 390–395, 2 N. E. 36, as follows: 'When the condition of the company is such that the end and object for which it was formed are destroyed, and there is neither an ability nor intention on its part at any time to further prosecute the business, it is no longer required to make the report mentioned in section 12 of the manufacturing act.' This case does not fall within the rules enunciated in any of the cases cited. The corporation was not in the hands of a receiver at the time of the default. Nor does the evidence show that it was insolvent, nor had its franchises been abandoned."

In Sanborn v. Lefferts, 58 N. Y. 179, it was held that:

"The fact that a manufacturing corporation, organized under the act authorizing the formation of manufacturing and other corporations (chapter 40, p. 54, Laws 1848), has ceased to do business and is engaged in closing up its affairs, is not an excuse for a failure to comply with the requirements of section 12, p. 57, of said act as to the filing of a report; and, in the absence of any legal dissolution of the company, these facts do not, nor does knowledge on the part of a creditor of the financial condition and embarrassments of the corporation, affect the liability of the trustees to him, imposed by that section for the failure to file a report."

Sanborn v. Lefferts is distinguished in Losee v. Bullard, 79 N. Y. 408, and Bruce v. Platt, 80 N. Y. 389. In the latter case Judge Danforth said it was not an exception to the rule there applied, and in Losee v. Bullard, Judge Rapallo said:

"In Sanborn v. Lefferts the corporation had not at the time of the default even suspended its ordinary business for one year. The defendant held over and acted as trustee until after the time of the annual statement should have been filed."

In Horrocks Desk Co. v. Fangel, 71 App. Div. 313, 75 N. Y. Supp. 967, the rule contended for by the appellant is specifically recognized. The headnote reads:

"The directors of a corporation are not relieved from the liability imposed upon them by section 30 of the stock corporation law for a failure to file an annual report of the corporation, as required by that section, by the fact that, prior to the time when the default in filing the annual report occurred, the corporation had made a general assignment for the benefit of creditors,

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and did not carry on any business or exercise any of its corporate franchises thereafter. Semble, that in order to relieve the directors of a corporation from the duty of filing an annual report, it must appear that the corporation is insolvent, that it had ceased to exist by dissolution, or, as a matter of fact, from a total abandonment of its business, and its being placed in such a position that it does not intend to and cannot continue or resume operations under its franchise."

In Matty v. Sampson, 64 App. Div. 1, 71 N. Y. Supp. 731, where it was held that the fact that a corporation does no business for several years does not relieve the directors from the necessity of filing annual reports in those years, the defendants had become directors, and continued in office as such down to the time of the trial, and no report had ever been filed by them as directors. In Stevenson v. Cowan, 84 App. Div. 135, 82 N. Y. Supp. 78, it was held that:

"The abandonment of the company's business was merely temporary, and that the directors of the corporation were not relieved from the consequences of the failure of the corporation to file annual reports during those years."

In that case Judge Chase said:

"Merely ceasing to do business does not relieve directors from filing an annual report. While a technical dissolution of the company is not necessary to relieve directors from the consequences of not filing an annual report, the abandonment of the business and its franchises must be certain and final, and such as to put the company beyond the possibility of resuming business."

This means, as indicated by the qualifying words used, that the abandonment of the business and franchise which will relieve the directors from filing an annual report occurs when the corporation is entirely without property or means of continuing or resuming its business, and there is no intention of so doing. The doctrine and the reasons for the rule, which has since been followed, were stated by Spencer, C. J., in Slee v. Bloom, 19 Johns. 456, 10 Am. Dec. 273, as follows:

"In point of good sense, this corporation was dissolved, within the meaning and intent of the act as regards creditors, when it ceased to own any property, real or personal, and when it ceased for such space of time from doing any one act manifesting an intention of resuming their corporate functions. The end, being, and design of the corporation were completely determined, and if even it had the capacity to reorganize and reinvigorate itself, the case has happened when, as relates to its credits, it is dissolved."

The judgment should be reversed.

Judgment reversed, and new trial ordered, with costs to the appellants to abide the event. All concur.

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## SHALET v. RAUCH

(Supreme Court, Appellate Term. April 24, 1906.)

LANDLORD AND TENANT—RECOVERY OF POSSESSION—SUMMARY PROCEEDINGS—GROUNDS.

After several assignments of a lease reserving a certain monthly rental, the landlord demanded a greater rental from the final assignee, and brought proceedings to dispossess him for nonpayment of the full amount demanded. *Held*, that the tenancy being thereby admitted and there being no showing of any leasing to defendant save the assignment to him,

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**contentions on the part of the landlord that the lease was terminated by reason of the surrender by one of the intermediate assignees, in pursuance of a condition contained in the original lease, and that the lease to the one under whom defendant directly claimed was invalid, were of no avail, and defendant was only required to pay the rent reserved in the original lease.**

Appeal from Municipal Court, Borough of Manhattan, Fourth District.

Summary proceedings by Paul Shalet against Max Rauch. From an order in favor of the tenant, the landlord appeals. Affirmed.

Argued before SCOTT, P. J., and TRUAX and BISCHOFF, JJ.

Herman Gettner, for appellant.

SCOTT, P. J. The landlord (appellant) seeks to dispossess the tenant for the alleged nonpayment of $80, being $40 each for the months of December, 1905, and January, 1906. The property formerly belonged to one Moses M. Valentine, who executed a lease of the entire property to one Harris Krakauer in March, 1904, for a term expiring January 31, 1907. This lease was assigned to Abraham Brandman on August 28, 1904, and by him to Abraham Saperstein on March 28, 1905. On September 1, 1905, Saperstein leased the portion of the building now occupied by the respondent to one Samuel Holtz for the term of one year and eight months from September 1, 1905, at the yearly rental of $720, payable in equal monthly installments of $60 in advance on the first of each month. Holtz in turn assigned this lease to the tenant (respondent), who went into possession, and was in possession when plaintiff acquired title to the property. The landlord (appellant) at once insisted that he should receive $100 a month rent for the premises. He accepted $60 on account of the December rent, and $50 on account of the January rent; the tenant offering and standing ready to pay the remaining $10. This proceeding is instituted for the $40 a month which the landlord claims he should receive over and above the $60 reserved by the lease. The appellant's brief is mainly devoted to showing that plaintiff's lease was terminated by reason of a surrender by Saperstein to Valentine in pursuance, as it is said, of a condition contained in the original lease from Valentine to Krakauer, and to contending that Saperstein's lease to Holtz was invalid. The discussion of these questions is irrelevant, because this is a proceeding for nonpayment of rent, which necessarily admits and recognizes the respondent's status as a tenant, and not a hold-over proceeding. If the respondent is the tenant of the premises, as the petition alleges, it must be under the lease from Holtz, since no other tenancy or agreement to hire is shown. Under that lease, she is required to pay only $60 per month, and there is no warrant for the landlord's claim to more.

The final order was right, and should be affirmed, with costs. All concur.

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## CITY OF WATERTOWN v. RODENBAUGH.

(Supreme Court, Appellate Division, Fourth Department. May 2, 1906.)

1. MUNICIPAL CORPORATIONS—ORDINANCES—VIOLATION — PROSECUTION — EVIDENCE—SUFFICIENCY.

In a prosecution for violation of an ordinance forbidding the distributing of sample packages of merchandise without a license, but providing that it should not apply to merchants and other residents of the city distributing bills or advertising the business in which they were engaged, evidence that defendant distributed packages, stating that she was doing the work for the local groceries, did not support a conviction.

2. LICENSES—ORDINANCES—CONSTITUTIONALITY—CLASS LEGISLATION.

An ordinance declaring that no person shall engage in the business of bill posting, bill distributing, or distributing sample packages of merchandise without a license, but providing that it shall not apply to merchants and other residents of the city distributing bills or advertising the business in which they are engaged in the city, nor to religious, benevolent, labor, or social organizations, distributing advertisements of their meetings, entertainments, etc., is class legislation.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Licenses, § 12.]

Williams, J., dissenting.

Appeal from Jefferson County Court.

Action by the city of Watertown against Lillian Rodenbaugh to recover a penalty for violation of a city ordinance. From a judgment for plaintiff, defendant appeals. Reversed.

Argued before McLENNAN, P. J., and SPRING, WILLIAMS, NASH, and KRUSE, JJ.

Eugene M. Bartlett, for appellant.

I. H. Breen, for respondent.

KRUSE, J. The ordinance for the violation of which the defendant was convicted provides:

"Section 1. No person shall engage in the business of bill posting, bill distributing or sign-advertising of any kind, or in distributing sample packages of merchandise, or in any other like method of advertising in this city, without license so to do granted by the common council."

Sections 2 and 3 relate to the granting of the licenses, and fixing the charges which the licensee may make for the business he is licensed to do.

Section 4 provides:

"Nothing in section one, two or three shall be construed to apply to legal notices or to prevent merchants and other residents of this city from distributing bills or advertising the business in which they are directly engaged in this city, nor to prevent any religious, benevolent, labor or social organization of this city from distributing or advertising its meetings, entertainments or other subjects of like nature. Legal notices nevertheless, shall only be posted at such places as have been or may hereafter be provided or designated for such purpose by the common council."

Other sections forbid scattering or placing advertisements in certain places, and regulate billboards. The license fee is fixed at $50 per year, and a violation of the ordinance is punishable by a fine of $10. The defendant was fined $10 for violating section 1 of this ordinance, and it is the judgment imposing this fine which we are asked to review.

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What she did which it is claimed subjected her to this penalty was distributing in the city on one occasion, September 6, 1904, sample packages of Mapl-flake, a breakfast food manufactured at Battle Creek, Mich. She used a horse and wagon and two boys in distributing the packages, a boy on each side of the street handing them into the houses. She stated to one of the witnesses that she was working for the Mapl-flake people of Battle Creek, Mich., and doing the work for the local groceries. It was admitted that she had no license. No testimony was given on her behalf, but at the close of the plaintiff's case a motion was made to dismiss the complaint, upon the ground that the plaintiff had failed to make out a cause of action, and upon the further ground that the ordinance was unconstitutional in that it restricted freedom of trade, was against public policy, and in violation of the interstate commerce law. The motion was denied, and judgment rendered for the plaintiff.

We think the judgment is erroneous, and that it, as well as the judgment of affirmance of the County Court, should be reversed.

1. Assuming the ordinance to be valid, the proof does not seem to establish that the defendant violated its provisions. Section 4 of the ordinance expressly provides that nothing contained in section 1, 2, or 3 shall be construed to prevent "merchants and other residents of this city from distributing bills or advertising the business in which they are directly engaged in this city." If a merchant is thus permitted to advertise his business, he need not do it personally to bring himself within the exception contained in this section, but may employ others, and the proof shows that the defendant was doing this work for the local groceries. Again, the ordinance assumes to prevent any unlicensed person from engaging in the business referred to, and it may well be questioned whether a person who upon one occasion only distributes sample packages under circumstances here disclosed can be said to be engaged in the business, within the meaning of this ordinance; keeping in mind the exceptions contained in section 4 and the rules by which the validity of the ordinance must be tested.

2. If the construction contended for on behalf of the city is to be placed upon this ordinance, and the acts of the defendant to be regarded as engaging in the business of distributing sample packages, within the meaning of section 1 of the ordinance, then we think the ordinance unconstitutional and void so far as it prevents a nonresident of the city or one class of persons from doing what a resident or another class is permitted to do. It not infrequently happens in urban communities that telegraph poles and other available places are placarded, streets and public places littered with handbills and other advertising matter, and billboards become nuisances, and even homes and private premises invaded by the bill circulator and sample package distributor without leave or license and against the protest of the owner; and it may have been entirely proper for the common council to intervene and regulate the business in this city, and its power may be adequate to do so under the general welfare clause of its charter, (Laws 1897, p. 1038, c. 760, § 43), and the special provisions made in subdivision 12 of that section relating to bill posting, bill distributing, and sign advertising; but in exercising that power it may not unjust-

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ly discriminate against any particular class. No good reason occurs to us, and none is suggested by the counsel who are seeking to uphold this judgment, for permitting resident merchants to press upon the attention of the people of this city their wares in this manner, and forbid nonresident tradesmen from doing so except through the official billposter of the city.

While municipal ordinances passed in pursuance of the authority of the Legislature have the force of law, and are as obligatory as if enacted by the Legislature itself (City of Buffalo v. N. Y., L. E. & W. R. R. Co., 152 N. Y. 276, 280, 46 N. E. 496), and the right of a city to regulate billposting has been upheld under a statute conferring such power in terms similar to the provisions of this charter, to which attention has been called (City of Rochester v. West, 164 N. Y. 510, 58 N. E. 673, 53 L. R. A. 548, 79 Am. St. Rep. 659; Gunning System v. City of Buffalo, 75 App. Div. 31, 77 N. Y. Supp. 987), yet such law, whether enacted by local legislative authority or by the Legislature itself, must be consistent with our state and federal Constitutions; and if the construction contended for on behalf of the city is to be given to this ordinance, and what the defendant did is to be regarded as coming within its prohibitions, then we think the ordinance must be condemned as class legislation. The rule that an ordinance must be reasonable applies with particular force to ordinances imposing license fees or business taxes, and such an ordinance must not discriminate against nonresidents or persons engaged in the sale of property produced or manufactured outside the municipality. 21 Am. & Eng. Ency. (2d Ed.) 783, 784; City of Buffalo v. Reavey, 37 App. Div. 228, 55 N. Y. Supp. 792. Whether the defendant was distributing these sample packages for the Michigan manufacturers or the local merchants in Watertown, we think she was improperly convicted.

The judgment of the County Court and that of the City Court should be reversed, with costs.

SPRING, J., votes for reversal on the ground that the ordinance in question was unconstitutional. WILLIAMS, J., dissents.

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## CHARTERS v. PALMER.

**(Supreme Court, Appellate Division, First Department. May 11, 1906.)**

1. MUNICIPAL CORPORATIONS—NEGLIGENCE IN DRIVING VEHICLE IN STREET—EVIDENCE.

   Defendant's negligence was established where it appeared that plaintiff's intestate was run over in a street by a rapidly moving truck belonging to defendant, the driver of which was looking backwards, and not giving attention to the street ahead.

   [Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1515.]

2. DEATH—ACTION FOR CAUSING—CONTRIBUTORY NEGLIGENCE OF DECEASED—QUESTION FOR JURY.

   In an action for the death of one run over by a truck, the question of decedent's contributory negligence *held* one for the jury.

   [Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Death, § 141.]

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3. SAME—SUFFICIENCY OF EVIDENCE.

In an action for negligence resulting in death owing to the difficulty of proving freedom from contributory negligence, the rule with respect to the evidence of care is not so rigid as otherwise.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Death, § 94.]

Appeal from Trial Term, New York County.

Action by Elizabeth Charters, as administratrix of the estate of John Charters, deceased, against Clarence M. Palmer. From a judgment dismissing the complaint, plaintiff appeals. Reversed, and new trial ordered.

Argued before O'BRIEN, P. J., and PATTERSON, INGRAHAM, LAUGHLIN, and CLARKE, JJ.

David C. Hirsch, for appellant.

Charles S. Petrasch, for respondent.

LAUGHLIN, J. This is a statutory action to recover for the death of John Charters, alleged to have been caused by the negligence of the defendant. The decedent was about 54 years of age, in the possession of all his faculties, and in the employ of the street cleaning department of the city of New York as a street sweeper, and had been so employed upwards of nine years. He used a car carrier, which is a three-wheeled vehicle, pushed like a baby cart, carrying several cans for carting away street sweepings, and a large, wide, long-handled broom and a shovel. On the 19th day of January, 1903, he was working on Avenue A, between Sixty-First and Sixty-Fourth streets. His hours of labor upon the street were from 7 a. m. until 4 p. m. His push cart and implements were kept at the station at the southwest corner of Sixty-Fifth street and Third avenue, and he was obliged to report there for duty in the morning and at the close of working hours for the day. He left his post on the day in question to report at the station at Sixty-Fifth street and Third avenue. He came westerly on the carriageway of Sixty-Third street, pushing his cart containing his broom and shovel. He was dressed in the white uniform, with a white helmet, customarily worn by street sweepers. He turned into Second avenue at the northeast corner of Sixty-Third street, and was proceeding northwesterly in the carriageway of Second avenue, his course being diagonally toward the northwest corner of Sixty-Fourth street and Second avenue, as if he intended to go through Sixty-Fourth street to Third avenue. There is a double street railway track in Third avenue and an elevated railroad above.

The evidence is open to conflicting inferences, and it might be found therefrom that while he was crossing the first or easterly street railroad track at a point from 40 to 60 feet northerly of the northerly crosswalk of Sixty-Third street, when the push cart was in the middle of the track, and he was about upon the first rail, he was run down by a loaded sugar truck owned by the defendant. The truck was drawn by two horses. The horses were going very fast, trotting or running, and going north and on the north-bound track. The plaintiff was struck and knocked down by the head or shoulders of the off horse. The evidence tends to show that the driver was, and had been from the time he

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crossed Sixty-Third street, looking back, and not giving proper attention to the street ahead of the horses he was driving, and that the horses were a considerable distance away from the deceased when the push cart passed into the lines along which the team and wagon were moving. Only two eyewitnesses to the accident were called. They were a father and his son, 10 or 11 years of age, who were on a brewery wagon passing down the westerly side of Second avenue, just opposite the defendant's wagon, at the time of the collision. As there was nothing to attract their attention until the accident, or, at least, until they saw the wagon approaching rapidly, it could not be expected that they closely observed the conduct of the deceased before the collision became imminent. They do not assume to tell us whether or not he looked for approaching vehicles as he was proceeding in his course up and diagonally across the street. If he did look, and saw the vehicle approaching, the evidence is susceptible of the inference that it was so far away that it could not be said as matter of law that he was guilty of negligence in proceeding on his way. The fact that he was looking straight in the direction in which he was going at the moment he was struck does not show that he had not exercised proper care. While the degree of care required to be exercised by the deceased was the same as if he had not been killed, yet, owing to the fact of his death and the difficulty in proving freedom from contributory negligence in such cases, the rule with respect to the evidence of care is not so rigid. Although he was crossing the street, he was not crossing at right angles. The jury might well have found that his course was far more along, than across, the street. The blocks are 200 feet long. The paved carriageway would not be over 50 feet in width. He may have been going, then, at least four or more feet up the street to one across, and his back would be more than half way turned toward a vehicle approaching from the south. If he had been struck by a street car traveling in a fixed groove, and unable to turn out, perhaps the nonsuit would be sustained. He was, however, run down unnecessarily by a vehicle to which his back must have been partially turned, and which should have slowed down or turned out. A street car was coming some little distance behind the wagon, but there was nothing to prevent the defendant's driver from turning out on either side. The negligence of the defendant was clearly shown, and we are of the opinion that it cannot be said as a matter of law that the decedent was guilty of contributory negligence.

The judgment should therefore be reversed, and a new trial granted, with costs to the appellant to abide the event. All concur.

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## CITY OF NEW YORK v. A. T. STEWART REALTY CO.

**(Supreme Court, Appellate Division, First Department. May 11, 1906.)**

1. COSTS—EXTRA ALLOWANCE OF ADDITIONAL COSTS—AMOUNT AND COMPUTATION.

**Where no facts are stated from which the court can find the value of the subject-matter involved in a suit, no extra allowance as costs on the discontinuance of the case can be awarded, under Code Civ. Proc. § 3253, allowing additional costs, not to exceed a specified per cent. on the value of the subject-matter involved.**

**[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Costs, § 628.]**

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2. SAME—EXTRAORDINARY CASE.

A city sought to enjoin an owner and its contractors from placing material not fireproof in a building. An answer was interposed. A motion to vacate the temporary injunction which had been granted was made. The appeal from the order denying the motion was argued. *Held*, that the suit was not an extraordinary one, within Code Civ. Proc. § 3253, authorizing the granting of an extra allowance in extraordinary cases.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Costs, § 624.]

Appeal from Special Term, New York County.

Action by the city of New York against the A. T. Stewart Realty Company. From an order granting costs and an extra allowance on discontinuance of the action, plaintiff appeals. Modified and affirmed.

See 96 N. Y. Supp. 513.

Argued before O'BRIEN, P. J., and McLAUGHLIN, INGRAHAM, CLARKE, and HOUGHTON, JJ.

John P. O'Brien, for appellant.

Louis Frankel, for respondent.

PER CURIAM. This appeal is from an order allowing costs as in an action, and, in addition thereto, granting an extra allowance of $500 as a condition of permitting plaintiff to discontinue the action.

There is no basis for the extra allowance. The evidence presented bearing on that subject is that a large part of the fixtures was in the building, and the balance "ready for delivery on receipt of notice from the defendant"; that these fixtures (those in the building and those to be thereafter delivered) were of the contract price of $196.000, and had plaintiff succeeded in the action, which was to enjoin the defendant from maintaining fixtures in the building, and to compel it to remove those already placed therein unless the same were constructed of fireproof wood, the defendant "would have suffered by reason of the increase in the cost of such fixtures * * * very considerable; that if the defendant had been required to take out the fixtures placed in the building, and to throw out the fixtures contracted for, it would have suffered a loss of $160,000, and, in addition, been unable for an indefinite period to carry on business; and that defendant would have suffered "primarily the loss of the fixtures already in the place and contracted for, and which were ready to be delivered." No facts are stated from which the court could determine "the value of the subject-matter involved," as required, in order to justify an extra allowance. Section 3253, Code Civ. Proc. The statement that if the plaintiff had been successful defendant would have suffered, not only the loss of $160,000, and, "primarily," the contract price of all the fixtures, but would have been unable for an indefinite period to carry on any business, is a conclusion not sustained by any of the facts set forth. In addition to this, the action was not a difficult and extraordinary one, within the meaning of the section of the Code above cited, which authorizes the granting of an extra allowance. The action was barely at issue, and all that was done was to interpose an answer, move to vacate the temporary injunction which had been granted, and argue the appeal from an order denying the motion.

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The order appealed from, therefore, should be modified by striking out the provisions thereof granting the $500 extra allowance, and, as thus modified, the same is affirmed, without costs to either party.

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## KING v. MAIL & EXPRESS CO.

(Supreme Court, Appellate Division, First Department. May 11, 1906.)

PLEADING—CLERICAL ERRORS.

A complaint alleging that plaintiff's intestate, was lawfully crossing a street, and that while crossing, a wagon driven by defendant's servants negligently ran into "said plaintiff," knocking her down, and inflicting injuries from which she died, was not demurrable, because of the allegation that the wagon ran into "plaintiff" instead of "plaintiff's intestate"; the mistake being a clerical error which, under Code Civ. Proc. § 723, might have been amended at any time upon mere suggestion.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 51.]

Appeal from Special Term, New York County.

Action by Martin J. King, as administrator of Ellen O'Hara, deceased, against the Mail & Express Company. From a judgment sustaining a demurrer to the complaint, defendant appeals. Reversed.

Argued before O'BRIEN, P. J., and INGRAHAM, McLAUGHLIN, CLARKE, and HOUGHTON, JJ.

W. J. Walsh, for appellant.

Charles L. Burr, for respondent.

CLARKE, J. This is an administrator's action to recover damages for the death of plaintiff's intestate as the result of defendant's negligence. Defendant demurred upon the ground that the complaint does not state facts sufficient to constitute a cause of action.

The complaint alleges:

"That on December 6, 1902, plaintiff's intestate, Ellen O'Hara, in the exercise of due care and precaution, was lawfully crossing Tenth avenue at the northeast corner of Fifty-second street, public highways in the borough of Manhattan, from the east side of said Tenth avenue, for the purpose of boarding a car going north on said Tenth avenue. That while crossing said avenue, as aforesaid, one of the wagons drawn by horses so owned, used, hired, or employed by said defendant, in its said business, then being driven by one of the agents and servants of said defendant at a rapid and unlawful rate of speed, and recklessly, negligently, and carelessly ran into the said plaintiff, knocking her down, and inflicting upon her serious, painful, and internal injuries, whereby, and by reason whereof, and as the direct cause thereof, the said intestate Ellen O'Hara, after lingering in great pain, died on the 11th day of April, 1904."

There were appropriate allegations as to the incorporation of the defendant, and its business, as to its negligence and freedom of contributory negligence of "the said intestate," Ellen O'Hara, as to the next of kin, the due appointment of the administrator, and the damages claimed. The defect claimed is that the complaint stated that the wagon "ran into the said plaintiff," whereby "the said intestate, Ellen O'Hara, after lingering in great pain, died on the 11th day of April, 1904." It is, of course, perfectly obvious that a word has inadvertently been

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omitted. What the allegation was intended to be was, "ran into the said plaintiff's intestate," whereby, etc. The argument of the respondent that the complaint is susceptible of the interpretation that the wagon ran into the plaintiff, the administrator, whereby, "and as the direct cause thereof," the intestate died, is not saved from frivolity by reason of its ingenuity. If it be necessary to point out the obvious, the complaint sets forth that "plaintiff's intestate Ellen O'Hara * * * was * * * crossing Tenth avenue; * * * that, while so crossing, one of the defendant's wagons ran into said plaintiff, knocking her down." Here the plaintiff is Martin J. King, as administrator; and clearly "her" does not apply to him—"and inflicting upon her serious, painful and internal injuries, whereby and as the direct cause thereof the said intestate Ellen O'Hara" * * * "died." What possible doubt can there be of the meaning of this paragraph taken as a whole?

"In every stage of the action the court must disregard an error or defect in the pleadings or other proceedings which does not affect the substantial rights of the adverse party. * * * The court may upon the trial or at any other stage of the action * * * in furtherance of justice * * * amend any * * * pleading, * * * by correcting a mistake * * * in any other respect." * * * Section 723, Code Civ. Proc. Such an omission as in the case at bar, amendable at any time upon mere suggestion to the court, did not make the complaint demurrable. It was a clerical error that could not by any possibility have misled the defendant, and so should have been disregarded. In Kenney v. N. Y. C. & H. R. R. Co., 49 Hun, 535, 2 N. Y. Supp. 512, the action was by an administrator of a decedent, who left a widow, to recover damages. The complaint alleged "defendant left him surviving his widow." Demurrer was overruled, the court saying:

> "It is very evident that the words, 'defendant left him surviving his widow' was a mere clerical error in drawing or copying the complaint; and it is so apparent that the word "defendant" instead of decedent was in that manner inserted that it may, we think, be treated as if the latter word had been the word used."

There is no substance in the criticism of the complaint, and the judgment should be reversed, with costs, and demurrer overruled, with costs, with leave to defendant to withdraw the demurrer and answer over within 20 days on payment of such costs. All concur.

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## MOORE et al. v. COYNE & DELANEY MFG. CO. et al.

(Supreme Court, Appellate Division, First Department. May 11, 1906.)

1. PATENTS—CONTRACTS FOR MANUFACTURE OF PATENTED ARTICLES—LIABILITY OF THIRD PARTY FOR ROYALTIES.

A complaint alleging that plaintiffs, being the owners of certain letters patent, made a contract with a firm authorizing it to manufacture the patented article upon payment of a royalty, and that the firm "gave the benefit of the contract" to a corporation, which thereafter manufactured the articles, but refused to pay the royalties, and seeking an accounting from the corporation, stated no cause of action as against the corporation.

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2. ACCOUNT—RIGHT OF ACTION—BREACH OF CONTRACT.

**Where a contract provided for the manufacturing of patented articles by defendant and the payment of royalties therefor to plaintiff, who owned the letters patent, a failure to pay royalties did not give plaintiff a right to an accounting in equity, inasmuch as it had an adequate remedy at law, and no trust or fiduciary relation existed.**

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Account, § 71.]

Appeal from Special Term, New York County.

Action by Charles H. Moore and another against the Coyne & Delaney Manufacturing Company and others. From an interlocutory judgment overruling a demurrer to the complaint, defendants appeal. Reversed.

Argued before O'BRIEN, P. J., and INGRAHAM, McLAUGHLIN, CLARKE, and HOUGHTON, JJ.

De Witt Bailey, for appellants.

J. D. O'Connor, for respondents.

McLAUGHLIN, J. The Coyne & Delaney Manufacturing Company demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action against it. The demurrer was overruled, and it has appealed. The complaint charges that at all the times mentioned John Coyne and James Delaney were a copartnership doing business under the name of Coyne & Delaney; that the Coyne & Delaney Manufacturing Company is a domestic corporation, and has an office for the transaction of business at the same place that the firm of Coyne & Delaney has; that on the 22d of March, 1899, the plaintiffs were the owners of letters patent issued by the United States for the manufacture and sale of wash basin fixtures or traps of a certain design, and that on that day they entered into an agreement with the firm of Coyne & Delaney, by which such firm was permitted to manufacture and sell such patented articles upon paying to the plaintiffs, their legal representatives or assigns, a royalty of 25 cents on each fixture or trap manufactured or sold, and rendering to plaintiffs, every 30 days, an account of the fixtures or traps so manufactured or sold, and paying such royalty, which the firm agreed to do. It also contains an allegation to the effect that Coyne & Delaney fraudulently and deceitfully represented themselves as a firm, and gave the benefit of the contract to the Coyne & Delaney Manufacturing Company, and it thereafter manufactured and sold large quantities of the patented articles, for which Coyne & Delaney and the Coyne & Delaney Manufacturing Company refused to pay, although requested to do so; that the plaintiffs had received not exceeding $350 from Coyne & Delaney, but they were unable to say whether the payments were made by the firm or the corporation. The judgment demanded is that both the firm and the corporation account for the articles manufactured and sold, and that plaintiffs have judgment against the individuals composing the firm, and the corporation, jointly, for whatever sum might be found due.

I am unable to see any cause of action whatever alleged against the corporation. If it be true that the corporation has manufactured or sold the patented articles in violation of plaintiffs' rights secured under

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their letters patent, then their remedy against the corporation is to enjoin it, and to recover damages for an infringement of the patent, which would necessitate a different action in a different form. It will be noted there is no allegation in the complaint that any of the articles for the manufacture and sale of which the corporation is sought to be held liable were made or sold in pursuance of the license given by the plaintiffs to the firm of Coyne & Delaney. The only allegation bearing on that subject is that the corporation had the benefit of the contract, and it and the firm were "beneficiaries under said agreement," whatever this may mean. This allegation might make the corporation liable to the firm, but not to the plaintiffs, because there is no contract relation existing between the plaintiffs and the corporation.

The complaint is also bad for another reason. It appears upon the face of it that the plaintiffs have an adequate remedy at law. The contract simply provides for the payment of royalties upon a patented article if manufactured or sold, and, if the same have been manufactured or sold under the contract, then this gives the plaintiffs the right, not to an accounting, but to the royalties stipulated to be paid, for which an action at law may be maintained. And while it might be necessary, in order to ascertain just what royalties were due, to take an account, this alone would not give a court of equity jurisdiction. There must be something in addition. There must exist some trust or fiduciary relation between the parties to justify a court of equity in exercising its powers by decreeing an accounting. The only relief that could here be awarded would be a moneyed judgment—clearly an action at law, and nothing else. McCullough v. Pence, 85 Hun, 271, 32 N. Y. Supp. 986; Everett v. DeFontaine, 78 App. Div. 219, 79 N. Y. Supp. 692.

If the action could be treated as one at law, and an inference could be drawn from the facts alleged that the corporation had assumed the obligations of the firm of Coyne & Delaney, this would not aid the plaintiffs, because there are no allegations that the corporation has manufactured or sold articles upon which the royalties would be in excess of the amount which has been paid.

The judgment appealed from, therefore, should be reversed, with costs, and the demurrer sustained, with costs, with leave to the plaintiffs to serve an amended complaint on payment of the costs in this court and in the court below. All concur.

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## METROPOLITAN MILK & CREAM CO. v. CITY OF NEW YORK et al.

(Supreme Court, Appellate Division, First Department. May 11, 1906.)

1. LICENSES—BOARD OF HEALTH—PERMITS TO SELL MILK—REVOCATION.

Under Consolidation Act, Laws 1882, p. 159, c. 410, § 576, as amended and New York City Charter, Laws 1901, p. 497, c. 466, § 1169, requiring the board of health to enforce its sanitary code and the laws relating to health and to avert peril to health, a license to sell milk, issued pursuant to the sanitary code prohibiting the sale of milk without a permit, continued in force by section 575 of the consolidation act (page 158) and section 1172, c. 466, p. 499, Laws 1901, as amended by Laws 1904, p. 491, c. 628, § 3, may be revoked by the board on it finding after hearing that the licensee sold adulterated milk, especially where the license stipulated that it was revocable at the pleasure of the board.

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Appeal from Special Term, New York County.

Action by the Metropolitan Milk & Cream Company against the city of New York and another. From an interlocutory judgment overruling a demurrer to a separate defense in the answer, plaintiff appeals. Affirmed.

Argued before O'BRIEN, P. J., and PATTERSON, INGRAHAM, LAUGHLIN, and CLARKE, JJ.

John J. Lenehan, for appellant.

Theodore Connoly, for respondents.

INGRAHAM, J. The action was brought to recover $30,000 damages sustained by the plaintiff by the revocation by the board of health of the city of New York of certain permits issued by the said board under which the plaintiff was authorized to sell fresh and condensed milk in the city of New York. The plaintiff was a domestic corporation and engaged in selling milk and cream in the city of New York. The complaint alleges: That the department of health is a department of the city of New York, organized under the charter of the city of New York (chapter 466, p. 1, of the Laws of 1901). That prior to January 1, 1897, the board of health of the former city of New York issued to the plaintiff seven permits or licenses to sell milk in the city of New York, dated May 10, 1896. That thereafter the present board of health organized under the charter of 1901 issued to the plaintiff three additional permits to sell milk in the city of New York, dated May 7, 1902, and June 10, 1903. That the sale of milk by the plaintiff in the city of New York without a permit from the board of health was after the 14th of December, 1904, a misdemeanor. That on the 14th day of December, 1904, the board of health adopted a resolution wherein and whereby they directed all said 10 permits or licenses to sell milk theretofore issued to the plaintiff and under which the plaintiff was carrying on its said business to be forthwith annulled and revoked. That the action of the board was unjust, arbitrary, unlawful, and illegal, and without just cause, and that the said board was without any power, authority, or warrant in law to revoke said licenses. The form of the permits were set forth in the complaint as follows:

"Metropolitan Milk & Cream Company is hereby authorized to sell milk, fresh and condensed, at borough of Manhattan, under the laws, rules, and regulations of the board of health, of the department of health of the city of New York. This permit is not transferable to any person or location other than above, and must be kept posted at all times in a conspicuous place in the store, and is revocable at the pleasure of the board."

That the plaintiff's good will, trade, and business were at the time of said revocation of the value of $30,000. That in consequence of said revocation of the said licenses or permits the plaintiff was prevented from continuing or carrying on its said business, and said business thereby and thereupon was forthwith wholly and instantly terminated and entirely destroyed, all to the plaintiff's damage in the sum of $30,000. The defendants served separate answers, which set up as a separate defense that by virtue of the laws of the state of New York and the Sanitary Code of the city of New York the defendant, the department of health of the city of New York, had authority and power

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to prevent the plaintiff from bringing into the city of New York, or keeping or selling therein, unwholesome or adulterated milk, or milk which had been watered, or milk which had been in any respect adulterated, reduced, or changed by the addition of water or any other substance; that prior to the 14th day of December, 1904, the department of health of the city of New York, upon investigation and inquiry, discovered that the plaintiff was operating a creamery in the county of Orange, in the state of New York, which creamery and appurtenances were kept and maintained by the plaintiff in a filthy, unwholesome, and unsanitary condition, and from the said creamery the plaintiff was shipping and sending to the city of New York, to be sold to its citizens, milk which had been watered, and which had been adulterated and changed by different substances; and that the plaintiff had been using in such milk preservatives, so called, and coloring matter, and was also shipping and sending to New York, to be used by its citizens skim milk mixed with water, labelled "Butter Milk"; whereupon the department of health of the city of New York, after notice to the plaintiff and after a hearing upon all the facts, revoked the license or licenses of the plaintiff to sell milk in the city of New York, as it had a right to do, and as it was its duty to do, and not otherwise. To these separate defenses demurrers were interposed by the plaintiff, which were overruled.

The learned counsel for the defendants do not attack the sufficiency of the complaint, although it is somewhat difficult to see how any act of the board of health, acting under an authority conferred by the state to regulate the sale of impure and unwholesome milk in the city of New York, can impose an obligation upon the municipality. As this point, however, is not taken by the defendant, it will not be considered. The first seven permits were issued on March 10, 1896, under the consolidation act. Chapter 410, p. 1, Laws 1882, as amended. By section 34 (page 8) of that act the board of health was created a department of the said city. Section 575 (page 158) provides that the Sanitary Code "adopted and declared as such at a meeting of the board of health of the health department of the city of New York, held in the city, on the second day of June, 1873, as amended in accordance with law, is hereby declared to be binding and in force in said city." Section 576 (page 159) provides that the board of health "shall cause to be enforced the provisions of its Sanitary Code." In People ex rel. Lieberman v. Vandecarr, 175 N. Y. 440, 67 N. E. 913, it was held that section 66 of the Sanitary Code which reads, "No milk shall be received, held, kept, offered for sale or delivered in the city of New York without a permit in writing from the board of health and subject to the conditions thereof" was valid; that it was lawful for the health authorities in the city of New York to require the relator to obtain a permit under section 66 of the Sanitary Code in order to receive, hold, offer for sale and deliver milk, and failing so to do to arrest and punish him; that the vesting of powers more or less arbitrary in various officials and boards is necessary if the work of prevention and regulation is to ward off fevers, pestilence, and the many other ills that constantly menance great centres of population. The board of health thus having power to issue permits authorizing a person to carry the business of dealing in milk

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in the city of New York, this power was continued by the subsequent charters of the city of New York. By the present charter (chapter 466, p. 499, of the Laws of 1901) the board of health is constituted. Section 1172 of the charter, as amended by chapter 628, p. 491, § 3, of the Laws of 1904, provides that:

"The Sanitary Code which shall be in force in the city of New York on the first day of January, ninteen hundred and seventy-two, and all existing provisions of law fixing penalties for violations of said Code are hereby declared to be binding and in force in the city of New York, and shall continue to be so binding and in force, except as the same may, from time to time, be revised, altered, amended or annulled, as herein provided."

By section 1169 it was made the duty of the board to "enforce all laws of this state applicable in said district, to the preservation of human life, or to the care, promotion or protection of health; and said board may exercise the authority given by said laws to enable it to discharge the duty hereby imposed; and this section is intended to include all laws relative to cleanliness, and to use or sale of poisonous, unwholesome, deleterious, or adulterated drugs, medicine or food. * * * The board of health shall use all reasonable means for ascertaining the existence and cause of disease or peril to life or health, and for averting the same, throughout the city." The board, being charged with the duty of protecting the health of the inhabitants and preventing the sale of impure or adulterated food, ascertained that the plaintiff, acting under the permits which it had issued, was engaged in selling impure and adulterated milk. The board gave to the plaintiff notice of these charges, and after a hearing it revoked the permits; and to sustain the contention of the plaintiff we must hold that such permit thereby becomes irrevocable and authorizes the person to whom it was granted to continue forever to sell milk, although the conditions under which the permit was issued were continually violated, the provisions of the Sanitary Code in relation to milk sold disregarded, and that a person acting under a permit from the board of health is selling to the inhabitants of the city of New York poisonous and impure article for food, endangering the public health. The sole authority that the health board would have, if this contention was correct, would be to prosecute the person selling the poisonous article in the shape of milk, fine it, and in the meantime such person could go on poisoning the people under a permit or license from the health authorities, a proposition which is so unreasonable that a mere statement is sufficient to refute it. There is nothing in either the Penal Code or the charter that makes such a permit irrevocable. The permit itself provides that it is revocable at the pleasure of the board, and the plaintiff accepted it with that condition. There is nothing unreasonable in this condition; and, irrespective of the general power of the board of health to revoke a permit which is being abused and under which the person accepting it and using it is persistently violating the law, it is certainly not an unreasonable condition to insert into such a permit a provision that it is revocable by the board that issues it. To hold that a permit once granted is irrevocable would be to totally defeat the object of the statute in requiring such a permit before a person should engage in the business of supplying to the inhabitants of a city food.



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We think it entirely clear that the court below was justified in overruling the demurrer, and the judgment appealed from is affirmed, with costs, with leave to the plaintiff to withdraw the demurrer within 20 days on payment of costs in this court and in the court below. All concur.

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## PEOPLE v. NEW YORK BUILDING-LOAN BANKING CO.

### In re MONTAGUE'S CLAIM.

(Supreme Court, Appellate Division, First Department. May 11, 1906.)

BUILDING AND LOAN ASSOCIATIONS—INSOLVENCY—DISTRIBUTION OF ASSETS.

A person sui juris entered into a contract with a building and loan association, becoming a member thereof and subscribing for its stock and agreeing to pay $225 per month for 144 months, including principal, interest at 5 per cent., premium; the association agreeing in consideration thereof to pay off and discharge a mortgage of $25,000 on his property before the end of the period covered by the 144 monthly payments. To secure the monthly payments the member gave to the association a mortgage on the property for $30,000. The association failed, and its dissolution was ordered before it complied with its obligation, and before the time had arrived in which it was required to have performed, and without having made any advances to the member, but after the member had made some of the payments he had obligated himself to make. *Held*, that the member was not entitled to come in on a distribution of the assets as a creditor distinct from those entitled to share in the distribution of the property of the association when made among the members thereof, even as to the amount paid by him denominated interest on the $30,000 mortgage to the association.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Building and Loan Associations, § 88.]

O'Brien, P. J., and Laughlin, J., dissenting.

Appeal from Special Term, New York County.

Action by the people against the New York Building-Loan Banking Company. From an order overruling exceptions filed to the report of a referee, to whom was referred all claims presented against the corporation disputed by the receivers, and which further ordered that the claim of Peter J. Montague was entitled to be paid a certain sum as a creditor, the receiver appeals. Reversed, and Montague's claim as creditor denied.

See 92 N. Y. Supp. 62.

Argued before O'BRIEN, P. J., and PATTERSON, INGRAHAM, LAUGHLIN, and CLARKE, JJ.

Charles W. Dayton, for appellant.

Charles R. Hall, for respondent.

INGRAHAM, J. The New York Building-Loan Banking Company was organized as a building and loan association. The corporation continued to transact business down to September 12, 1903, on which day a temporary receiver was appointed and on the 24th day of February, 1904, judgment was entered dissolving the corporation and appointing a permanent receiver. Peter J. Montague presented a claim as a creditor of the corporation, which was referred to a referee, who reported in his favor, and the receiver appeals.

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It appeared that in November, 1897, the claimant owned a piece of real property in the county of Kings, upon which there was a mortgage of $25,000. In November, 1897, he applied to the defendant corporation for aid to remove this incumbrance from his property at or before the time that it became due, and offered to pay a premium for priority for such sums as the corporation might deem necessary to advance for that purpose. This was in form of a written instrument submitted to the corporation by which he subscribed for 300 shares of its class A stock. This application, after subscribing for the stock, provided as follows:

"As a member of said corporation I desire from it cash advance of $——— on the above shares, and further advance for the purpose of aiding me in removing the incumbrances, amounting in the aggregate of $25,000 consisting of a first mortgage at 5 per cent. held by Mrs. Harriman, 141 Joralemon St., Brooklyn, N. Y., now resting on my property, which I purchased on or about March, 1893, for $40,000, and which is now well worth the sum of $52,000, and which is situated and described as follows: 4 story and basement marble front store, 60 Court St., Brooklyn, N. Y., and to that end I hereby bid to pay a premium of 25 cents per month on each share, as provided by the articles of the association, for 144 months and will pay the same in advance for priority, for such sums as the corporation may deem necessary to advance to complete the above transaction. * * * If after an examination of the property, and the title thereto, the corporation considers the condition surrounding the property such as to make it a desirable and safe transaction for it to undertake, I agree to make monthly payments of $225.00, which sum includes the dues on the shares subscribed for by me for the purpose of covering the sum that the corporation shall be deemed to have advanced in the transaction, and the interest charges thereon until the said shares shall mature, when the said New York Building-Loan Banking Company shall execute or cause to be executed a full satisfaction of the above-mentioned mortgage or incumbrances, aggregating $24,000, and also the company's usual blanket mortgage to be given by me, which will comprehend the then existing mortgages as well as the premium above mentioned and any money advanced by said corporation. All payments to be made by me under this application shall be deemed to be conditional upon the provisions of chapter 122, p. 234, of the Laws of 1851 of the state of New York, and of the articles of the association and by-laws of the above corporation, although the same may not be fully expressed herein."

This application was accepted, and the claimant executed and delivered to the corporation a mortgage provided for in the application. That mortgage recited the indebtedness of the claimant to the corporation of $30,000, secured by a certain bond or obligation bearing even date therewith, conditioned for the payment of the said sum of $30,000 in accordance with the rules and regulations as set forth in the articles of the association, which amount is agreed to be paid by the payment of the sum of $75 per month, being the monthly dues or installments on 300 class A shares of the capital stock of the corporation subscribed for by the claimant, together with interest at the rate of 6 per cent. per annum, payable monthly, which interest amounts to the sum of $150 per month, making all together the sum of $225, the first monthly payment of which total sum of $225 shall become due and payable on the 1st day of December, 1897, and monthly thereafter until the maturity of the said 300 class A shares of the capital stock of the corporation of which the said Peter J. Montague is a member; and that, to secure the payment of the said sums of money mentioned in the agree-

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ment and of the said bond or obligation with the interest thereon, the premises in question were mortgaged to the corporation. There was also the following provision:

"Provided, always, that as long as the payments above stipulated to be made by the said party of the first part are regularly and promptly made, the said party of the second part hereby binds itself to promptly pay the interest on a prior mortgage or mortgages upon the said premises for $25,000 as it becomes due, and further binds itself to pay off and discharge the amount of the said prior mortgage or mortgages on or before the maturity of the above-mentioned class A shares of the capital stock of the said party of the second part subscribed for by the said party of the first part, and which has been assigned to the said party of the second part as collateral security for the prompt payment of the said monthly dues, and interest, taxes, and assessments hereinafter mentioned; the intent hereof being that until the maturity of the said shares of stock the said premises shall, at the election of the party of the second part, be subject to a prior mortgage or mortgages, and if payment of said mortgage or mortgages shall be demanded, and payment thereof made before the maturity of the said shares, the party of the first part agrees in lieu thereof to execute, at his own proper cost and expense, a further mortgage or mortgages in similar amount at the option of the said party of the second part."

The articles of the association or corporation provide that the object of the corporation has been and is, among other things, to accumulate a fund for paying off incumbrances on lands and for aiding members making improvements thereon and removing incumbrances therefrom. By articles 25 it is provided:

"Every applicant for membership shall subscribe to an application form, in which he shall agree to the articles of association of this corporation and its by-laws and regulations adopted thereunder, and pay such premium or entrance fee per share as the board of directors or executive committee may from time to time determine equitable to the stockholders and to the best interest of the corporation. Such entrance fee or premium shall not be credited to the stock or shares on which it is paid as a payment thereon, or enter into any accounts of the corporation, or in any sense be deemed an asset or liability of the corporation."

Article 26 provides that the shares of the corporation shall be issued in several classes.

Article 27 provides:

"The monthly installments or dues on shares in class A shall be 25 cents, and must be paid on or before the 3d day of each month, in advance, until the money accumulating from monthly dues or installments, together with the profits from interest, premiums, fines, withdrawals, an equitable portion of any reserve or surplus fund or undivided profits, and all other profits accruing to each share, shall equal $100."

Article 49 provides:

"The sum bid as premium by any member for priority of advances or loans on shares shall be deemed to be a sum paid for the right to secure an advance prior to and against all other members who were equally entitled to secure the same, and shall be a profit wholly earned by the corporation."

Article 50 provides:

"All sums paid for priority, as provided in articles 36 and 49, shall be for priority, and not for the use of money."

Under this application for membership in the corporation, the claimant paid to the corporation $225 per month down to and including

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August, 1903. By the application for shares of stock in the corporation, the claimant subscribed for 300 shares of class A stock, and also applied for advances to enable him to remove an incumbrance of $25,000 on his property, and to that end he bid to pay premiums of 25 cents monthly on each share, as provided in the articles of the association, for 144 months, and agreed to pay the same in advance for priority for such sums as the corporation may deem necessary to advance to complete the above transaction. After the corporation accepted the proposition he agreed to make monthly payments of $225, which sum includes all dues on the shares subscribed for by him for the purpose of covering the sum which the corporation shall be deemed to have advanced in the transaction and the interest and charges thereon until the said shares shall mature, when the corporation undertook to have executed a full satisfaction of the mortgage or incumbrance aggregating $25,000 and the company's mortgage to be given to the claimant. By this agreement the corporation obligated itself to discharge the mortgage and all interest on the claimant's property. I can see no basis for the division of the rights accruing on the obligation to either of the parties to this agreement. The claimant, being of full age, entered into the contract, which it must be assumed he supposed would be an advantage to him. In form, he subscribed to the stock of the corporation, and thereby became a member of the corporation. He agreed to pay a premium of $5,000 in monthly payments for securing from this corporation an obligation that it was to pay off this mortgage of $25,000 upon his property before the maturity of the stock to which he subscribed, thus relieving the property from the lien of the mortgage. In full of these various payments that he agreed to make as a consideration for the corporation's promise, he undertook to pay to this corporation a sum of money each month for a certain period, and, if the company had continued in existence and performed its obligations, the object of his becoming a member of this corporation and making these payments would have been secured. If the installments had been paid, there would have been no liability under the mortgage, and no sum would be due under it. What in fact the claimant agreed to do was to pay $225 per month for a certain number of months, and what the corporation agreed to do was, before the last of these payments, to pay off and discharge the mortgage of $25,000 on the claimant's property, and to secure these monthly payments the claimant gave to the corporation a mortgage upon the property.

The corporation having failed before it complied with this obligation, and before the time had arrived in which it was required to have performed it, the question is whether this claimant becomes a creditor of the corporation entitled to be paid as a creditor, or whether as a member of the corporation he shares with the other members of the corporation in its assets after the payment of its debts. The question that has been presented in relation to the determination of the amount due corporations of this kind, upon advances made by the corporations to its members, is not here presented, as no advance was made to the claimant. We have the converse of that proposition, for here the member, having subscribed to the stock of the corporation, has taken

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from it an obligation to pay a mortgage upon his property, and has paid on account of his obligation to the corporation a portion of the consideration that he agreed to pay. If the claimant had not become a member of the corporation by subscribing to the shares of stock, but had occupied the position of an independent party contracting with the corporation, as here indicated, he would be a creditor of the corporation and entitled to recover from the corporation the money that he had paid or the amount of damages that he sustained by reason of the corporation's failure to comply with its contract, and pay off his mortgage. That, however, is not the relation that the claimant bears to the corporation. He has become a member of it, joining in with the other members of the corporation, and, by reason of his membership, the corporation made this agreement with him, and thus he became a part of the corporation itself. It seems to me that his position is somewhat analogous to that of a partner in a copartnership, when the copartners agree among themselves that the profits of the business are to be divided in certain proportions, depending upon the capital contributed by the various members of the copartnership. It may be that, on a distribution of the assets after the payments of its debts, he would be entitled to preference over the other members of the corporation, and that his claim should be paid first. But I cannot see how he can be said to come in as a creditor as distinct from those entitled to share in the distribution of the property of the corporation when made among the members of the corporation. The learned referee has held him to be a member as to his subscription to the stock of the corporation, and as to that he must join with the other stockholders, but, as to the payment of what was called interest on the $30,000 mortgage, he occupied the position of creditor, and not as a member. But this distinction, it seems to me, was unauthorized, and it cannot be sustained.

I think, therefore, that the order appealed from should be reversed, with $10 costs and disbursements, and the application of the petitioner to claim as creditor should be denied, with $10 costs, without passing on his rights as between himself and the other members of the corporation.

PATTERSON and CLARKE, JJ., concur.

O'BRIEN, P. J. (dissenting). Were it not for the two cases of Preston v. Reinhart (Sup.) 96 N. Y. Supp. 851, and Preston v. Lamano (Sup) 93 N. Y. Supp. 210, which are relied upon by the appellant, and which he contends are directly in point, we should not feel called upon to add anything to the reasons assigned by the learned referee for his conclusion in holding in the case at bar that Montague was entitled to be paid, as a creditor, the amount of interest paid by him in excess of the interest paid by the company on the $25,000 mortgage. The fact, however, that both cases referred to are decisions of the Appellate Division in the Second Department, and which, were they directly in point, we should follow, makes it necessary briefly to refer to what we regard as features distinguishing them from the case at bar.

The Lamano action was one brought by the receiver of a building

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loan company to foreclose a mortgage given as collateral security for a loan, and it was there held that the premiums and all other payments must be left out of consideration entirely in fixing the amount due to the receiver by the defendant member. The Reinhart Case is in no way distinguishable in its facts from the Lamano Case, and the rule in the former case was therefore very properly applied in determining the rights of the parties. The principal fact which distinguishes those cases from the case at bar is that here no loan was made, nor was there any consideration moving from the company to Montague. It is true he was a member, having subscribed for stock in the building loan company; but this relation was one which he was obliged to assume as a condition for the agreement which the company made with him that, in the event of the mortgage on the property becoming due before the amounts which he agreed to pay were sufficient to meet the principal, they would loan whatever was necessary to protect him until the time fixed when they agreed to pay the mortgage in full. In noting the distinction, therefore, we must not lose sight of the important fact that in the cases relied upon the company made a loan, whereas in the case at bar they did nothing but take Montague's money upon an agreement to protect him against the foreclosure of a mortgage, which agreement on their part is ended because of the insolvency of the company. This necessarily results in the failure of the consideration upon which alone the company could claim the right to receive from Montague any more money, or, in our judgment, to retain what they had already received. It will not do, in construing the contract entered into by Montague, to make that the principal feature which is really incidental and subsidiary, namely his becoming a member of the loan company, and then, as a result of so regarding him, to hold that he should not only lose the amount which he paid on his stock, but that, in addition, the company should be allowed to retain money which it received without paying or parting with any consideration therefor. In applying to the loan company, what Montague sought to obtain was protection against the foreclosure of a mortgage then on his property; and, in order to procure the agreement from the loan company, it imposed as a condition, not alone that he should take the stock, but that, during the period intervening between his application and the time when they would be called upon to advance the money, he should make payments in excess of the interest due on the existing mortgage; such payments being made in consideration of their promise to protect him against its foreclosure. The company never having been called upon to advance money, and having become insolvent, has been guilty of a breach because of inability to perform its contract, and it would be in the highest degree inequitable to permit the company to retain money which it has received without having parted with any consideration therefor. Nor do I think that the position of the appellant is sustained by the line of argument upon which he proceeds in contending that the contract is to be construed as though the principal feature was membership in the company, which membership imposed upon the member not only the forfeiture of what he had paid upon the stock, but deprived him of any rights to money which he had voluntarily paid, and which the company received and

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insisted on retaining without having parted with any consideration therefor. This process of reasoning also assumed that it is impossible legally to separate the two relations which one could occupy under the contract, viz., as a stockholder and as a borrowing member; and yet, as I read all the text-books and decisions, the two relations are perfectly severable and distinct.

It would serve no useful purpose to collate and discuss what has been said by text-writers and in the numerous decisions on the question, all sustaining this statement, thinking it sufficient to refer to but one—the case of Roberts v. Cronk, 94 App. Div. 171, 88 N. Y. Supp. 103, affirmed 182 N. Y. 546, 75 N. E. 1133, which was similar to the Lamano and Reinhart Cases, in that it was an action by the receiver of an insolvent loan association to foreclose a mortgage executed by a shareholder. In this case it was held that:

"The shareholder is not entitled to be credited upon the mortgage in the foreclosure action with the amount of dues paid by him to the association, or with the amount of the monthly premium which he paid as a bonus for the loan."

In the opinion in that case, however, it was said:

"We cannot express our view of the law defining the rights of the parties, in the circumstances in which they are now placed, better than to reiterate the words of Mr. Justice Williams, in the case of Hall v. Stowell, 75 App. Div. 21, 77 N. Y. Supp. 953: 'When the corporation making the loan goes into the hands of a receiver, and it is no longer able to carry out the agreement, the borrower is relieved also from compliance with the terms thereof, and an equitable adjustment between the parties must be made. In such case the better rule seems to be that the borrower be charged with the money received from the corporation and the legal rate of interest thereon, and be credited with such payments as are referable to the loan itself, and not to the stock. This rule is based upon the theory that the relations of a member as a shareholder and a borrower are separate and distinct; that as a shareholder he should bear his proportionate share of the loss, but as borrower he should have the benefit of the rescission of the contract, and should repay what he has received, less what he has paid on account thereof'—citing Strohen v. Franklin Saving, etc., Loan Ass'n, 115 Pa. 273, 8 Atl. 843; Post v. Building & Loan Ass'n, 97 Tenn. 408, 37 S. W. 216, 34 L. R. A. 201; Endl. Build. Ass'n (2d Ed.) §§ 514, 515, 531; Rochester Savings Bank v Whitmore, 25 App. Div. 491, 49 N. Y. Supp. 862; Breed v. Ruoff, 54 App. Div. 142, 66 N. Y. Supp. 422; and Hannon v. Cobb, 49 App. Div. 480, 63 N. Y. Supp. 738."

If, therefore, we can, as the cases seem to hold, legally separate the relations which Montague occupied as shareholder and under his contract to obtain security against the foreclosure of the mortgage, then it seems to follow that, upon the failure of the company and its consequent inability to carry out its contract to protect him against the enforcement of the lien of the mortgage, the consideration for his payments failed, and he is entitled to such settlement as will return to him all moneys paid by him because of such contract, less the moneys paid out for him. The conclusion of the learned referee that the company did no beneficial thing to or for this claimant is not only supported, but, as we understand it, is not in dispute; and the agreement of the company to do something which its insolvency will now prevent its ever doing, presents an instance where the consideration for the contract has entirely failed. The rule is settled that when money has been paid on

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contract, and the consideration fails, an action for money had and received will lie.

In the Lamano and Reinhart Cases there was a partial performance. The member got the advance and was furnished with money; whereas, in this case, as we have endeavored to point out, Montague got nothing for the money which he seeks to have allowed to him as a creditor.

Thinking, as we do, therefore, that upon the facts, and upon the law applicable to them, there is a clear distinction to be noticed between the cases relied upon by the appellant and the one at bar, we are of opinion that the order appealed from should be affirmed, with costs.

LAUGHLIN, J., concurs.

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## PEOPLE v. SMITH.

(Supreme Court, Appellate Division, First Department. May 11, 1906.)

1. HOMICIDE—MURDER—EVIDENCE—SUFFICIENCY.
   In a prosecution for murder, evidence *held* sufficient to support a conviction.
2. CRIMINAL LAW—APPEAL—REVIEW—HARMLESS ERROR.
   In a prosecution for murder error, if any, in permitting the state to introduce in rebuttal evidence of statements made by deceased before her death relative to the circumstances of the shooting was cured by subsequently striking out the evidence, directing the jury to disregard it, and not mentioning it in the instructions.
   [Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 3141.]

Appeal from Court of General Sessions, New York County.

Thomas C. Smith was convicted of murder and appeals. Affirmed.

See 89 N. Y. Supp. 1098.

Argued before O'BRIEN, P. J., and INGRAHAM, McLAUGHLIN, CLARKE, and HOUGHTON, JJ.

Lorlys E. Rogers, for appellant.

E. Crosby Kindleberger, for the People.

INGRAHAM, J. The defendant was indicted for the murder of one Louisa Smith. There was evidence that the defendant and the deceased had been living together for some years prior to the 9th of February, 1904; that a few days prior to February 9, 1904, the deceased left the defendant, and on the morning of February 9th was with her sister, who lived in a tenement house in West Forty-First street with a man named Brooks who was in the defendant's employ; that on the morning of February 9th the defendant, with two companions, took Brooks, who was drunk, to the rooms in which Brooks lived with the deceased's sister; that in trying to take Brooks to his room, the defendant having become covered with filth, he left Brooks on the stairs and went into a room where the deceased and her sister were in bed; that the defendant requested the sister of the deceased to "wash him off," and took off his coat and vest; that the sister of the deceased washed him, gave him another shirt, which he put on and walked back into the room

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where the deceased was in bed, leaving the sister of the deceased in the kitchen; that in the meantime the deceased had got up and partly dressed herself.

The sister of the deceased, called for the people, testified that the defendant walked back to the parlor, grabbed the deceased by her arm, and said, "Are you going to give me those rings?" that the deceased did not make any reply, and walked on to the bedroom; that the defendant followed the deceased into the bedroom, when he grabbed her by the arm again, and the deceased said, "Don't, Tom, you hurt"; that the witness said, "You children want to stop playing in there," to which the defendant replied, "I am not playing," and the deceased then sat down on the edge of the bed, when the defendant said, "Are you going to give me those rings?" that the deceased made no reply, when the defendant took a pistol out of his pocket and said, "Take that," and discharged the pistol, inflicting the wound which subsequently resulted in her death. After the shooting the police were called in, and the deceased was taken to the hospital.

The defendant was called as a witness, and his account of what happened in the room prior to the shooting was not substantially in conflict with that of the deceased's sister. He stated that they were in the front room of the apartment; that the deceased came into the room, when the defendant said to her, "What did you do with your rings?" to which the deceased replied, "I have got them," and the defendant said, "I thought perhaps you had pawned them," that the defendant then sat down on the lounge near the fire, the deceased standing in front of the door between the frontroom and the bedroom; that the defendant took a revolver from his pocket to transfer it to the other pocket, and it caught in his suspenders; that as he did that, the deceased grabbed the revolver and attempted to make off with it; that the defendant then grabbed the deceased by the right shoulder, taking the revolver from her; that they struggled to the edge of a bed; that the defendant raised the revolver, when it went off; that the deceased's sister who was in the kitchen then ran into the room screaming "Murder!" that the deceased then said, "If you have shot my sister, run," and the defendant said, "What for?" to which she replied: "She don't like you. She will have you locked up"; whereupon the defendant left the house and subsequently went to New Jersey, throwing the revolver in the river as he went across the ferry; that about the 2d of March he returned, and saw the deceased at Bellevue Hospital; that from Bellevue Hospital he took the deceased to the place where he lived in Twenty-Fourth street, stayed with her there until she died on the 12th day of March, and then gave himself up to the police; that after the shooting, and before her death, the defendant and the deceased were married. There was a small amount of insurance on the deceased's life which the defendant claimed, as her husband. It also appeared that the deceased was first taken to Roosevelt Hospital, where an operation was performed for the gunshot wound, and she was then transferred to Bellevue Hospital; that while there, what was called "Resolving pneumonia" developed which was the cause of her death; that after the death there was an autopsy by the coroner's physician, who found a bullet wound over the left hip bone, the bullet was broken in two fragments lying at the level of the fifth

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lumbar spine; that he found a large fecal abscess containing intestinal contents; that this abscess had burrowed down to the brim of the pelvis, and had caused a clot of blood to form in a large vein which was carried by the blood from the pelvis and the leg to the heart, lodged in the arteries supplying a portion of the right lung, and caused an infection of the lung which finally broke down and became gangrenous, and caused the death of the deceased. Thus, the pistol wound caused the abscess, and from that followed the gangrene of the lung which caused death.

I think there is no serious question but that there was presented by this evidence a question for the jury. The case was submitted to the jury by a charge which seems to have protected all the rights of the defendant and to which the defendant made no objection, and took no exception. The defendant insists that error was committed by the court receiving in rebuttal the evidence of two police officers as to declarations made by the deceased to them after the shooting. The circumstances under which this testimony was received were as follows: On the part of the defendant testimony of statements made by the deceased were introduced to the effect that the deceased and the defendant were fooling with the revolver and in some manner the revolver went off; that at first she did not know she was shot, and thought her sister was shot; that she had told a lie about the defendant; that her sister had told her to make these statements; that just before she died she sent for her husband to tell him that she was sorry for what she had said, and that the shooting was an accident. In rebuttal the people called two police officers who saw the defendant at the hospital. One of them testified that the deceased said to him that:

"He [defendant] asked me for these rings and these clothes that he always asked me for every time we had a fight. I told him, 'Now Tom, you get away from here; I don't want nothing to do with you at all.' My sister was out in the other room and she says, 'You children stop your fooling in there.' Tom says, 'I am not fooling.' She says at the same time he pulled a revolver out of his pocket and pointed it at me and said, 'Take that.' That he then ran away."

The defendant moved that his testimony be stricken out and that the jury be instructed to disregard it, on the ground that it was incompetent and irrelevant, to which the court said: "Strike out all except, 'He took the pistol from his pocket and said, " 'Take that." ' " Another police officer was also allowed to testify that the deceased said to him:

"He demanded rings and clothes from her. When she refused to give them, he put his hand in his pocket, pulled the revolver, and fired, and said, 'Take that.' "

The defendant moved to strike out this testimony, and the court struck it all out except as to the shooting, taking the revolver from his pocket, saying, "Take that," and to this the defendant excepted. On the following morning the court made this statement:

"Yesterday I permitted the police officers to testify to certain statements made to them by deceased immediately after the shooting, because it seemed fair. Strike out all the testimony of the two police officers as to the statements made to them by the deceased, and I instruct you, gentlemen, to pay no attention to these statements."

Counsel for the defendant then said:

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"In that view I shall ask your honor to strike out all the testimony of Officer Biggart as to his having any conversation with the deceased."

To that, the court said:

"The fact that he had a conversation, of course, would not prejudice the defendant."

To which counsel for the defendant said:

"The fact that she gave him that picture."

Whereupon the district attorney said:

"I consent that she said 'It was a picture of the defendant' be stricken out, but not the fact that it was a picture."

No further statement was then made by the defendant, and no further requests to the court in regard to this testimony.

The defendant insists that it was error to receive this evidence; the testimony not being sufficient to justify its reception as an antemortem deposition of the deceased. The district attorney claims that this testimony was competent in rebuttal to meet the evidence offered by the defendant of antemortem statements of the deceased that the shooting was an accident, and Carver v. U. S., 164 U. S. 694, 17 Sup. Ct. 228, 41 L. Ed. 602, is relied on. In that case it was held that it was error to refuse to allow the defendant to prove declarations of the decedent tending to contradict declarations admitted on behalf of the people as to whether the statements were admissible as dying declarations or not. In this case the declarations made to the police officers which were admitted were made some time before those introduced by the defendant, when it appears from the testimony that the deceased did not then expect to die. There is no doubt but that declarations made about the same time which were inconsistent with declarations admitted in evidence as dying declarations were admissible; but whether the people could prove declarations by the deceased, made immediately after the wound, when there was no expectation of death, to contradict dying declarations made when the deceased had given up hope of recovery, need not be now determined, as we think that if there was any error in admitting these declarations it was cured by the action of the court in striking out the testimony and expressly directing the jury to disregard it and subsequently submitting the case to the jury without reference to this testimony. The defendant excepted to the admission of the testimony and after its admission moved to strike it out. The court granted that motion. No further request was made in relation to this evidence by the defendant, and it seems to have been disregarded in the subsequent conduct of the trial. Under those circumstances I do not think the defendant can complain of the admission of the evidence.

We think, therefore, that the question as to the admissibility of this evidence is not presented, and that the defendant was not prejudiced by the ruling of the court, to which exceptions were taken. There are other exceptions to rulings on questions of evidence; but we do not think any of them well taken or that they require discussion. A careful examination of the whole record has convinced us that the defendant had a fair trial, and that the verdict of the jury is in accordance with the evidence.

The judgment appealed from must be affirmed. All concur.

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## SOUTH BAY CO. v. HOWEY.

(Supreme Court, Appellate Division, First Department. May 11, 1906.)

1. CORPORATIONS—FOREIGN CORPORATIONS — ACTIONS — COMPLAINT — ALLEGATION OF COMPLIANCE WITH STATUTE—NECESSITY.

Code Civ. Proc. § 1779, authorizes a foreign corporation, subject to the regulations governing domestic corporations, to maintain an action except as otherwise prescribed by law. General Corporation Law, Laws 1901, p. 1326, c. 538, § 15, provides that no foreign stock corporation shall do business in the state without having first procured a certificate that it has complied with the requirements of law authorizing it to do business in the state. The complaint in an action by a foreign corporation against a resident defendant showed that plaintiff was a foreign corporation but did not show that it was a stock corporation. *Held*, that the complaint was sufficient without alleging that the corporation had obtained the certificate authorizing it to do business in the state.

2. SAME—PROOF OF NONCOMPLIANCE WITH STATUTE.

To entitle a defendant in an action by a foreign corporation to a dismissal of the complaint, on the ground that it does not allege that the corporation had obtained the certificate that it had complied with the requirements of law authorizing it to do business in the state, it must appear in the record that the foreign corporation is a stock corporation, and if that fact does not appear from the complaint, it must be proved on the trial.

3. INSURANCE—CONTRACT—PLACE OF MAKING—PROOF.

A fire policy insuring the property of a foreign corporation showed that it was executed by the insurer's agent in New York, but it did not appear where the policy was delivered. The insurer had a home office in New York. *Held* insufficient to show that the contract was made in New York within the statute providing that no foreign stock corporation doing business in the state shall maintain any action in the state on any contract made by it in the state, unless prior to the making thereof it shall have procured the certificate authorizing it to do business in the state.

4. CORPORATIONS—FOREIGN CORPORATIONS—CONTRACTS.

A contract insuring the property of a foreign corporation situate in the state of New York is not embraced within General Corporation Law, Laws 1901, p. 1326, c. 538, § 15, providing that no foreign stock corporation shall do business in the state without having first procured a certificate that it has complied with the requirements of the law authorizing it to do business.

O'Brien, P. J., and Clarke, J., dissenting.

Appeal from Trial Term, New York County.

Action by the South Bay Company against William J. Howey. From an order setting aside a verdict in favor of plaintiff, it appeals. Reversed.

Argued before O'BRIEN, P. J., and INGRAHAM, McLAUGHLIN, CLARKE, and HOUGHTON, JJ.

John D. Lannon, for appellant.

Mortimer M. Menken, for respondent.

INGRAHAM, J. The first question presented on this appeal is whether a cause of action was alleged without an allegation that the plaintiff had obtained from the Secretary of State a certificate that it had complied with the requirements of law which authorized it to do business in this state.

Parmele v. Haas, 171 N. Y. 581, 14 N. E. 440, held "where a foreign

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corporation brings a suit in the courts of this state, and states a good cause of action in the complaint, it will be assumed that it is rightfully in this state and properly in court until the contrary is made to appear." Welsbach Co. v. Norwich Gas & El. Co., 96 App. Div. 52, 89 N. Y. Supp. 284, affirmed, 180 N. Y. 533, 72 N. E. 1152, held on demurrer to the complaint that, obtaining such a certificate being a condition precedent to maintaining an action in the courts of this state, it was a fact necessary to be proven and therefore necessary to be alleged. In the opinion in the Welsbach Case, it was stated that it appeared from the complaint that the corporation was a foreign stock corporation within the provision of section 15 of chapter 538, p. 1326 of the laws of 1901, and the decision of the court rested on that assumption. It therefore appeared from the complaint that the plaintiff was not rightfully within this state, and not properly in court, and it follows that no cause of action was alleged.

The fact that the plaintiff was a foreign stock corporation, within the provision of section 15 of the general corporation law, did not appear in the complaint in this case. The only allegation in this complaint is that the plaintiff is a foreign corporation. The defendants are residents of this state. Section 1779 of the Code of Civil Procedure provides that:

> "An action may be maintained by a foreign corporation, in like manner, and subject to the same regulations, as where the action is brought by a domestic corporation, except as otherwise specially prescribed by law."

The complaint alleges that the plaintiff is a foreign corporation, and that being conceded, it had a right to bring this action, unless restricted by the general corporation law which applies only to stock corporations. I think, therefore, that as it did not appear from the complaint that the plaintiff was a stock corporation, the motion that the complaint should be dismissed because it did not state facts sufficient to constitute a cause of action was properly overruled.

It was then proved that the plaintiff did business within this state, and one of the facts necessary to bring it within the provision of section 15 of the general corporation law was proved; but there was no proof that plaintiff was a stock corporation. I do not know that there is any presumption of law that a membership corporation, organized under the laws of the state of New Jersey could not engage in business as a manufacturer of and dealer in fish fertilizers. I agree with the court below that the provision of the policy as to the maintenance of actions in the Supreme Court of the county of New York was not a waiver of this prohibition contained in the statute which is for the benefit of the state, and not for parties to contract. But to entitle a defendant to a dismissal of a complaint on this ground, it must appear in the record that the plaintiff is a stock corporation. If that fact did not appear from the complaint, it must be proved upon the trial. The answer alleged that plaintiff was a stock corporation, but failed to prove that fact, and was not, therefore, entitled to a dismissal of the complaint on that ground. Nor does it appear in the record that the contract sued on, viz., the policy of insurance, was made by the defendant in this state. The statute provides that no foreign stock corporation doing business in this state shall maintain any action in this state,

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upon any contract made by it in this state, unless prior to the making of such contract it shall have procured the certificate. The complaint alleges that the defendant and others by their attorney or deputy attorney, duly authorized thereto, made, and delivered to the plaintiff a policy of insurance by which they agreed to indemnify the plaintiff against loss or damage by fire. The answer admits the making of the contract; but when and where it was made is not alleged. The contract sued on is annexed to the complaint. In the attestation clause it is stated that:

"In witness whereof, the said underwriters have hereunto respectively subscribed their names and the several sums insured by them separately subject to the limitations herein stated as to their individual liability, by their attorney or their duly authorized deputy, at the city of New York, this 21st day of August, 1902."

It therefore appeared that the instrument was subscribed by the defendant's attorney in fact in the city of New York, but its delivery was an essential part of the contract, and it did not become a contract with the plaintiff until it was delivered. The plaintiff did not execute the policy of insurance, and, therefore, delivery was essential to the making of the contract. It does not appear in this record that the contract was made by the plaintiff, a foreign corporation, by a delivery to it of the policy within this state. The prohibition extends only to contracts made by the foreign corporation within this state. A contract of insurance is made by the insured when the contract is delivered to him and the premium paid, or agreed to be paid. There is certainly no presumption that an insurance company makes its contract of insurance at its home office. Many foreign insurance companies do business within this state and make many contracts of insurance here; and many domestic insurance companies make contracts of insurance in other states and countries, and thus contracts of insurance are made in the state or country in which the policy is delivered. The plaintiff being a foreign corporation, and the defendants having a home office in this state, and executing a policy here, but delivering it in another state, the contract would clearly be a contract made within the state where the policy was delivered, and thus not a contract made within this state.

Applying the principle established in Parmele v. Haas, 171 N. Y. 581, 64 N. E. 440, that "before these statutes were passed the plaintiff could maintain this action under general provisions of law containing no restrictions whatever of the character referred to"; that "the statutes in themselves give no right of action, and are not essential elements of the cause of action stated in the complaint"; that "they are mere revenue regulations, compliance with which is made necessary in order to acquire the right to do business here and to enforce causes of actions in our courts"; that "they may possibly be matters of defense, but not essential to be stated as part of the cause of action or right to sue"; and that "when a foreign corporation brings a suit in the courts of this state and states a good cause of action in the complaint, it will be assumed that it is rightfully in the state and properly in court until the contrary is made to appear," unless it appears in the record that the contract sued on is a contract made by the plaintiff within this state, the objection would not prevent the plaintiff from

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maintaining its action. The Welsbach Case, supra, relied on by the defendant, does not in any way overrule the Parmele Case, for the question there arose upon a demurrer to the complaint, and in deciding the question the court assumed that from the complaint it appeared that the contract sought to be enforced was within the statute prohibiting such a contract from being enforced in the courts of this state. The defendant did not demur to this complaint, but answered, alleging, as an affirmative defense, that the contract sought to be enforced was within the prohibition of the statute. It was thus bound to prove the facts bringing the contract to be enforced within the statute, and, having failed to prove that this contract was delivered within this state, there was no proof that the defendant made the contract here, and that the contract was one which a foreign corporation could not enforce here.

In this connection, the question arises whether a contract of insurance is such a contract as was embraced within the prohibition contained in section 15 of the general corporation law. The policy of insurance was not a contract made in the usual course of its business carried on here. The intent of the statute is to prevent a foreign corporation from transacting within this state the business for which the corporation was organized without having procured the certificate therein required. I assume that a foreign corporation, having property in this state, could enter into a contract with an insurance company to insure that property without violating this statute; and although such a corporation did business in this state, a contract of insurance would not be a violation of the statute as a contract incapable of enforcement here. I assume that if this corporation had made a contract to sell its manufactured plants in this state, and had taken a mortgage to secure the payment of the purchase money, this statute would not prevent the enforcement of such a mortgage; and so, a contract by a foreign corporation having property within this state with an insurance company to indemnify it against a destruction of that property by fire, is not a contract relating to its business which is prohibited by this statute. The prohibition as to a foreign stock corporation enforcing contracts made in this state must be read in connection with the provision of the statute which prohibits a foreign stock corporation other than a moneyed corporation from doing business in the state and making contracts in relation to such business. It appears that this company was engaged in manufacturing fertilizers in this state. Undoubtedly the sale of such goods here without obtaining the certificate would be prohibited by this provision of the statute, and maintaining an action for the recovery of the purchase price of such goods manufactured and sold in the regular course of its business in this state is prohibited; but when it comes to the ordinary contracts for the protection of its property, not a part of its general business, such contracts are not within those contemplated by this provision.

For these reasons, I think the order setting aside the verdict, and granting a new trial should be reversed, and the motion to set aside the verdict denied, with costs. All concur, except O'BRIEN, P. J., and CLARKE, J., who dissent.

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## RHODES v. RICE et al.

(Supreme Court, Appellate Division, First Department. May 11, 1906.)

PLEADING—BILL OF PARTICULARS—KNOWLEDGE OF PARTIES.

Where, in an action for a certain sum for plaintiff's services in bringing about a sale of defendants' property, one of defendants, on a motion for a bill of particulars, filed an affidavit in which he denied that he had any knowledge of the matters alleged in the complaint, a bill should have been ordered showing whether the agreement was oral or written, and, if the former, the time when, place where, and name or names of the persons with whom made, and the substance thereof; and, if the latter, a copy should be delivered and the bill should specify what services were rendered of the value of the amount sued for.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, §§ 954, 958, 960.]

Appeal from Special Term, New York County.

Action by Charles M. Rhodes against Wandell P. Rice and others. From an order denying a bill of particulars, defendant Wandell P. Rice appeals. Reversed, and motion granted in part.

Argued before O'BRIEN, P. J., and McLAUGHLIN, INGRAHAM, CLARKE, and HOUGHTON, JJ.

Nicholas F. Lenssen, for appellant.

E. Ormonde Power, for respondent.

McLAUGHLIN, J. The complaint in this action, except the formal parts of it, is as follows:

"First. That between the 1st day of January, 1899, and the 1st day of September, 1900, the plaintiff performed, at the special instance and request of the defendants, certain work, labor, and services for the defendants in procuring the sale of real and personal property of the Lancaster Caramel Company to the American Caramel Company.

"Second. That as a result of the plaintiff's work and services the said sale of the Lancaster Caramel Company to the American Caramel Company was brought about and consummated.

"Third. That the fair and reasonable value of the plaintiff's services is the sum of two hundred thousand ($200,000) dollars, which sum the defendants agreed to pay to the plaintiff, and no part of which has been paid."

Judgment was demanded for this sum, together with interest thereon from the 1st of September, 1900. The appellant interposed an answer which denied each and every allegation of the complaint, and after issue had been joined he moved that the plaintiff be required to give a bill of particulars which should state, among other things, whether the services which were alleged to have been rendered at the special instance and request of the defendants were embodied in a written or in an oral communication; if in writing, that a copy of such writing be furnished, and, if oral, that the time, place, and substance of the communication and the name or names of the defendants with whom had, be stated; also that he should specify of what the services consisted, the nature and amount thereof, and the time and place of performance; that he should also state in what manner the alleged sale was caused or contributed to by his alleged work and services, and in addition that he should specify which of the defendants agreed to pay the sum of $200,000, and, if such agreement be in writing, that a copy



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be given, and, if oral, that the time when and the place where the oral communication was made, and also the substance of that, should be given. The motion was made upon the pleadings and on the appellant's affidavit, in which he denied that he had any knowledge of the matters alleged in the complaint, and that it was necessary and material for him, in order that he might properly defend the action, to be furnished with the information sought. The affidavit contained a further statement to the effect that the appellant had not, at any time, been in copartnership with the four other defendants, and that he had no knowledge plaintiff had been employed, or that he had rendered any service in connection with the transfer of the property referred to in the complaint. The motion was denied, and he appeals.

I am of the opinion this order should be reversed, and the motion granted to the extent of requiring plaintiff to state whether the agreement under which he claims to have rendered service was oral or in writing; if the former, to state the time when, the place where, and the name or names of the person or persons with whom made, and also the substance thereof; if the latter, to deliver to the appellant a copy of the same. Plaintiff should also be required to specify that services were rendered that were of the value of $200,000. If the appellant's affidavit be true, that he has no knowledge or information as to the alleged claim of the plaintiff, then he ought to be furnished with this information, to the end that he may properly prepare for the trial of the action. The object of a bill of particulars is not only to enable a party to properly prepare his pleading for trial, but to limit the scope of the inquiry at the trial, and thus shorten it, and whenever facts are presented from which the court can find that either is the object of the motion, a bill of particulars is ordered to the extent required for such purpose. Lynch v. Dorsey, 98 App. Div. 163, 90 N. Y. Supp. 741; Alleghany Iron Co. v. Chesapeake & Ohio R. R. Co., 69 App. Div. 87, 74 N. Y. Supp. 514; Fruin-Bambrick Construction Co. v. Marks, 48 App. Div. 51, 62 N Y. Supp. 621.

The order appealed from therefore should be reversed, with $10 costs and disbursements, and the motion granted to the extent above indicated, with $10 costs. All concur.

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## WALTER v. RAFALSKY et al.

(Supreme Court, Appellate Division, First Department. May 11, 1906.)

CONTRACTS—CONSTRUCTION—JOINT OBLIGATION.

Where an instrument recited a valuable consideration, and was under seal, and was between a corporation and three individuals as parties of the first part and plaintiff as party of the second part, and it recited the previous execution of various agreements between the parties relative to the formation of the corporation and the purchase and sale of shares, which agreements imposed liabilities on all the individuals, and provided that plaintiff should sell certain stock in the corporation to one of the first parties, and that, by the making of the agreement, the previous contract should be canceled, and each of the parties released and discharged from all liabilities, and that upon performance by plaintiff the parties of the first part would release him from all claims against him, and that upon the first payment for the stock plaintiff would release all defendants, the first parties were bound jointly, and a breach of the agreement to purchase the stock from plaintiff gave a cause of action against all the first parties.

Patterson and Clarke, JJ., dissenting.

Appeal from Special Term, New York County.

Action by Gustave E. Walter against Rosalie L. Rafalsky and others. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Reversed.

Argued before O'BRIEN, P. J., and PATTERSON, INGRAHAM, LAUGHLIN, and CLARKE, JJ.

Walter Carroll Low, for appellant.

Frank M. Avery, for respondents.

INGRAHAM, J. The action was to recover damages for the breach of a written contract, under seal, a copy of which was annexed to the complaint. The complaint alleges the execution of the agreement; that the plaintiff has in all respects duly performed it; that the defendants and each of them have failed to perform it and have failed to pay to the plaintiff the sum of $6,567.68, as therein provided, nor has any part thereof been paid, although payment has been duly demanded; that by reason of the facts aforesaid the plaintiff has sustained damages in the sum of $6,567.68; and the complaint demands judgment for that amount. The agreement is between these four defendants, as parties of the first part, and the plaintiff, as party of the second part. It recites an agreement dated December 14, 1897, between the plaintiff and the defendant Rosalie L. Rafalsky relative to the organization of a corporation and the transfer of $10,000 of the capital stock thereof to the plaintiff, and the assumption of certain liabilities by the palintiff; that on the same day the defendants Rosalie L. Rafalsky and Mark Rafalsky entered into an agreement with the plaintiff relative to the repurchase of the said stock from the plaintiff by the said Rosalie L. Rafalsky and Mark Rafalsky, and on the same date an agreement whereby Rosalie L. Rafalsky entered into an agreement with the plaintiff relative to a division of the dividends upon the stock of the corporation and in relation to the expense incurred; an agreement made on the 7th day of April, 1898, between the defendant Mark Rafalsky and the plaintiff relative to the purchase of the stock of the plaintiff in the same corporation, known

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as the Imperial Construction Company; an assignment by the defendant Rosalie L. Rafalsky to Albert S. Weill of the agreement relative to the repurchase of the stock from the plaintiff and an assignment by Weill to the defendant Bertrem Levyn; and that the plaintiff had agreed to sell all his stock in the said company, being 100 shares, to said Levyn. The agreement then witnessed that, in consideration of the premises and the sum of $1 and other valuable considerations, the receipt whereof was acknowledged, it was agreed (1) that Levyn, one of the parties of the first part, should purchase from the party of the second part, and the party of the second part should sell to said Levyn, 100 shares of the stock of the Imperial Construction Company for the price or sum of $6,567.68, to be paid for as therein provided. It was further provided that the four several agreements thereinbefore recited should be canceled, and each of the parties released and discharged from all liabilities under said contract, and upon the performance by the plaintiff of the agreement the parties of the first part jointly and severally released the plaintiff from all claims against him, and, upon the first payment being made for the purchase of the stock, the plaintiff released all of the defendants from all claims that he had against them. This agreement was duly executed by all the parties to the action.

The learned trial judge sustained this demurrer upon the ground that, while all the defendants are grouped together as parties of the first part, they are bound only to the extent of their individual promises, express or implied; and that obligation assumed in the first paragraph of the contract affected the defendant Levyn only, and the demurring defendants cannot be held liable for his breach; and to sustain this conclusion two cases were cited. Union Ins. Co. v. Central Trust Co., 157 N. Y. 633, 52 N. E. 671, 44 L. R. A. 227; Berry v. Wood, 152 N. Y. 540, 46 N. E. 952. In Berry v. Wood there were three parties to the agreement, and the promises of the respective parties to each other were separate and clearly defined, and, aside from these stipulations between the parties to the action, the defendant also agreed to employ Berry at a salary of $4,000 per year for three years in consideration of his services for that period, and Berry agreed to enter the service of the defendant upon the terms and conditions aforesaid. In construing this contract the court said:

> "Every party to such a contract is bound only to the extent of the promises made by him, and any party thereto may insist upon the performance of any promise made to him or for his benefit by the party or parties who made it. The mere fact that there are three parties to the agreement does not enlarge the effect of any promise, except as it may extend the advantage to two persons, instead of one, where that is the intention. When the promise is to two jointly, a single act of performance satisfied it; but, when it runs to two severally, there are two promises in fact, and each must be performed."

And in speaking of the contract under consideration it was said:

> "It will be observed that the stipulations in the contract before us are not all common to the three parties. While the defendant is interested in every stipulation, the interests of the others are mainly severed."

In Union Insurance Company v. Central Trust Company the agreement before the court was a quadripartite agreement. The plaintiff was party of the first part, but the defendant was not a party. This agreement provided that all matters embraced in certain actions, as well

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as all other actions or causes of action pending or existing between the parties, should be submitted to arbitration; that a judgment on the award might be entered in the Supreme Court; and that such award should be final. One of the parties deposited with the defendant certain stock to secure the payment of an award. The action was to have the stock sold, and the plaintiffs paid out of the proceeds their costs, expenses, and damages in preparing for the arbitration before its revocation; and it was held that the action could be maintained, and that the stock was liable for the amount of such damage. Neither of these cases seems to be controlling; for, recognizing the rule stated, the question is as to what the parties of the first part to this agreement undertook to do. The instrument itself recites a valuable consideration, and, being under seal, a consideration is presumed. Section 840, Code Civ. Proc. The agreement is between the parties of the first part (defendants) and the party of the second part (plaintiff). By it, it is agreed that the said Levyn, one of the parties of the first part, should purchase from the party of the second part, and the party of the second part should sell to the said Levyn, 100 shares of the stock of the said Imperial Construction Company; and it was also agreed that the four several agreements, two of which provided for the purchase of this stock by two of the defendants from the plaintiff, should be canceled, and each of the parties released and discharged from all liabilities thereunder. Then follows the provisions that, upon the performance of this contract to purchase the stock, the defendants were released from all liability to the plaintiff, and the plaintiff from all liability to the defendants. The clear intent of the parties was to release the reciprocal obligations which had been imposed upon the parties to the agreement by the contracts canceled and the obligations of the present contract substituted. These obligations were that the parties of the first part (defendants) agreed that Levyn should buy the stock, and the party of the second part (plaintiff) would sell it, and that the contracts which imposed obligations upon the parties should be released. It seems to me that there was here a distinct promise by the defendants jointly that Levyn should buy the stock, as well as an obligation on the part of the plaintiff that he would sell the stock to Levyn, and that in consideration of this obligation the contracts were released and canceled. By the making of the agreement all the defendants obtained an advantage in the cancellation of the contract, and as a substitute under the contract for their obligation they agreed that Levyn should purchase the stock. If plaintiff had refused to sell the stock to Levyn, and all the parties of the first part had sustained damage, the defendants would have had a cause of action against the plaintiff. The agreement of the defendants was joint, and it imposed on them a joint obligation, as well as it gave them a joint advantage.

I think therefore that the defendants were bound by their joint promise that Levyn would buy the stock, and that a breach of that promise gave to the plaintiff a cause of action against all the defendants. There being thus a contract made by the defendants with the plaintiff, and a breach of that contract by the defendants, the plaintiff had a cause of action to recover the damages sustained thereby.

It follows that the judgment appealed from must be reversed, with

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costs, and the demurrer overruled, with costs, with leave to the defendants to withdraw the demurrer and answer on payment of costs in this court and in the court below.

O'BRIEN, P. J., and LAUGHLIN, J., concur. PATTERSON and CLARKE, JJ., dissent.

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## ROBINSON v. INTERURBAN ST. RY. CO.

(Supreme Court, Appellate Division, First Department. May 11, 1906.)

1. APPEAL—REVIEW—DISCRETION OF TRIAL COURT—NEW TRIAL.
   The action of the trial court in setting aside a verdict as against the weight of evidence will not be disturbed on appeal unless there was clearly an abuse of discretion.
   [Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3871.]

2. SAME—GRANT OF NEW TRIAL.
   In an action against a street railway for personal injuries, evidence *held* not so clearly sufficient to support a verdict in favor of plaintiff as to render it an abuse of discretion on the part of the trial court to set aside the verdict.
   [Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3871.]

Patterson, J., dissenting.

Appeal from Trial Term, New York County.

Action by Margaret Robinson against the Interurban Street Railway Company. From an order setting aside a verdict in favor of plaintiff, and granting a new trial, plaintiff appeals. Affirmed.

This is an action for damages for personal injuries sustained by the plaintiff by reason of the alleged negligence of the conductor of one of defendant's street cars. The plaintiff was thrown and injured while attempting to board one of defendant's cars, the accident happening at about midday. By the testimony of the plaintiff, who was uncorroborated as to the material details of the accident, she was waiting on the corner of the street when the car approached; she signaled to the conductor to stop the car; the conductor stopped the car for her; and just as she was getting on the car, just as she had one foot on the step, the conductor signaled the car to go ahead, the car started, and she was thrown to the street. The conductor of the car, the only witness for the defendant, and who had left the employ of the defendant about two years before the trial, stated that he saw the plaintiff upon the street corner; that he called out "East Side car"; that plaintiff made no move to get on the car and gave no indication of an intention to do so; that just as the car started slowly ahead after he had signaled, his "side vision caught a figure, like a shadow," and he perceived that some one was getting on the car and saw "the figure sliding right down by the handle"; that he immediately gave three bells, and the car came to a stop within a few feet. There was also conflicting testimony by experts as to whether the locomotor ataxia from which the plaintiff was suffering at the time of the trial could be attributed to the accident, and also considerable testimony given by witnesses for the defendant tending to show that plaintiff's character was bad. The jury rendered a verdict in favor of the plaintiff for $7,500. Upon motion by the attorney for the defendant the court set aside the verdict, as against the weight of evidence, and granted a new trial, and it is from the order entered on such motion that this appeal is taken.

Argued before O'BRIEN, P. J., and PATTERSON, McLAUGHLIN, LAUGHLIN, and HOUGHTON, JJ.

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Robert C. Taylor, for appellant.
Charles F. Brown, for respondent.

O'BRIEN, P. J. Upon the question of whether the learned trial court erred in setting aside a verdict we must keep in mind the rule which controls an Appellate Court in approaching the consideration of that question, and which requires that it should not disturb the disposition made unless it appears that the discretion vested in the trial judge has been exceeded or abused. As said in Serwer v. Serwer, 71 App. Div. 415, 75 N. Y. Supp. 842:

"When a verdict has been set aside by the trial court in the exercise of its discretionary power as against the weight of evidence, its determination ought not to be reversed by an appellate tribunal unless it is made to appear beyond all cavil that great injustice has been done to the defeated party, or unless there has been an abuse of discretion. Bannon v. McGrane, 45 N. Y. Super. Ct. 517; Slater v. Drescher, 72 Hun, 425, 25 N. Y. Supp. 153."

And in Silverman v. Dry Dock, &c., R. R. Co., 69 App. Div. 23, 74 N. Y. Supp. 481, it is said:

"While it may be that there was not that preponderance of evidence which would justify an appellate tribunal in setting aside the verdict in the first instance, nevertheless it will not disturb the discretion of the trial court in so doing unless an abuse of that discretion appears."

With this rule in mind, we have examined the record on the present appeal, and without expressing our view as to the impression produced by the plaintiff's testimony which was the evidence upon which the verdict practically rested, it is sufficient to say that it was neither clear nor convincing upon the question either of the defendant's negligence or of her own freedom from contributory negligence. When first examined on the trial her account did not make it appear just how the accident happened, and it was only after she had rested and a motion had been made to dismiss the complaint that she was permitted to reopen the case, and to again testify, and it was upon that examination conducted by the learned trial judge that sufficient evidence was elicited to carry the questions to the jury. Contradicting her version of the accident, we have not only the inherent improbabilities of the occurrence as she details it, but we have evidence on behalf of the defendant which, if credible, should have led the jury to find a verdict in favor of the defendant, and had the jury done so, and the court refused to set it aside, we doubt if this court would have interfered with the decision thus reached.

This summary of the evidence, as bearing upon the weight in favor of and against plaintiff's right to recover, sufficiently indicates what impression a reading of this record will produce. In addition the trial judge had the advantage of seeing the witnesses and their manner of testifying, an advantage which is not to be lightly disregarded where the question is presented as to the right which is vested in him to exercise his discretion on a motion to set aside a verdict. The character of witnesses as affecting their credibility is also an element, the force of which can with greater certainty be determined by the trial judge. It would serve no useful purpose to detail the evidence disclosed by this record bearing upon the past habits of the plaintiff and necessarily

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affecting her character further than to remark that it was entirely proper and competent for the learned trial judge, upon the motion to set aside the verdict, to determine how far this militated against the weight, which should be attached to her version of the accident. There is another consideration which should be referred to briefly. The jury concluded to accept her version of the accident and that they were greatly prejudiced against the defendant because of the effort made to exaggerate her failings and associations, bad as they were, is shown, we think, by the size of the verdict, which, considering the position in life, the extent of the injuries, and the age of the plaintiff, was excessive. Were this the only question on this appeal it could be remedied. In Pesant v. Met. St. Ry. Co., 96 App. Div. 634, 89 N. Y. Supp. 314, where a similar question was involved, this court reversed the order, and reinstated the verdict upon condition that the plaintiff would stipulate to reduce it to a sum commensurate with the damages proved. In that case the real conflict was with respect to the amount of damage; whereas, in the case at bar, the question of whether the plaintiff sustained the burden of proof by establishing the two elements, of negligence and freedom from contributory negligence, by a fair preponderance of evidence was, as we have endeavored to point out, not free from doubt.

The learned trial judge having after consideration resolved the question of the weight of evidence adversely to the plaintiff, we are unable to say that he erred or exceeded the discretion which was vested in him in ordering a new trial. We have not the disposition, even if we had the power, to lightly interfere with the discretion of a trial judge in setting aside a verdict because it is a power which is rightly vested in him, and which he is justified and should exercise in every case where he believes that the jury have been affected either by prejudice or passion, or where, upon all the facts, he thinks that in the interest of justice there should be a new trial before another jury.

This was peculiarly a case in which the court had the right to determine whether, in the interests of justice, a new trial was proper; and there being nothing in the record from which we can conclude that his discretion was improperly exercised, the order setting aside the verdict must be affirmed, with costs. All concur, except PATTERSON, J., who dissents.

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## In re SCHMID.

## In re SPRATHOFF'S ESTATE.

(Surrogate's Court, Kings County. March 8, 1906.)

APPEAL—SETTLEMENT OF CASE.

Code Civ. Proc. § 2545, in relation to Surrogate Courts, provides that an exception may be taken to a ruling by a surrogate upon the trial by him of an issue of fact, including a finding or refusal to find on a question of fact in a case, where such an exception may be taken to a ruling of the court upon a trial without a jury of an issue of fact; and section 2576 provides that an appeal from a surrogate from a decree rendered on the trial of an issue of fact must be heard upon a case to be made and settled by the surrogate, as in making and settling of a case upon an appeal in an action. *Held* that, where an application for the revocation of letters of administration was heard by the surrogate on the moving papers and replying affidavits and exhibits, an application to settle a case on appeal and to make findings will be denied as not necessary to review on appeal; and appellant must print as his papers on appeal the papers recited in the order determining the proceedings, which should be certified by the surrogate, or stipulated to be the proper papers, in accordance with the rules governing such practice.

Application by Anton Schmid for a settlement of a case on appeal and for findings, on the denial of an application by him for the revocation of letters of administration issued to Johanna Ilg on the goods, chattels, and credits of Louise Sprathoff, deceased. Application denied.

See 98 N. Y. Supp. 1114.

Paul C. Schnitzler, for the motion.

Francis B. Mullin, opposed.

CHURCH, S. The appellant in this matter presents an alleged proposed case on appeal and also a number of requests to find, and contends that, unless the papers which he presents as a case on appeal are settled, or unless the proposed findings are passed upon, there can be no review or appeal of the order made by this court.

The question, when a proposed case should be made on appeal from the Surrogate's Court, or when findings should be signed upon the rendition of the decision of the surrogate, seems to perplex a great many, and there is a constant discussion arising upon various appeals as to what is the proper practice. It seems in order, therefore, in disposing of the question in this case, to outline my view upon this subject, which may be regarded by the bar as finally settling the line of conduct on this subject, unless such decision is modified by the Appellate Division.

Beginning with the question of filing exceptions to a decision of the surrogate, we find the provisions in relation thereto contained in section 2545 of the Code of Civil Procedure. It will be noticed that it states that an exception to a ruling of the surrogate can be taken "upon the trial by him of" an issue of fact, including a finding or a refusal to find "upon the question of fact," and then provides that it shall be in the same cases of the court upon a trial without a jury of an issue of facts, and that the provisions of the Code relating to a trial by the court without a jury shall apply to a trial by the surrogate. Section 2576 of the Code provides that it is necessary to make and settle a case on appeal when such appeal is taken from a decree rendered "upon

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the trial by the surrogate of an issue of fact." When we find these two sections of the Code both referring specifically to "a trial by the surrogate of an issue of fact," it is but fair to assume that the framers of the Code used the word "trial" in the ordinary sense in which it is employed by lawyers and courts, viz., where there was an issue of fact and testimony taken thereon, and that it was not intended to cover every hearing in the Surrogate's Court, the basis of which may consist solely of affidavits, records, or certified copies of documents; in other words, it is apparent that these provisions of the Code were designed with the intention of making the practice in the Surrogate's Court substantially the same as the practice in the Supreme Court. This view is taken by Redfield (6th Ed., Section 114):

"The purpose of this requirement was to assimilate the practice on appeals from a surrogate's decree in the prescribed cases to that which regulates appeals from a judgment rendered by a court or a referee in an action."

If it was the intention of the framers of the Code that every determination of the surrogate which was to be the subject of review could only be reviewed in the event of there being findings of fact and a proposed case on appeal settled, then the Code would not specially refer to a "trial of an issue of fact," but would simply state that in all cases findings should be made, and in all appeals a case should be prepared and settled. Not having done this, it is evident it was intended that upon the trial of an issue of fact the same practice should be adopted upon such a trial and upon the appeal as would prevail upon such a trial by the court without a jury and appeal therefrom, and that in all hearings where the hearings proceeded simply upon affidavits and other documents the entry of a simple order thereon was all that was required, and that an appeal from such order would bring up the question on appeal the same as an appeal from an order granting or denying a motion in the Supreme Court.

In the case at bar the matter was heard upon the papers of the moving party and also the papers submitted in opposition thereto. While findings were presented in the first instance, they were unnecessary, and a simple order disposing of such proceedings was ample to accomplish the result desired.

A careful examination of the various cases referring to the requirement of findings in the Surrogate's Court fails to show anything in conflict with the views herein expressed. In Matter of Widmayer, 52 App. Div. 301, 65 N. Y. Supp. 83, the appeal was from a trial upon the probate of a will. In Matter of Daymon, 47 App. Div. 315, 61 N. Y. Supp. 997, it appeared that the hearing was had before the surrogate upon the final accounting, at which testimony was taken; in other words, a trial of an issue of fact was had. Matter of Roberts, 74 Hun, 630, 26 N. Y. Supp. 838, was a precisely similar proceeding. Matter of Sprague, 125 N. Y. 732, 26 N. E. 532, was also a trial of an issue of fact; so that it appears in all these cases that oral testimony was taken, necessitating findings of fact and the preparation of a case on appeal. On the other hand, the General Term of the First Department in Matter of Jackson, 32 Hun, 200, expressly recognizes the distinction suggested in this opinion, and sustains the correctness of the same in the following language of Judge Daniels:

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"The objection has been taken that the points urged in support of the appeal are not regularly before this court for its decision, for the reason that no case has been prepared or made as that has been directed by section 2576 of the Code of Civil Procedure; but, as the decree was not made upon a trial by the surrogate on an issue of fact, it is not within the practice prescribed by this action. The objections taken to it arise upon the decree itself and the will of the testatrix, and they may properly be heard and disposed of without a case, according to the practice provided for by the latter part of section 998 of the Code."

The Appellate Division of this department has also recognized this as the correct practice. Matter of Marx, 106 App. Div. 212, 94 N. Y. Supp. 151. That case is on all fours with the case at bar, as it was a proceeding to remove an executor, and was heard on the moving papers and the replying affidavits and exhibits. An order was made denying the application, from which an appeal was taken. On the appeal the respondent strenuously urged that it could not be reviewed by the court, as there were no findings or requests to find. The court, however, ignored this contention, and considered the case on its merits, which they would not have done if they had regarded the above point well taken. The appellant should therefore print as his papers on appeal the papers recited in the order determining the proceeding, which papers should either be certified by this court or stipulated to be the papers by the attorney for the respondent, in accordance with the rules governing such matters.

The application to settle the case on appeal or to pass upon the requests to find is denied.

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(49 Misc. Rep. 161.)

## In re WARD.

(Surrogate's Court, Cayuga County. January, 1906.)

1. GUARDIAN AND WARD—ACCOUNTING—INTEREST.

In proceedings to compel a general guardian to settle his accounts, where it appears that he received from a former guardian, a larger sum than he charged himself with, which is included by a supplemental account, but there is no evidence as to what he did with the money, his account may be charged with such amount as such sum would have earned if deposited in a bank, from its receipt to the date of settlement.

2. SAME.

A general guardian who was subsequently discharged had paid to his successor, out of the ward's funds, money as a loan to be used to defray the funeral expenses of a brother of the second guardian. The succeeding guardian acknowledged the indebtedness to the ward, though incurred before his appointment. *Held*, that his account could be surcharged with such sum, together with interest thereon.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Guardian and Ward, § 321.]

3. SAME—MAINTENANCE OF WARD.

A guardian on an accounting is entitled to such a credit for board and maintenance of the ward as would have been authorized on an application made in advance.

4. SAME—COMMISSIONS—COSTS.

Where the facts show a disposition on the part of a guardian to deplete the funds of the ward, he is not entitled to commissions, and is chargeable with costs of accounting.

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In the matter of the judicial settlement of Frank Ward, guardian of Susie Ward Dresch. Decree entered.

Frank S. Wright, for Susie Ward Dresch.
John Kingston, for guardian.

WOODIN, S. This is a proceeding instituted by the above-named ward, upon her attaining the age of 21 years, to compel her general guardian to account. The present guardian, a brother of the ward, was appointed upon her application, after reaching the age of 16 years, to succeed Sister De Chantel, a former guardian appointed while the ward was under 14. Upon the return of the citation in this proceeding, the guardian filed an account, in which he charged himself with the amount of $393.29, principal, and total interest, $27.10, and credited himself with numerous disbursements, amounting to $338. The guardian was examined at considerable length concerning the amount of money received by him and the disbursements made by him, and it appears that he had an informal settlement with the former guardian, after his appointment, and that she turned over to him the funds then in her hands belonging to the minor. Later in the proceeding, after an examination had been made of the bank records, from which it appeared that the guardian had received $75 more than he charged himself with, he filed a supplementary account, including this $75, which makes a total, including interest, of $495.39. In this supplemental account, however, he has stricken from the credit side certain items which were plainly improper and has included an item of $243, being a charge for 81 weeks' board of the ward at his house. Objections to the account were subsequently filed, demanding that this item of $243 for board be stricken from the account; also, that the account be surcharged with the amount of $25 received by the present guardian from the former guardian, prior to his appointment; and that he be charged with interest on the $75 above mentioned, and that he be denied his commissions and charged personally with the costs of this proceeding. Concerning the question of surcharging the account with interest on the $75 referred to, it is now conceded that the guardian received from the former guardian, at the time of his appointment, $495.39, instead of $420.39, as charged in his original account; but he only charges himself with bank interest upon an amount less the $75. It appears that the guardian kept all of the funds of the minor on deposit in the bank, with the exception of this $75, and such amounts as were drawn from the bank, from time to time, for expenditures on behalf of the ward. No proof is offered by the guardian as to what investment or other disposition of this $75 was made by him, and it necessarily follows that he must be charged with interest on that sum from the time he received it to the present time. His account may, therefore, be surcharged with an amount of interest which said sum of $75 would have earned if the same had been deposited in the bank with the other funds from the time of his appointment to the present time.

In regard to the item of $25, alleged to have been paid to the present guardian by the former guardian, it is practically conceded that the present guardian had this money, and it appears from the uncontradicted testimony of Sister De Chantal, the former guardian, that the

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money was paid out of the minor's funds to the present guardian as a loan, on the express promise to repay the same; the money to be used to help to defray the funeral expenses of a deceased brother. It is contended, however, by the accounting guardian, that this loan, if it should be held to be such, was one unauthorized by law, and was made by the former guardian at her own risk, and that the ward must look to the former guardian for this money; this court not having jurisdiction to surcharge the account with this item. It has been held that the Surrogate's Court has no jurisdiction to try the question of the guardian's alleged indebtedness to the ward, where that alleged indebtedness was incurred prior to the guardian's appointment, and the fact of the indebtedness was expressly denied by the guardian. But, in this case, the fact of receiving the money by him is not controverted, and inasmuch as he had the same, clearly knowing that it was taken out of the estate of the minor, it seems to me that this indebtedness passed to him from the former guardian as a chose in action against himself individually, for which he must account. The account may therefore be surcharged with the sum of $25 and interest thereon from the time of his appointment to the present time, equal to the amount it would have earned had it been deposited in the bank with the other funds.

This leaves for discussion the item of credit of $243 for board and lodging alleged to have been furnished by the guardian to the ward. It appears that, subsequent to the appointment of the present guardian, he took the ward into his home and provided board and lodging for her. The guardian and his wife both testified that the ward came to live with them on the 7th of March, 1900, and was boarded and lodged by them from that time until January 22, 1902, with the exception of the three different times that the ward was at the hospital during that period. It is admitted by the ward that she was boarded at the guardian's home for a part of the period in question; but she testifies positively that between the two dates above mentioned she was not living at the guardian's house, except a part of the time, and during the remainder of the time she was engaged as a domestic elsewhere, and that during the time of this employment she was not boarding or lodging at the guardian's home. She gives, positively, the names of the people by whom she was employed and with whom she lived, and the dates of entering and leaving such employment in each case. No attempt was made to dispute this in rebuttal. I think therefore it appears beyond doubt that, during the period in question, the ward was away from the guardian's home and board for a period amounting to one year, three months, and seven days, including the time she was at the hospital, made up as follows: At the hospital, 3 months and 4 days; at Mrs. Hull's, 1 month and 17 days; at Mrs. Stevens', 5 months and 23 days; at Miss Stone's, 4 months and 23 days. No claim, however, is made for board by the guardian for the time the ward was at the hospital. No application was ever made to the court for authority to expend any of the ward's estate for board and maintenance, but, I believe, the rule is well settled that the court, upon the accounting of the guardian, may make such allowance for past support and maintenance of the ward as it might have made if application therefor had been made in the first place. Of course, the guardian was under no legal obligation

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to support the ward and could properly have applied for an order to disburse the necessary amount toward her maintenance; but, instead of allowing for the full time claimed, I cannot see that he is, on any theory, entitled to compensation for more than seven months and seven days. It is contended that this claim for board is an afterthought, inasmuch as it did not appear in the original account in this proceeding, but was incorporated in the supplemental account. This contention might have some force, perhaps, if it were not for the fact that an item of credit of $112 for board and maintenance appears in the guardian's annual report, filed March 3, 1903, indicating that the guardian contemplated charging for such maintenance. It is undisputed that the ward was at her brother's home for seven months and seven days, and received her board and lodging. I will therefore allow a credit for board and maintenance, covering a period of seven months and seven days, at $3 a week, less the sum of $29.04, which, it appears without dispute, that the ward earned as wages at the button factory, at the rate of $2.42 a week from March 7, 1900, to May 30, 1900, and which wages she turned in, each week, on account of her support.

The failure of the guardian to account for the additional $75 received by him, until confronted by the bank records, his silence concerning, and omission to make any reference to, the $25 paid him from the ward's funds prior to his appointment, and the excessive board bill for which he demands credit, in view of what seem to be the facts, indicate a lack of fairness and suggest a disposition on his part to deplete the estate of his sister intrusted to him. Commissions are therefore denied; and a decree settling the accounts, modified as above, may be entered upon two days' notice, with costs against the guardian personally to be taxed.

Decreed accordingly.

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(49 Misc. Rep. 177.)

## In re HASKIN.

(Surrogate's Court, Cayuga County. January, 1906.)

1. TRUSTEE—COMPENSATION OF TRUSTEE.

Where a trustee has for years paid over the income of the estate without making any charge for commissions, they will be deemed waived, and he cannot recover the same on final accounting.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trusts, § 454.]

2. SAME—ACCOUNTING.

Testatrix directed her executor to invest $2,000 for the use of Q. for life, with remainder over to the children of F., the balance of the estate to be invested for the use of F. for life, with remainder to his children. On an accounting by the trustee, it appeared that by a separate agreement with F. and his children, the trustee had surrendered his trust in the estate other than as to the $2,000, to F. and his children. *Held*, on an accounting it will be assumed that the trustee had in his hands the several trust funds in order that they might be charged with their proper share of the expenses of administration.

Petition for the judicial settlement of the account of Clinton A. Haskin, testamentary trustee of Phebe M. Ferris, deceased. Decree rendered.

See 97 N. Y. Supp. 827.

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Harry T. Dayton, for executor and trustee.
Frank S. Wright, for Ella Quinlan and others.

WOODIN, S. This is a proceeding for an accounting and resignation of Clinton A. Haskin as executor and trustee of the above-named deceased. Mr. Haskin had an accounting as executor, in 1895, and this proceeding deals with his administration since that time. The will of the deceased, in substance, directed that the sum of $2,000 be held and invested by the trustee to the use of Ella Quinlan for life with remainder over to the children of James J. Ferris. There were four legacies of $200 each, which have been paid, and the balance of the estate was directed by the will to be kept and invested for the use of said James J. Ferris for his life, with remainder over to his children. The trustee, upon this proceeding, is accounting only for the $2,000 held by him for the benefit of Ella Quinlan and some interest accumulations, it appearing that the trustee, in 1898, by virtue of a separate agreement made with said James J. Ferris and his children, surrendered up the trust in that part of the estate and turned the same over to said Ferris and children. It seems, also, that the trustee has, each year, turned over the entire income to the life beneficiaries without deducting his commissions. There are several credits asked for by the trustee in his account which are objected to; but, at the close of the hearing, in order to facilitate the disposition of the case, it was stipulated that the only questions to be determined were: The amount of interest with which the trustee should be charged since May, 1904; the question of commissions to which the trustee is entitled on the past income, or the trust fund itself, and the schedule of disbursements, amounting to $97.23, for which he asks credit.

Taking up, first, the question of the interest with which the trustee should be charged since May, 1904, it seems to me that question disposes of itself for the reason that the trustee has filed a supplemental account, charging himself with the interest received or to be received by him, to which no objection is raised.

Concerning the question of commissions, as before stated, the income of the $2,000 trust fund was paid over by the trustee to Ella Quinlan, up to within a few weeks prior to the commencement of these proceedings, and to James J. Ferris, up to the time the balance of the estate was turned over to him and his children in 1898, without any deductions for commissions in either case; and the trustee asks, first, that he be awarded commissions on the income paid to Ella Quinlan, to be paid out of the income now in his hands belonging to her; and, second, that he be awarded commissions on the income paid to James J. Ferris from the accounting in 1895 to the settlement with said Ferris in 1898, to be charged against the Quinlan trust fund now in his hands, to be paid upon the final determination of the trust when the same shall have become vested in the remainder. From an examination of the authorities, I feel compelled to hold that this claim of the trustee cannot be allowed. The rule seems to be well settled that, where a trustee pays over the entire income, year after year, without making any claim for commissions, he is deemed to have waived his right thereto, and he cannot, upon his final accounting, be awarded commissions upon the past income payable, either out of the trust fund or the present or

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future income. Spencer v. Spencer, 38 App. Div. 403, 56 N. Y. Supp. 460; Matter of Tucker, 29 Misc. Rep. 728, 62 N. Y. Supp. 1021; Matter of Haight, 51 App. Div. 310, 64 N. Y. Supp. 1029. The claim of the trustee for commissions on the past income paid over by him must be denied.

The remaining question as to the credit of $97.23 for disbursements may now be considered. It is contended by Ella Quinlan that these disbursements, or substantially all of them, were paid and adjusted on the settlement had between the trustee and James J. Ferris and his children in 1898, and that, in any event, they are not properly chargeable against the $2,000 Quinlan trust fund or the income therefrom. I think, for the purposes of this accounting and in adjudicating upon the questions, it must be assumed that the trustee has in his hands the several trust funds, to the end that the different funds may be charged with their proportionate and proper administration expenses. While no question seems to be raised to the fact of the payment of the items of disbursements in said schedule, or the propriety of the same, save in, perhaps, one or two instances, I am inclined to think that the disbursements, save possibly the last four items, are, or were, properly chargeable against the remainder fund of which James J. Ferris had the life use; and, in view of the fact that the trustee had an adjustment and settlement with said Ferris in 1898, wherein a balance was struck, and the balance of the estate, save the $2,000 Quinlan trust fund, was surrendered up and turned over by the trustee to said Ferris and his children, it is fair to assume that the disbursements made prior to that settlement were taken into account and therein adjusted. At any rate, it appears that a large proportion of the sum total of these disbursements was incurred in relation to the Hand matter, and it also appears that the Hand judgment was turned over to Ferris in the settlement in 1898; and it cannot, it seems to me, be asserted that the disbursements made in connection with this Hand matter could legally be charged against the Quinlan $2,000 trust fund. Neither is it tenable to hold, as counsel suggests, that these disbursements may be adjudged to be a charge against, and a lien upon, the Quinlan trust fund, to take effect upon the final determination of said life estate. The credits to which the trustee is entitled must be allowed him at this time and deducted by him from the funds turned over by him to his successor. Of course, it is undoubtedly proper that the several trust funds should bear, respectively, the proper and legitimate expenses incident to the care and management of each fund; but the schedule of disbursements is not sufficiently clear to identify these details; except, possibly, it is proper to assume that the last four items, namely; "No. 14, '98 taxes, $2.55, March 20, 1900, recording mortgage $1, April 9, 1900, recording mortgage $1, and November 22, 1902, drawing discharge of Thayer mortgage $.50," were disbursements made in connection with the Quinlan trust fund; and these items I will allow to be paid from the accumulated income. The rest I must disallow for the reasons above stated.

A decree embodying these conclusions, and allowing said trustee to resign, may be entered upon two days' notice and without costs to either party.

Decreed accordingly.

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(49 Misc. Rep. 189.)

## In re SEIGLER'S ESTATE.

(Surrogate's Court, Dutchess County. January, 1906.)

1. GIFT—SAVINGS BANK DEPOSIT—EVIDENCE.

A mother changed her savings bank account to herself and son, "payable to either or survivor," and retained possession of the book until her death. *Held*, that there was no gift to the son, and he was properly charged as administrator of his mother with the amount of the deposit and accrued interest.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Gifts, §§ 53, 55, 56.]

2. ADMINISTRATORS—COMPENSATION.

Where an administrator is allowed the usual commissions, an item for services in looking after personal property of the estate should be disallowed.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, §§ 2084, 2118.]

3. SAME—ACCOUNTING—COSTS.

Persons representing the estate on questions litigated on the accounting by an administrator are entitled to costs payable out of the estate.

In the matter of the settlement of the account of the administrator of Mary E. Seigler, deceased. Decree entered.

Amasa P. Disher, for William Seigler, administrator.
E. S. Luckenbach, for Delia Miller.
George R. Carhart, for Helen Miller.
Joseph Morschauser, special guardian, for Chauncey Seigler.

HOYSRADT, S. On the settlement of the accounts of William Seigler, as administrator of the estate of his mother, Mary Seigler, it is sought to charge him with the amount of a savings bank deposit which he has not included in his account.

Mrs. Seigler, who died intestate, January 14, 1904, was survived by her husband and eight children. Her husband died about one month later. The gross value of her personal estate, excluding the deposit in question, is $785; and, although there is evidence of her desire that William should manage her property, I have found no indication of any intention on her part to favor any of her children in the final distribution of her estate.

On January 7, 1902, Mrs. Seigler went to the Hudson City Savings Institution, unaccompanied, and by her directions the officers discontinued the deposit then standing in her name, on which there was due $313.60, and opened a new account for the same amount to the credit of "Mary E. or William Seigler, payable to either or survivor." An additional deposit of $350 was made in this account June 11, 1903, and the amount due at the time of Mrs. Seigler's death was $692.22. From the time this deposit was commenced, Mrs. Seigler retained possession of the bankbook continuously until her death, and it does not appear that the son, William, ever saw the book during that period or had any conversation with his mother about the deposit. The natural presumption that this account was placed so either the mother or son could withdraw it, for convenience, is strongly fortified by the



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son's evidence. He, the son, William Seigler, has testified and reiterated:

"It was in our joint name, I suppose it was hers, that she put it there for convenience so that we could both draw it. Q. It was her money and she put it that way for convenience so that you could draw it? A. Yes. Q. You made no claim to it? A. No."

In a letter written by Mary Seigler to her son William, dated January 17, 1902, she says:

"What I am about to ask of you is in case if I should die before my money is spent I have found there might be some trouble in collecting it, so I have been to the bank and have had it fixed so you could draw it in case I am dead. I know you will do what is right with it, so I will send you the envelope and the slip of paper that they gave me and you send it to them."

The claim of the administrator to the deposit in question must necessarily rest upon a gift inter vivos to establish his ownership, and, with the facts stated in mind, it is very evident that the most essential elements of such a gift are lacking in this case. The rule has been frequently stated and will be found associated with facts quite similar to those in the case at bar, in Matter of Bolin, 136 N. Y. 177, 32 N. E. 626, where a Mrs. Cody changed her bank account to one entitled "Julia Cody or daughter Bridget Bolin." The book subsequently came into the daughter's possession, but the court held that nothing beyond the presumption of convenience arose from the transaction, and that no gift was made out. The court, at page 180 of 136 N. Y., page 626 of 32 N. E., says:

"There were no words of gift, and the holding of the passbook was consistent with a mere custody or agency. The law never presumes a gift. To constitute a valid gift there must have been the intent to give and a delivery of the thing. The evidence must show that the donor intended to divest herself of the possession of her property, and it should be inconsistent with any other intention or purpose."

This rule is elaborated in Beaver v. Beaver, 117 N. Y. 421, 22 N. E. 940, 6 L. R. A. 403, 15 Am. St. Rep. 531, particularly on the question of what constitutes a delivery, which the court says may be either actual or symbolical; that is, by actually transferring the manual custody of the chattel to the donee, or giving to him the symbol which represents possession. In this case the deposit was placed in the name of a father and son. The father retained the book, and there was no evidence, as in the case at bar, of an intention by the parent to part with ownership, and it was held that no gift was established. The same reasoning is followed in De Puy v. Stevens, 37 App. Div. 289, 55 N. Y. Supp. 810, where the deposit was to "S —— or D —— either or survivor to draw," and it was there further held that an alleged gift inter vivos or causa mortis, which is not asserted until after the death of the donor, should be supported by evidence of the highest probative force. Joint tenancy and survivorship incidental thereto are not favored in law or equity and never when any other deduction can be made.

I am unable to distinguish the essential facts in the case under consideration from those in Kelly v. Home Savings Bank, 44 Misc. Rep. 102, 89 N. Y. Supp. 776, where a mother caused her savings bank deposit to be placed in the name of herself and her daughter so that

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either could draw it, the mother retaining possession of the book. And Judge Herrick held that, although the mother intended that the daughter should have the deposit at her death, there was no absolute gift of the deposit and no irrevocable renunciation by the mother of all her interest and no creation of joint tenancy or survivorship. In Hallenbeck v. Hallenbeck, 44 Misc. Rep. 109, 89 N. Y. Supp. 780, a deposit was made in the name of "Huldah Van Aernan or Huldah B. Hallenbeck pay to either or survivor of either." They were aunt and niece. There were full instructions to the treasurer of the bank to permit either to draw and the niece did make two withdrawals in the lifetime of the aunt. The facts showed that the original owner never surrendered dominion or control over the deposit. She kept the passbook, only permitting the niece to take it to make the withdrawals, and it was held that the gift was not completed under authority of Beaver v. Beaver and Kelly v. Home Savings Bank, supra. The same ruling is to be found in Wood v. Zornstorff, 59 App. Div. 538, 69 N. Y. Supp. 241. In Farrelly v. Emigrant Industrial Savings Bank (Sup.) 87 N. Y. Supp. 54, the donor in her lifetime delivered her bankbook, entitled "Margaret or son Frank J.," to her sister, with instructions to deliver it to the son, showing an intention to divest herself of ownership; but this delivery and declaration distinguishes this clearly from the case at bar. It is also to be readily distinguished from Mack v. Mech. Bank, 50 Hun, 477, 3 N. Y. Supp. 441, where the book was delivered by the donor to the donee with the declaration: "This is yours."

The only inclination to swerve from the well-established rules in these cases is shown in several decisions involving deposits made by husband and wife, and usually accompanied with the statement that the proof of intent to make a gift was found satisfactory (McElroy v. Nat. Savings Bank, 8 App. Div. 192, 40 N. Y. Supp. 340; Matter of Finn, 44 Misc. Rep. 622, 90 N. Y. Supp. 159; Matter of Meehan, 59 App. Div. 156, 69 N. Y. Supp. 9), although, on the principles involved, these cases appear to conflict with Matter of Ward, 51 How. Prac. 318, and Brown v. Brown, 23 Barb. 565.

I have found the line of decisions in other states quite in accord with those cited. Where a depositor, accompanied by his sister, went to the bank and had his deposit made payable to himself and his sister, and their survivor, subject to the order of either, held not a gift. Taylor v. Henry, 48 Md. 550, 30 Am. Rep. 486. By a deposit in the joint name of himself and his child, merely for the convenience of the parent in drawing money, a determination to make a gift is not shown merely by facts that the account was permitted to remain in the joint names and the parent made loose declarations indicating a gift. Skillman v. Wiegand, 54 N. J. Eq. 198, 33 Atl. 929; Norway Sav. Bank v. Merriam, 88 Me. 146, 33 Atl. 840; Noyes v. Inst. for Savings, 164 Mass. 583, 42 N. E. 103, 49 Am. St. Rep. 484, to the same effect.

The evidence in the case under consideration clearly shows that Mrs. Seigler never intended to dispose of this bank account in her lifetime. If we sensibly construe her own words, she intended nothing more than that, if any of it remained at her death, then William should do what was right with it toward the natural objects of her

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bounty. The operation of the law will now, I think, carry that intention into effect, as none of the requisites of a valid gift seem to be present in this case. The administrator will therefore be charged, in addition to the amount stated in his account, with $692.22, with interest from January 1, 1904.

Another objection to an item of $50 with which the administrator credits himself, for work in looking after personal property of the estate and for loss of time from his usual occupation, seems to be well taken. His commissions are full legal compensation for such service, and this item will be disallowed. With the exception of these two items, to be adjusted, and the payment of George Wood's bill of $15 for services and stenographer's bill of $11.75, the account will be allowed as presented.

I have concluded that the administrator's counsel has been sufficiently paid for his services to the estate. The services which he and his associate have rendered in aiding the administrator to establish his individual claim against the estate cannot be paid for out of the assets, and the same is true as to the disbursements incurred in the same effort. The estate cannot be made to pay for successfully defending the claim. The special guardian and counsel for Helen Miller, who have, in effect, represented the estate upon the litigated questions on this accounting, are each entitled to $50 costs, payable out of the estate.

Decreed accordingly.

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(49 Misc. Rep. 186.)

## In re BOSTWICK'S ESTATE.

(Surrogate's Court, Dutchess County. January, 1906.)

1. WILLS—INTEREST ON LEGACIES.

An absolute legacy to a wife in lieu of dower does not draw interest until one year from the issuance of letters testamentary.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 1856.]

2. SAME—CONSTRUCTION—GENERAL LEGACY.

Testator had agreed by an antenuptial agreement that his executors should pay his wife $4,000 within six months after his death, with interest, and that she, in consideration thereof, should release her dower and make no claim against his estate. *Held*, that the direction to his executors to pay such sum was unnecessary, and where, in addition to such direction, he provides for payment of $6,000, the words: "Which sums aggregating $10,000 are to be accepted by my wife in full satisfaction and in lieu of dower in my real estate as agreed between us in the said antenuptial agreement"—are of no legal effect, and the $6,000 is a general legacy.

3. SAME—INTEREST.

A general legacy draws interest from one year after letters are issued.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 1849.]

In the Matter of the Settlement of the Estate of Henry Bostwick, Deceased. Judgment entered.

C. W. H. Arnold, for executor.
Allison Butts and John Hackett, for widow.

HOYSRADT, S. On the 13th day of March, 1899, Henry Bostwick and his intended wife, Emma F. Davis, entered into an antenup-

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tial agreement, which provided, among other things, that within six months after the death of Mr. Bostwick his executors should pay $4,000, with interest from the date of his death, to her; and in consideration of this provision she agreed to release her dower and to make no claim of any nature against the estate of her husband. After the execution of this agreement the parties were married. Mr. Bostwick executed his last will September 17, 1904, and died October 3, 1904. The will contains this provision:

"First. Whereas I made an ante-nuptial agreement with my wife, Emma F. Bostwick, by which I agreed to give her and she agreed to accept the sum of four thousand (4,000) dollars in full satisfaction of any claim she might have against my estate and in lieu of dower, and whereas I have decided to increase the amount to be given her to ten thousand (10,000) dollars,

"Now, therefore, I direct my executor hereinafter named, to pay the said sum of four thousand dollars to my wife as provided in said agreement, and in addition thereto the further sum of six thousand (6,000) dollars, which sum aggregating ten thousand (10,000) dollars are to be accepted by my wife in full satisfaction and in lieu of dower in my real estate, as agreed upon between us in said ante-nuptial agreement."

The widow has claimed interest on $10,000 from the death of the testator on the theory that the will is a modification of the agreement, or should be construed with it, and, further, because the whole provision was made in discharge of her dower. Considering the latter point first, it would seem that the widow had, by the antenuptial agreement, obligated herself to accept $4,000 in lieu of her dower, and as the testator's real estate was valued at $14,092 it will be seen that its terms were very favorable to her. The payment to her of the further sum of $6,000 provided for by the will could not, therefore, form any of the consideration for the discharge of her dower, and she has no legal claim for interest on that contention from the death of her husband.

In addition, it is now well settled that an absolute legacy to a wife in lieu of dower does not draw interest until one year from the issuance of letters testamentary, and it is only where the interest of a trust fund is given in lieu of dower that it runs from the testator's death. Matter of Barnes, 7 App. Div. 13, 40 N. Y. Supp. 494, affirmed 154 N. Y. 737, 49 N. E. 1093.

I think a proper consideration of the other question requires that the antenuptial agreement should be regarded by itself as giving the widow more than she was entitled to by law, capable of enforcement in equity and irrevocable except by mutual covenant or release. The husband could not add or detract from its effectiveness in terms by any provision in his will. He chose to direct that his executors pay her the "further sum of $6,000."

In Washburn v. Weeks (Sup.) 17 N. Y. Supp. 708, a testator had obligated himself by a marriage settlement to give his wife by will $4,000 and the use of $4,000 more. He left her the use of $4,000 with power to use the principal. The General Term, Second Department, Justice Barnard writing the decision, held that payment of the obligation was not established, even if the wife said she was satisfied. Her rights were independent of the will. Nothing but payment or release, with full knowledge of the facts, would satisfy. In Peck v.

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Vandemark, 99 N. Y. 29, 1 N. E. 41, the testator sought to evade his antenuptial agreement to leave one-half of his estate to his wife by a provision in his will, and the court held that the agreement was unaffected.

Construing the provision in Mr. Bostwick's will, the fair and reasonable deduction is that the testator, fully realizing that he had provided $4,000 for his wife "in full satisfaction of any claim she might have against my estate and in lieu of dower," directs the payment of this sum, and in addition thereto the further sum of $6,000. I regard the direction to pay the $4,000 as unnecessary, except for the information of the executors as to the existence of the agreement. The words, "which sums aggregating $10,000 are to be accepted by my wife in full satisfaction and in lieu of dower in my real estate as agreed upon between us in said ante-nuptial agreement," are surplusage and of no legal importance, as the testator had purchased his wife's dower for the original $4,000 more effectively than he could bind her by his will.

For these reasons, I have concluded that the provision in the will directing the payment of $6,000 is a general legacy which draws interest from one year after letters were issued, and was so intended by the testator.

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(49 Misc. Rep. 199.)

## In re FUNK'S ESTATE.

(Surrogate's Court, Kings County. January, 1906.)

1. WILLS—CONTRACTS TO MAKE BEQUEST—CLAIMS AGAINST ESTATE.
   Claimant showed that previous to her marriage she had lived with deceased and his wife, and was induced to break up her home and go with her family and live with him after the death of his wife, on his promise to make her the sole beneficiary under his will. Some difficulty arose, caused by the habits of deceased distasteful to claimant, and he terminated the contract and left a last will, in which claimant was not provided for. *Held*, that she could recover the reasonable value of services rendered.
   [Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 177.]
2. SAME—LIMITATIONS OF ACTIONS—ACCRUAL OF CLAIM.
   Where deceased in his lifetime had promised claimant for services rendered to remember her in his will, limitations did not begin to run against her claim until the death of decedent.
   [Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 179.]
3. EXECUTORS AND ADMINISTRATORS—CLAIM AGAINST ESTATE.
   Where one, since deceased, had specifically promised to pay for certain services rendered by making a testamentary provision, the claim for services cannot be defeated, on failure to make such provision, on the ground that the services were gratuitous.
   [Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 177.]

In the matter of the estate of John Funk, deceased. Claim allowed.

Walter L. Durack, for claimant.
Chase, Cahoone & Regan, for executor.

CHURCH, S. This is a hearing upon a claim made against the decedent's estate. The claimant herein had, previous to her marriage,

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resided with the deceased and his wife. Although no relation of the deceased, their relations were very friendly, and at times she was spoken of by the deceased as his adopted daughter, and at other times the claimant called the deceased "father" and "papa." The claimant married and went to live in the home provided by her husband. The deceased lost his wife and was alone in the world. He thereupon induced the claimant to break up her home and, with her family, go and live in the home owned by the deceased. This was upon a general understanding as to the household expenses and upon a further explicit promise that the deceased would make the claimant the sole beneficiary under his will. Such a will was, in fact, drafted and delivered into the claimant's possession. In the course of time the deceased became afflicted with total blindness and, of necessity, required considerable additional attention from that originally expected, among which was the almost constant reading to him of newspapers and other matter. As the deceased progressed with his illness he became ill-tempered and resorted to certain habits which were distasteful to the claimant and her family. In consequence of the friction between the parties by reason of these facts, the deceased practically terminated the contract in question. He subsequently died, leaving a will which completely ignored the claimant.

The general proposition that, where services rendered under the promise and expectation that they will be paid for by suitable testamentary provision, and upon it appearing that no such testamentary provision is made, the person rendering the services is entitled to recover for the same on a quantum meruit is too well settled to need citation of authority. The only proposition therefore to be considered is whether the facts in this case bring it within the line of authorities under which the claimant is entitled to recover. The counsel for the executor contends that, as the agreement was broken at the time that the claimant left the testator's house, the statute of limitations then commenced to run. I am unable to agree with him as to the correctness of that proposition. It is true that the relation under which the claimant was rendering the services was stopped; but, until the deceased died and left a will in which no provision was made for the claimant, the claimant could not contend that the deceased had broken his contract; and therefore the statute of limitations, in my judgment, did not begin to run until the death of the deceased.

The evidence of disinterested witnesses plainly establishes the fact that the deceased had agreed to recompense the claimant for her care and attention to him by way of testamentary provision, and, he having failed to comply with this promise, the claimant is entitled to recover the sum asked for herein. It has been suggested by the executor that under the principle that services between parent and child are presumed to be rendered gratuitously, unless the contrary is shown, the claimant cannot recover. There are two answers to this contention: In the first place, it cannot be said that the claimant stood in the relation of an adopted daughter to the deceased; in the second place, the evidence shows that, irrespective of the relationship of the parties, the deceased

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had specifically promised to pay the claimant by making a testamentary provision for her.

The claim is therefore allowed and findings will be signed accordingly.

Decreed accordingly.

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(49 Misc. Rep. 201.)

## In re WOOLSEY'S ESTATE.

(Surrogate's Court, Kings County. January, 1906.)

WILLS—GIFT TO CLASS—CONSTRUCTION.

A will provided that, on termination of a trust for life for the benefit of testator's wife and sister, the estate should go to his living nieces and nephews and a niece of his wife, and the lawful issue of those who had died. *Held*, to refer to the nieces and nephews living at testator's death, and not at the date of the termination of the trust.

In the matter of the estate of John Woolsey, deceased. Decree settling accounts of executor entered.

Frederick Cobb, for executor, petitioner.

Thomas H. Troy, special guardian, for C. L. Schenck and others.

Grasmuck & Ostrander, for Charlotte W. Betjemar, Eleanor A. Schonten, Sarah M. Ewald, Emma W. Fortune, and Eliza Gallagher.

James W. Glendinning, for Wm. H. Woolsey.

O. B. Gould, guardian ad litem of Evanita S. Schlieder, an infant.

CHURCH, S. The only question arising upon this accounting is one as to the construction of the will of the deceased. He created a trust in such will to exist during the lifetime of his wife and sister, and provided that, upon the cessation of the same, the entire estate should go "to my nieces and nephews who may be living and the niece of my said wife, Helen Heath, and the lawful issue of those who have died." At the time of the testator's death, he left surviving 12 nieces and nephews, and also the said Helen Heath. At the time of the death of his wife, Lydia Woolsey, which terminated the trust, he left surviving four nephews and nieces and the said Helen Heath.

The contention is now advanced that such will should speak from the date of the termination of the trust, and not from the testator's death. I am unable to agree with this proposition. The cardinal rule of construction as to the time from which a will is presumed to speak fixes it at the death of the testator. There is nothing in this will which shows any contrary intention; but, on the other hand, there is a provision that the said estate is to go to the testator's nephews and nieces, and in addition to the lawful issue of those who have died. Unless it spoke from the time of the testator's death, the provision as to the lawful issue of those who have died is absolutely meaningless. In fact, it is worse than meaningless, because, in order to properly interpret the will, it would have to be completely expunged from the same.

Let a decree be entered in accordance with the foregoing views.

Decreed accordingly.

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(49 Misc. Rep. 194.)

## In re BRUCHAESER'S ESTATE.

(Surrogate's Court, Kings County. January, 1906.)

1. EXECUTORS AND ADMINISTRATORS—ACCOUNTING.

The surrogate on the settlement of the accounts of an executor or trustee can pass on any questions necessarily involved, whether they relate to personalty or real estate.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 2003–2005.]

2. CONVERSION—REALTY AND PERSONALTY.

Where testator's entire estate is given in trust to pay the income to his wife for life, and the trustee is given power of sale on her death, the proceeds of sale to be invested until the death of testator's daughter, and on her death divided with such other real and personal estate as may then exist between the issue of the daughter, and in case of her death without issue or on the death of such issue under 21 years then the property to be divided between his brothers and sisters, the issue of any such brother or sister to take the share of the deceased parent, no equitable conversion of the real estate is effected; the directions for sale not being mandatory.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Conversion, § 38.]

3. PERPETUITIES—TESTAMENTARY TRUSTS.

Where testator bequeaths his property in trust, the income to be paid to his widow during life, and on her death the income to be paid to his daughter, and on the death of said daughter without children the property to be divided between the brothers and sisters of the deceased, but if she should die leaving children the property to be divided when such children become of age, the probability is that the trust will be measured by more than two lives in being, and is void as against the statute of perpetuities.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Perpetuities, §§ 45–55.]

In the matter of the settlement of the estate of Valentin Bruchaeser, deceased. Judgment entered.

Emil Schneeloch, special guardian.
Mortimer S. Brown, for trustees.
E. K. Van Beuren, for contestant.

CHURCH, S. The sole question arising upon this accounting is the construction to be given to certain provisions of the will of the deceased.

The deceased left at the time of his death a widow, Margaretha, a daughter, Mary Elizabeth, who was married to one Julius C. Jagel, and three grandchildren, the children of said Mary E. Jagel. After making several minor provisions, he gives all of his estate to his executor, in trust to apply the entire income therefrom to the use of his wife, Margaretha, during her lifetime. On the death of his wife he provides that a further trust should be created in regard to his estate, and, as this provision is the subject of dispute, it will be set forth in full:

"Seventh. After the death of my said wife, I empower my said trustee, if he thinks it beneficial to the interests of my estate, to sell and dispose of my said real estate at public or private sale, as in his judgment he may see

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**fit, and to give good and sufficient deeds in the law for the same, and the moneys arising from such sale or sales are estate in the State of New York and that the said moneys are to be invested and held by him as said trustee until the death of my daughter Mary Elizabeth Jagel, and then, upon her death, to divide the same and such other real and personal estate as may then exist, between the issue of my said daughter by her present husband and I hereby appoint John D. Topp as testamentary guardian of any of said children who may be minors upon the death of my said daughter. In case of the death of my said daughter leaving no issue her surviving by her present husband Julius C. Jagel, or in case of all of such issue should die, under the age of twenty-one years, then and in that case all of my said property whether real or personal, I give, bequeath, and devise to my brothers and sisters, share and share alike. In case of the death of any one of them then their issue to take the share that the parent would have taken if living."**

There was, following this, a provision empowering the trustee to apply so much of the income as might be necessary for the maintenance and education of the issue of his said daughter. The widow of the deceased having died, the trustee presents his accounts for judicial settlement, and upon such settlement the daughter, Mary Elizabeth Jagel, contends that the trust attempted to be created after the death of the widow is not a valid one, and alleges, therefore, that all of the property passed to her. The trustee, on the other hand, contends that it is a valid trust to be held by him during the lifetime of said contestant, Mary Elizabeth Jagel.

At the very threshold of the matter, the trustee contends that the Surrogate's Court has no jurisdiction to pass upon this question, as it involves the construction of a will in which real estate is concerned. It is undoubtedly true that, upon the probate of a will, the surrogate has no power to construe such provisions of the same as affect the disposition of realty. But, upon the judicial settlement of the accounts of an executor or trustee, the surrogate has full power to pass upon all questions that are necessarily involved in such accounting, whether they refer to real estate or are simply confined to personalty. The authorities referred to by the counsel for the trustee pertain exclusively to the surrogate's jurisdiction in probate matters.

Passing, therefore, to the question of the construction of the will under consideration, the first proposition is the contention of the contestant that, under the provisions of the seventh clause of such will, as above set forth in full, the testator intended to create an equitable conversion of his estate. In the consideration of this question, we must appreciate that the distinctive requisite necessary to create an equitable conversion of an estate is that the power of sale which is reposed in the executor or trustee is a compulsory one, and must be exercised by such executor or trustee, and that, while the time of the exercise of such power may be left to his discretion, the fact that he must so execute it is not left open. It is, of course, not necessary that such a direction shall be perfectly explicit, and it will be held, at times, that an equitable conversion is effected, although it can only be determined by implication from the general term of the instrument. Some of the language of the seventh clause undoubtedly gives color to the claim that an equitable conversion has been effected. But, upon the other hand, it will be noticed that the testator has, in no instance, required that the trustee shall dispose of such real estate. On the contrary, however, it is apparent that the testator contemplated the possibility of there being

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real estate undisposed of at the termination of such trust, as shown by his direction to the trustee to divide the proceeds of such real estate as was unsold, and also "such other real and personal estate as may then exist."

The question being determined, the remaining question is whether the provisions of the will offend against the statutes limiting the suspension of the power of alienation. Ostensibly the trusts created simply suspend the power of alienation during the lifetime of the widow, and the said daughter, Mary E. Jagel; and if the provision of the seventh paragraph regarding the division of the trust fund upon the death of said daughter, Mary E. Jagel, had not been interfered with, then such provisions would have been complete. But it will be observed that, further on in such paragraph, the direction to divide the estate upon the death of said Mary E. Jagel is limited by the provision that, in case all of such children should die under the age of 21 years, the property is to be divided between the brothers and sisters of the deceased. In consequence of this provision, the duration of such trust is not measured solely by the life of Mary E. Jagel, except the children should die previous to her death. If she died and left children under the age of 21 years, such estate could not be divided, but the trust must continue until either some one of such children should reach the age of 21 years or they all died previous to that period. There is, therefore, the probability that this trust would really be measured by five lives in being rather than by two lives in being as limited by the statute.

The cases quoted by the counsel for the trustee do not any of them discuss a situation such as has arisen in the case under consideration. They are, each of them, an illustration of the general principle and as such are valuable; but in none of them is there an intimation that such a condition of affairs as here exists can be regarded as not violating the statute in question. The only one of the cases which at all approximates the condition here disclosed is that of Bird v. Pickford, 141 N. Y. 18, 35 N. E. 938. But a careful examination of that case will reveal the fact that while, in the first instance, the document read as if it was to cover the lives of three persons in being, by the subsequent paragraphs in the will it depended only upon the lives of two persons, as it provided that, in the event of two of them being dead before the third then the third took the estate absolutely, whereas, if the third should die before the other two, then the trust should also cease.

The provisions in question, therefore, being illegal and improper, the trust has ceased to exist, and Mary E. Jagel is entitled to the entire corpus of the estate.

Decreed accordingly.

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(49 Misc. Rep. 208.)

## In re SCHUESSLER'S ESTATE.

(Surrogate's Court, Kings County. January, 1906.)

EXECUTORS AND ADMINISTRATORS—DISTRIBUTION OF ESTATE.

Under Code Civ. Proc. § 2799, providing that where surplus money arising on foreclosure is paid into the Surrogate's Court at any time before final distribution, and there is pending a proceeding for the sale of the decedent's estate, the decree shall provide that the money shall be

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**paid to his administrator. *Held* that, where no proceeding for such sale is pending, every person entitled to share in the distribution of the proceeds must be cited.**

**[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 1281.]**

In the matter of the estate of Kasper Schuessler, deceased. Proceeding for the distribution of surplus money arising on foreclosure. Proceeding dismissed.

Hugh Wintner, for petitioner.

P. A. Hatting, for Ferdinand Schuessler, Mary A. Schuessler, Friedrich Schling, Anna S. Bennett, and Amelia A. Stillwell, executrices of A. E. Stillwell, deceased, and Victor L. Bedingfield.

William D. Veeder, for respondents.

CHURCH, S. This is a proceeding for the distribution of surplus moneys arising on a foreclosure suit which have been paid into the Surrogate's Court.

The method of distribution of such moneys is covered by section 2799 of the Code of Civil Procedure. By the first part of the section it is provided that, where at the time of the payment of such money into the Surrogate's Court, or at any time before the final distribution of the same, there is pending a proceeding for the sale of decedent's real estate to pay his debts, then the decree shall provide that such money be paid to the administrator. By chapter 750, p. 1907, of the Laws of 1904, the proceedings for the sale of decedent's real estate to pay his debts were very much simplified; and, instead of the surrogate hearing at length the rights and priorities of the creditors and other persons interested in the fund, it was provided that the proceeds of the sale should be applied by the administrator as if he were an executor acting under a power of sale contained in a will. If such a proceeding was pending, therefore, at the time of the payment of this money into court, the matter would be an extremely simple one, and the decree would simply provide for the money being paid to the administrator. But the petition herein alleges that such is not the case. We therefore pass to the provision in the section affecting such a condition of affairs. This provides for the presentation of a petition praying for the distribution of the money. But, in order to give the court jurisdiction to make a decree upon such petition, every person entitled to share in the distribution of the proceeds of the sale must be cited, and on the return of the citation the rights and priorities of such persons must be established. The petition herein does not comply with this provision of the Code. It is true that it recites that certain persons are heirs at law, and it also mentions that certain other persons claim to be creditors. But it does not show, affirmatively, that they are the only persons entitled to share in the distribution of the proceeds.

The proceeding is therefore dismissed, with permission to renew upon proper petition.

Decreed accordingly.

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## SCHWARTZMAN et al. v. BROOKLYN HEIGHTS R. CO.

(Kings County Court. March 16, 1906.)

CARRIERS—REGULATION—PASSENGERS—TRANSFERS—REFUSAL BY CONDUCTOR—PENALTY.

Laws 1890, p. 1114, c. 565, § 105, providing that railroads operating intersecting lines shall give to each passenger paying a single fare a transfer, entitling such passenger to one continuous trip to any portion of its road, "to the end that public convenience may be promoted by the operation of the railroads embraced in such contract, substantially as a single railroad with a single rate fare," and providing a penalty for failure to give such transfer, does not render a company liable to the penalty where it has established a system of transfers for its intersecting lines, and furnishes its conductors with tickets for that purpose, and some individual passenger has not received transfers through the misjudgment, neglect, or mistake of the conductor.

Action by Charles H. Schwartzman and others against the Brooklyn Heights Railroad Company. Motion to dismiss. Granted.

Wilmot L. Moorehouse, for plaintiffs.

Geo. D. Yeomans (Harry F. Ives, of counsel), for defendant.

CRANE, J. These three actions, tried together, are brought to recover penalties under section 105 of the Railroad Law, Laws 1890, p. 1114, c. 565, for refusal to give transfers. The plaintiffs were passengers upon a Douglass street or St. John's Place car, which crossed the Hamburg avenue line at Rockaway and Liberty avenues. It is claimed by them that they demanded transfers from the conductor to enable them to continue their passage without payment of an extra fare on the Hamburg avenue line. It is conceded for this motion that the defendant by the railroad law must give transfers from the Douglass street line to the Hamburg avenue line, and that in compliance with this law it had established a system of transfers, furnishing the conductor with tickets for the purpose, and posting a notice in its cars regulating the distribution thereof. The failure of the plaintiffs to receive transfers was not due to the refusal of the company to issue transfers at the point stated, or failure to comply with the law, but was due either to the negligence of the conductor having the transfers, or through his belief that the plaintiffs were not entitled thereto for failure to comply with the reasonable requirements of the notice posted in the car. This notice stated that passengers must ask for transfers when paying fares. The only dispute between the plaintiffs and the defendant is whether or not the plaintiffs asked for transfers at the time they paid their fares. They say they asked for them when they boarded the car and paid their fares, while the conductor and other witnesses say they did not ask for transfers till arriving at the intersecting point. To my mind, however, the principal question is one of law, and that is whether the company subjects itself to the penalty of $50, having provided transfers, and seeking to meet all the requirements of the railroad law, when its servant, the conductor, in the exercise of his judgment makes a mistake.

The counsel for the railroad company at the end of the entire case has moved to dismiss, and I have taken his motion under advisement, for the purpose of examining authorities upon this point. Most of the cases,

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if not all, deal with a state of facts where the companies have sought to resist the giving of transfers on certain lines, but the cases are few indeed where a company has been held liable for the $50 penalty after it has established a system of transfers, and the conductor failed in the performance of his duty. As I read the railroad law, it would seem to me to be the object of section 105 to force upon companies taking over intersecting lines by lease or contract to establish a system of transfers, so that these lines might be run as one continuous railroad, and that where the company refused to run such intersecting lines as one railroad and for one single fare, and refused to establish a system of transfers, then, and only then, was it liable to any aggrieved passenger for the penalty of $50.

Part of section 105 reads:

"Every such corporation shall upon demand and without extra charge, give to each passenger paying one single fare a transfer entitling such passenger to one continuous trip to any point or portion of any railroad embraced in such contract, *to the end that public convenience may be promoted by the operation of the railroads embraced in such contract substantially as a single railroad with a single rate of fare.*"

As suggested by Judge Hatch in the Topham Case, 96 App. Div. 323, 89 N. Y. Supp. 298, this italicized phrase must have some meaning. It would indicate, it appears to me, that the purpose and intent of the Legislature was to compel the railroad companies to establish transfers, and for their refusal to comply with the law in this particular they were to be subjected to a penalty. It does not mean that after a transfer system was established the company would be liable for the penalty of $50 if the conductor on its car failed through neglect, inadvertence, or misjudgment to give a transfer. This would be a heavier burden placed on the railroad than if it were actually a continuous line, and the passenger were wrongly ejected for the supposed nonpayment of fare. In such a case the passenger has his common-law action for breach of contract, and would usually recover, if no violence was used, the price of his fare—five cents. Moon v. Interurban St. Ry. Co. (Sup.) 85 N. Y. Supp. 363. If both lines—those leased and those actually continuous—are to be run alike, the remedies for wrongful ejectment should be alike, and for a mistake or neglect in refusing to give a transfer, so that the passenger is ejected from the connecting car or cannot take it, his remedy should be for breach of implied contract; the same as where he cannot ride because it is mistakenly asserted that he has not paid his fare. Where the company has complied with the railroad law, and established its system of transfers, and made its reasonable rules, it does seem sensible that its servants and conductors should be able to exercise that same judgment regarding the giving of transfers as they do in the collection of fares, and that the company should suffer no severer consequences for a mistake of the conductor giving transfers than in collecting fares. If the purpose of section 105 be as I have stated it, this inconsistency vanishes, for the company would not be liable for the penalty of $50 where the conductor, having transfers, makes a mistake in refusing certain particular individuals, but otherwise accom-

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modating the public. Section 101 specifies that no street surface railroad shall charge any passenger more than five cents for one continuous ride from any point on its road, or on any road, line, or branch operated by it or under its control, to any other point thereof, or any connecting branch thereof, within the limits of any incorporated city or village. What is the remedy for a passenger overcharged? Evidently under section 39 of the act, which reads:

"Any railroad corporation which shall ask or receive more than the lawful rate of fare, unless such overcharge was made through inadvertence or mistake, not amounting to gross negligence, shall forfeit fifty dollars to be recovered with the excess so paid by the party paying the same," etc.

Under this section, a railroad having a branch or connection must carry passengers for one fare, and to do this effectually would probably provide transfers. If it charged a double fare, or, having transfers, failed to give one to any passenger whereby he had to pay twice, the penalty of $50 could not be recovered if it appeared that such payment was exacted or transfer refused through inadvertence or mistake not amounting to gross negligence. When a railroad operates a branch system under lease or contract, section 105 states that it shall be run as a continuous line. This evidently means as a line with branches originally all of one company; that is, a line with branches as specified and included in section 101. Can there be any reason why negligence or mistake will bar a recovery of the penalty for failure to give a transfer on original branches of the same company, and not on branches run under lease or contract? I confess I can see no reason. And, there being no reason for such inconsistency, I do not believe section 105 should be so narrowly read as to create it. The case of Tullis v. Brooklyn Heights R. Co., 71 App. Div. 494, 75 N. Y. Supp. 863, while not exactly in point, certainly does not decide that negligence or oversight is not a good defense under section 105, as well as under section 39. The opinion says that both sections should be read together when action is brought for the exaction of a double fare, no valid transfer having been given. Why should not the purport of section 39 also be read into section 105 when a transfer was refused, and no extra fare demanded, because the passenger did not board the connecting car?

Plaintiffs' counsel says that behind this construction of section 105 the railroad company could plan to refuse transfers to all or many, and prevent the recovery of the penalty by claiming oversight on the part of the conductor. Any such plan or scheme could be alleged and proved like any other fact, and, when established would make the company liable. Bad faith and gross neglect would be no excuse for a refusal. I do not find in any of the authorities that this exact point has been passed on, unless the Tullis Case be broad enough to cover it. Rosenberg v. Brooklyn Heights R. Co., 91 App. Div. 580, 86 N. Y. Supp. 871, does not hold contrary to this proposition, as in that case the company failed to provide the conductor with sufficient transfers, and he had none to give to the passengers. With the great multitude of cases which are now being brought under the supposition that a person being refused a transfer under any and all con-

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ditions can get $50, the courts should be awake to the situation, and so construe section 105 of the railroad law as to give it good sense and meaning, carry out the evident intention of the Legislature, and prevent injustice to the companies honestly seeking to make their connecting lines operate as one continuous line.

Judge Hatch's opinion in the Topham Case I do not think has been overruled by the Court of Appeals in the O'Reilly Case, 179 N. Y. 450, 72 N. E. 517, and the Griffin Case, 180 N. Y. 538, 72 N. E. 513, in so far as he there expresses the way in which railroad companies conducting their business may meet and comply with the provisions of this section 105. That case was overruled in so far as it held that the company could refuse all transfers at the intersecting point in question, but, as I do not find in any case, unless it be Moskowitz v. Brooklyn Heights R. Co., 47 Misc. Rep. 119, 93 N. Y. Supp. 385, that the construction given by Judge Hatch to this law has been overruled or disagreed with, I have taken the liberty of expressing my opinion in the matter, and to conclude that, under section 105 of the railroad law, the company is not liable to a penalty of $50 where it has established a system of transfers for its intersecting lines, and furnishes its conductors with tickets for the purpose of carrying its passengers for a single fare, and some individual passenger has failed to receive transfers through the misjudgment, neglect, mistake, or inadvertence of the conductor. In such a case I believe his remedy to be the same as if he had been ejected before finishing or completing his journey, through a mistaken belief on the part of the conductor that he had not paid his fare at all—that is, to a common-law action for damages.

As the evidence discloses in this case no gross negligence, but, at most, a mistake or oversight, the motion to dismiss, for the reason stated, is granted.

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## SMITH et al. v. IRVIN et al.

(Supreme Court, Appellate Division, First Department. May 11, 1906.)

PARTIES—DEFECTS—OBJECTIONS—AMENDMENTS.

A demurrer to a complaint, specifying that two persons as parties to an agreement were necessary parties, was sustained, and the court directed that all parties to the agreement should be made parties to the suit. The two persons were made parties in a supplemental summons and complaint. *Held* that, as the order of the court only related to the defect of parties raised, the supplemental summons and complaint could not be dismissed, because a third person, though a party to the agreement, was not made a party to the suit, but the remedy was by demurrer, under Code Civ. Proc. § 488; the defect of parties being apparent on the face of the complaint.

Appeal from Special Term, New York County.

Action by Mary I. Smith and another against Mary M. Irvin and others. From a final judgment entered on an order striking out the supplemental summons and complaint as to certain defendants, plaintiffs appeal. Judgment and order reversed, with costs.

Argued before O'BRIEN, P. J., and INGRAHAM, McLAUGHLIN, CLARKE, and HOUGHTON, JJ.

A. Coleman Smith, for appellants.

Lord, Day & Lord (Francis Woodbridge, of counsel), for respondent Mary M. Irvin.

Darius E. Peck, for respondent William Irvin.

CLARKE, J. This is an action to compel the defendants, who are the personal representatives of surviving partners, to account for the property of the partnership that they received as surviving partners. To the second amended complaint the defendants demurred, among other things, upon the ground that there was a defect of parties defendant "in the omission of Mary I. Burden and Susan I. Gray, parties to a certain agreement in said second amended complaint, alleged to have been executed on or about May 1, 1895, which agreement the plaintiffs in second amended complaint pray to have set aside as fraudulent and void." The demurrer was overruled at the Special Term, but on appeal to this court (108 App. Div. 218, 95 N. Y. Supp. 731) the judgment entered thereon was reversed, and the demurrer sustained; Mr. Justice INGRAHAM, writing the opinion of the court, stating:

"All of those who executed the agreement and are interested in the property transferred should be made parties defendant before it is adjudged fraudulent and void."

In the order of this court entered thereon leave was given to the plaintiffs to amend the summons and second amended complaint by making all parties to said agreement defendant upon certain terms. The terms were complied with, and the plaintiffs served a supplemental summons and supplemental and second amended complaint, bringing in Mary I. Burden and Susan I. Gray, the two missing parties specified in the demurrers. The defendants' attorneys accepted the payment of costs, and retained the new complaint, and it was not till 17 days thereafter that the attorney for the plaintiffs was notified of an alleged



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defect in this complaint, in that William Irvin individually was one of the parties to the agreement, and that, although he was a party defendant as surviving executor of Alexander P. Irvin and Richard Irvin, senior, he had not been made a party individually. This defect had not been pointed out in the prior demurrer, and seems to have escaped the notice of all parties up to the time of said notification. A motion was made to strike out the supplemental summons and supplemental and second amended complaint, and an order was made granting the motion, and final judgment dismissing the complaint was entered.

As this defect appeared upon the face of the complaint, we think that the proper practice would have been for defendants to have demurred to this complaint upon the ground of the defect of parties, pointing out the defect, as required by section 488 of the Code of Civil Procedure. Where a demurrer is made by law the proper method of testing the sufficiency of parties, we do not think that for a defect therein the pleadings should be stricken out, and judgment entered dismissing the complaint. It can hardly be held that this court intended by its former order directing all parties to the agreement to be made parties to go further than pass upon the facts as presented to it. A demurrer had been interposed, specifying two persons as necessary. There was no suggestion in any of the papers or arguments as to any others. It was the duty of demurrant to point out the specific omission. The court passed on the facts before it. A defect not discovered by any one, the power of demurrer still surviving, should not be visited by so drastic a penalty.

The judgment and order appealed from should be reversed, with costs, and the motion denied, with $10 costs. All concur.

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## STERNBERGER v. STERNBERGER.

(Supreme Court, Appellate Division, First Department. May 11, 1906.)

DIVORCE—EXPENSES—APPEAL—ALLOWANCE—AMOUNT.

Where the court was justified in requiring the defendant husband in a divorce suit to pay the expense of printing the record on plaintiff's appeal, the order requiring him to pay should stipulate that he should pay the costs of printing the record, when the amount should be ascertained and the record printed, and the fact that the cost of printing all the record would be a specified sum did not justify a presumption that such a sum would be necessary to print the case, as finally settled by the trial judge, pursuant to General Rules of Practice, Rule 34.

Appeal from Special Term, New York County.

Action by Birdie S. Sternberger against Louis Sternberger. From an order directing defendant to pay to plaintiff's attorney $2,000 to print the record on appeal from the final judgment, defendant appeals. Modified and affirmed.

Argued before O'BRIEN, P. J., and INGRAHAM, McLAUGHLIN, CLARKE, and HOUGHTON, JJ.

W. H. L. Edwards, for appellant.

H. S. Gans, for respondent.

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INGRAHAM, J. We think the court below was justified in requiring the defendant to pay the expense of a review of this judgment upon the plaintiff's appeal. The order, however, directs the defendant to pay to the plaintiff's attorney the sum of $2,000, and any additional sum that may be necessary to defray the cost of printing such appeal. There does not seem to be a necessity for the immediate payment of the sum of $2,000, before the case is settled and the cost of printing the record is ascertained. It does not seem possible that it will be necessary to print all of the testimony in the habeas corpus proceeding, although the same was introduced as evidence upon the trial. Upon the settlement of the case, an abstract of that testimony so as to present all the evidence necessary to submit to the court the question to be presented on the appeal can be prepared, and the trial judge can determine upon the settlement of the case how much of the evidence is necessary to present the question on the appeal. Rule 34, General Rules of Practice. The fact that the cost of printing all the record in the habeas corpus proceeding would be $2,000 does not justify a presumption that such a sum would be necessary to print the case as finally settled by the trial judge.

The order should therefore be modified by requiring the defendant to pay the counsel fee named, and to pay to the plaintiff or to her attorney the cost of printing the record on appeal, when the amount shall be ascertained and the record printed; and, as modified, the order should be affirmed, without costs of this appeal. All concur.

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## SULLIVAN et al. v. McCANN et al.

(Supreme Court, Appellate Division, First Department. May 11, 1906.)

1. ATTORNEY AND CLIENT—LIEN—ENFORCEMENT.

   Where an attorney had a contract with his clients for a contingent fee of 12½ per cent. of any sum obtained for his clients by litigation, settlement, or otherwise, and brought a suit which his client sought to dismiss as ill advised, under an agreement with defendants, the attorney had a right, which was beyond the power of the court to deny, to have the amount due him as between himself and his clients fixed, as provided by Code Civ. Proc. § 66.

2. SAME.

   Where an action brought was dismissed by plaintiffs without extinguishment of the claim sued on, or anything paid or agreed to be paid in settlement thereof, there was no lien in favor of the plaintiffs' attorney which could be enforced as against the defendants.

3. SAME—FEES—ESTABLISHMENT.

   Where an attorney had no lien which was enforceable against defendants in an action, his affidavit in return to an order to show cause why the action should not be dismissed on a stipulation entered into between the parties, in which the attorney made no objection to the dismissal, provided an allowance was made for his fees, which affidavit was not served on his clients, could not be treated as a petition for the fixing of his fees, as provided by Code Civ. Proc. § 66.

Appeal from Special Term, New York County.

Action by William H. Sullivan and another against John McCann and others. From an order granting a discontinuance without costs to

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any party as against the other, plaintiffs' attorney, Edward H. Fox. appeals. Affirmed.

Argued before O'BRIEN, P. J., and INGRAHAM, McLAUGHLIN, CLARKE, and HOUGHTON, JJ.

Louis Frankel and Edward W. Fox (Job E. Hedges, on the brief), for appellant.

John F. McCann, Jr. (Henry C. Eldert, on the brief), for respondents.

CLARKE, J. This action was brought by two grandsons of John Sullivan, deceased, to construe the last will and testament of said decedent, which had been admitted to probate in this county on or about March 9, 1886. The complaint asked that certain provisions of said will directing that the surplus income be applied for the payment of mortgages on the property left by said decedent, and to invest and reinvest such surplus income after paying off such mortgages until the determination of the trust estate, be declared invalid. The complaint also asked for an accounting by the trustees. The plaintiffs had entered into a contract, under seal, with the attorney, which provided:

"We * * * do hereby retain Mr. Edward W. Fox * * * as our attorney, to represent us in all matters relating to the estate of our deceased grandfather, John Sullivan, and we hereby authorize the said Edward W. Fox to institute such proceedings as may be necessary in any court to enforce our rights or to protect our interests in said estate, and said Edward W. Fox is hereby authorized to commence any action at law or in equity for an accounting, for the construction of the last will and testament of said John Sullivan, deceased, or otherwise, as said Edward W. Fox may deem necessary for such purposes, and to engage and employ such counsel as the said Edward W. Fox may deem necessary therefor. We hereby agree to pay the said Edward W. Fox the sum of 12½ per cent. each on any amount which we may recover, or to which we may be entitled by a decree or judgment in any such actions or proceedings instituted by the said Edward W. Fox: or, in case of settlement or adjustment of our rights or interests in said estate, the said Edward W. Fox shall be entitled to the equal sum of 12½ per cent. each on the amount to which we would be entitled, or would recover by decree or judgment were it not for such settlement or adjustment. It is hereby expressly understood that said Edward W. Fox is to be entitled to 12½ per cent. each on any amount of the accrued income to which we may be entitled or which we may recover as above from the estate of said John Sullivan, deceased, exclusive of any costs and allowances and which may be granted by the court, and which said costs and allowances are to belong to said Edward W. Fox, in addition to said sum of 12½ per cent. each."

After the preparation and service of the summons and complaint all of the parties agreed to a discontinuance; it being set forth in the papers by the trustees that no consideration of any sort has been paid to the plaintiffs, or agreed to be paid or intended to be paid, voluntarily or otherwise, for their agreement that the action be discontinued. The only reason given by the plaintiffs for their desire to discontinue is as follows:

"That since the bringing of said action he has regretted bringing any such case, and after due deliberation and consultation with his family he has come to the conclusion to absolutely withdraw from the case. It is his intention, therefore, to enter into any agreement with the trustees which will dispose of the case in the quickest possible manner. Deponent is willing to abide by any disposition of the case which the trustees may see fit to make."

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Each plaintiff making a similar affidavit.

Upon the return to the order to show cause why the motion for a discontinuance should not be granted, the attorney for the plaintiffs filed an affidavit in which he set forth at length his connection with the case, the services rendered by him, and his contract with the plaintiffs, and, averring that he had no desire to stand in the way of discontinuing the action if his rights were properly protected, prayed that the court might summarily determine his rights according to the provisions of section 66 of the Code of Civil Procedure, "and that an order may be entered discontinuing this action upon the payment to this deponent of the sum of $6,250, besides costs and disbursements to be taxed by the clerk of this court, and that such sum should remain a lien upon the shares of the accumulated income to which plaintiffs are or may hereafter be entitled, and that the court may make such other and further orders herein as may be proper or necessary to enforce the remedies provided in section 66 of the Code of Civil Procedure." The learned court made an order simply discontinuing the action "without further costs to any party as against the others"; and from said order the attorney for the plaintiffs appeals. The attorney makes no objection to the discontinuance of the action. He admits the right of the parties as between themselves to put an end to the litigation. His grievance is that his claim was not established summarily and a lien for the amount thereof declared.

Section 66 of the Code of Civil Procedure provides that:

"The compensation of an attorney or counsellor for his services is governed by agreement, express or implied, which is not restrained by law. From the commencement of an action or special proceeding, or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action, claim or counterclaim, which attaches to a verdict, report, decision, judgment or final order in his client's favor, and the proceeds thereof in whosoever hands they may come; and the lien cannot be affected by any settlement between the parties before or after judgment or final order. The court, upon the petition of the client or attorney, may determine and enforce the lien."

A valid contract, under seal, retained the attorney in all matters connected with the estate of plaintiff's grandfather, and his compensation by express agreement was fixed upon a percentage basis of the amount recovered, or, in case of settlement or adjustment, on the amount plaintiffs would be entitled to or would recover by decree or judgment were it not for such settlement or adjustment. Relying upon such contract, the attorney has made investigations, performed services, drawn and served papers, and employed counsel. Without his consent, without payment or security for the payment of his services, his clients adjust their differences with the defendants and discontinue the action. What rights has the attorney, and how is he to enforce them? He has by the section (66 of the Code) referred to a lien upon his client's cause of action or claim. There is no doubt but that this lien attaches not only to a verdict, decision, or judgment and the proceeds thereof, but also in case of settlement before the judgment or trial "it attaches to the amount agreed upon in settlement the instant that the agreement is made, and, if the defendant pays over to the client without providing for the lien of the attorney, he violates the rights of the latter, and must

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stand the consequences. The lien was not affected by the adjustment, but leaped from the extinguished cause of action to the amount agreed upon in settlement." Fischer-Hansen v. Brooklyn Heights R. R. Co., 173 N. Y. 502, 66 N. E. 395. But in the Fischer-Hansen Case there were two things which differentiated it from the case at bar. There was a settlement for a money consideration between the parties, and there was an extinguishment of the cause of action by the delivery of a release under seal. Upon these papers no pecuniary settlement has been made, no amount has been fixed as paid or to be paid upon which the agreed percentage could be calculated, or to which the lien could attach; nor has the cause of action or claim of the plaintiffs been extinguished. The suit has been discontinued, but there is no proof that the claim under their grandfather's will has been affected, or that when the trustees come to account, as some time they must, the questions raised in the complaint herein may not be raised by the plaintiffs. So that we have here a different question from those heretofore adjudicated. In Matter of King, 168 N. Y. 53, 60 N. E. 1054, stocks and bonds, assets of a trust estate, were removed into this state from the jurisdiction of the New Jersey court, and the New Jersey trustee employed attorneys in this state to recover the securities. After a long litigation they were successful, and the securities being in the possession of the Central Trust Company subject to the order of the court, and the trustee having disputed the attorneys' bill, they instituted a proceeding under section 66 of the Code of Civil Procedure to have the amount of their lien determined and enforced. It was upon those facts that the court said:

"In this case the petitioners had a lien created by statute. The proceedings provided by the Code are instituted by a petition, and are in the nature of the foreclosure of a lien. * * * The Special Term undoubtedly could have retained the proceedings, tried out the question as to the value of the petitioners' services, and determined the rights of the parties without a referee, but the petitioners were entitled to have their rights determined by the court either with or without the aid of a referee. The court could not properly, in the exercise of its discretion, deprive the petitioners of this remedy. The remedy given is equitable in character, and we think the equity side of the court has jurisdiction."

In Matter of Regan, 167 N. Y. 342, 60 N. E. 658, a decree had been obtained and entered in the Surrogate's Court which had been satisfied in derogation of the rights of the attorney, and it was held that the surrogate had power to protect the lien of an attorney upon the judgment or decree, and had power to vacate the satisfaction of the decree. In Matter of Fitzsimons, 174 N. Y. 15, 66 N. E. 554, in a proceeding to compel an accounting by an administratrix in the Surrogate's Court, a collusive settlement was had behind the attorney's back. Upon the consent and release so obtained a motion was made to approve the account. Upon that motion the attorney presented a petition setting forth facts entitling him to a part of any recovery to which his clients would be entitled upon such accounting, and to compensation as attorney for the contestants. He also asked that his rights as such attorney under the agreement between himself and the contestants be determined in that proceeding and the proceeding continued for that purpose. The court said:

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"That he had a right to present such a petition to the Surrogate's Court, and that it was the duty of the court to continue the proceeding for the purpose of enabling him to establish his rights to the compensation claimed, especially as his client was insolvent and the alleged settlement established by the plain provisions of the statute and the decisions of this court. * * * But the Appellate Division dismissed the petition, denied his right to establish such lien before any evidence as to the facts had been given, and with no proof before it except that set forth in the affidavits used upon the motion. * * * The Appellate Division erred in dismissing the petition and denying him the relief sought, when there had been no investigation or trial of the facts."

In Smith v. Acker Process Co., 102 App. Div. 170, 92 N. Y. Supp. 351, Mr. Justice Williams, after reviewing the case, said:

"It seems to us from a consideration of these late expressions of the Court of Appeals that we should not favor the continuance of an action for the benefit of the attorney's lien. Its only object would be to arrive at the attorney's compensation in a case where there had been an agreement with the client for a percentage of the recovery, and even in such a case the result of a trial after a settlement would hardly be a fair indication of what the recovery would have been in the absence of the settlement which was comtemplated by the agreement originally made. It seems to us even in such a case a more satisfactory determination would be arrived at by the court with or without the aid of a referee under section 66."

In the Fischer-Hansen Case, 173 N. Y. 492, 66 N. E. 395, it was held that a cause of action was not the property of the attorney, but of the client, and that the existence of the lien does not permit the plaintiff's attorney to stand in the way of a settlement.

Applying these cases to the facts now before us, we think that the court below was right in making the order of discontinuance appealed from; that the action should not have been continued for the mere purpose of fixing the amount of the attorney's compensation. We think, also, that the attorney, having the contract with his clients that he did, had a right, which the court has no discretion to refuse, to have the amount due him as between himself and his client fixed under the provisions of section 66 of the Code. The contract still exists, and the claim of the client does not appear to have been extinguished. We think that inasmuch as it does not appear that any sum was paid or agreed to be paid in settlement, and as, therefore, the lien only attached to the claim or cause of action, so far as the defendants are concerned there is no lien to be determined or enforced. So far as they are concerned, it is a shadow without substance. Further, as the question is now between the attorney and his clients, we should not treat the attorney's answering affidavit on the motion for an order of discontinuance, which does not appear to have been served upon his clients and to which they have not interposed an answer, as a petition under section 66, but should follow the course taken in Smith v. Acker Process Co., supra, and grant leave to institute such proceedings to the end that upon proper papers the questions may be squarely raised between the interested parties and decided by the Special Term on the facts.

With this leave, the order appealed from should be affirmed, with $10 costs and disbursements to be paid by the appellant. All concur.

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## In re WETMORE.

(Supreme Court, Appellate Division, First Department. May 11, 1906.)

1. TRUSTS—APPOINTMENT—PROCEEDINGS—PARTIES.
An order appointing a person to execute a trust cannot be made, without notice to the beneficiaries and those entitled to the remainder of the trust estate.
[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trusts, § 208.]

2. SAME—REMOVAL OF TRUSTEE—AUTHORITY OF COURT.
On an application to vacate the appointment of a trustee to execute a testamentary trust, the court appointed a referee to take proof of the facts stated in the application. The beneficiaries, when subsequently made parties, asked that the order of reference be affirmed. *Held*, that the order of appointment of the referee, though irregular because made when the beneficiaries were not parties, would not be vacated.

3. SAME.
On a petition to vacate an order appointing a trustee to execute a trust created by a will, appointing trustees, and providing that on the death of any trustee, the remaining trustee might appoint a trustee, etc., it appeared that the surviving trustee, in an instrument executed by her mark, appointed the petitioner trustee. The instrument was not recorded until seven years after its execution, though the will provided that appointments should be recorded. The petitioner waited 10 years after the purported execution of the instrument before presenting it to the court to be enforced. *Held*, that the court properly appointed a referee to take proof of the allegations in the petition.

Appeal from Special Term, New York County.

Petition by Katherine B. Wetmore to vacate an order appointing the Continental Trust Company trustee of the trust created in the will of Samuel Wetmore, deceased. From an order appointing a referee to take proof of the facts stated in the petition, the petitioner appeals. Affirmed.

Argued before O'BRIEN, P. J., and INGRAHAM, McLAUGHLIN, CLARKE, and HOUGHTON, JJ.

Lewis L. Delafield, for appellant.
John M. Shedd, for respondent.

INGRAHAM, J. One Katherine B. Wetmore, of the city and county of New York, presented a petition to the Supreme Court, alleging that by an order entered on the 10th day of July, 1899, and an order entered on the 23d day of August, 1900, the Continental Trust Company, of the city of New York, was appointed to execute a trust provided for by the will of Samuel W. Wetmore, deceased. This trust consisted of $100,000, the income thereof to be paid to the testator's son, William B. Wetmore, during his life, who was authorized to dispose of the trust property by a last will and testament; but upon the decease of William B. Wetmore, without exercising his power of appointment, the trust fund was to go to his next of kin. The trustees named in this will are all dead, and by the order sought to be vacated in this proceeding the trust company was appointed to execute the trust. The will of the testator provides that:

"In case of the decease, removal or inability of any such trustee, then I authorize and request the acting or remaining trustees or trustee of any such

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trust (with the concurrence of the party or parties beneficially interested in the same, if of full age and competency, but otherwise of their own motion) to appoint by deed such other suitable, competent and discreet person or persons as he or they may think proper, to fill the vacancy or vacancies caused as aforesaid, * * * provided that the appointment of any such trustee and his acceptance of the office or duty of such trustee shall be made in writing and duly proved or acknowledged and recorded in the office of register or filed in the office of the clerk of the city and county of New York, and that proper conveyances or transfers of title be executed so as to carry such appointments into full effect."

There is annexed to the petition what purports to be an instrument executed by Sarah T. Wetmore, the last surviving trustee, appointing the petitioner trustee. This instrument purports to be executed by the mark of Sarah T. Wetmore, the last surviving trustee, and its execution as to said Sarah T. Wetmore was proved on the 27th day of April, 1896, by the subscribing witness to the instrument, but was not acknowledged or its execution proved by the other parties, to the instrument until March and June, 1903, nor does it appear when they executed it; and it was not recorded until July 3, 1903. It purports to be dated over three years before the first order sought to be vacated was entered. Mrs. Wetmore lived for some time after this paper was executed, but during her life the appointee made no attempt to act as trustee, nor did she appear and oppose the order appointing the trust company to execute the trust, and, 10 years after it purports to have been executed, it is presented to the court for the first time to be enforced. When this application was presented to the court, it was on notice to the trustee; the children of the life beneficiary not having received notice. The rule is well settled that no order can be made in relation to a change of trustees, or the appointment of a person to execute a trust, without notice to the beneficiary and those entitled to the remainder. In opposition to this application, the trust company appointed to execute the trust submitted an affidavit stating that the children of William B. Wetmore would be entitled to the fund, in the event that the life beneficiary should die without exercising the power of appointment; whereupon the court made an order directing that these children should be made parties to this proceeding, and also appointing a referee to take proof of the facts stated in the application. The petitioner appeals from so much of the order as appoints a referee to take proof of such facts.

The circumstances disclosed which surrounded the execution of this instrument, the fact of the relationship of the person appointed trustee to the life beneficiary, the further fact that for years the life beneficiary, as the executor of the last surviving trustee, has had the securities of this trust in his possession, and has refused to obey the order of the court and turn these securities over to the new trustee, keeping out of this state with such securities, in defiance of the law of this state and of the orders of the courts of this state, might have justified the court in refusing to entertain any application of this kind until the securities in which the estate is invested were restored to the legal custodian by the life beneficiary. But as the trust company has not appealed from this order, but asks that it be affirmed, it is not necessary at this time to express any further opinion upon that question. The

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appointment of a referee was irregular, in that the persons who would be entitled to the trust property on the death of the life beneficiary were not parties to the proceeding; but as it appears that they have been made parties to the proceeding, and have appeared therein, and on this appeal have submitted a brief asking that the order so far as it appoints a referee be affirmed, there is no reason for setting it aside until they could be heard; and, as we are of the opinion that it would have been error for the court to grant this application without a full disclosure of the facts under which this alleged appointment was executed, we think it was proper for the court to order such an investigation.

It follows that the order appealed from is affirmed, with $10 costs and disbursements. All concur.

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## CADIGAN v. GLENS FALLS GAS & ELECTRIC LIGHT CO.

(Supreme Court, Appellate Division, Third Department. May 2, 1906.)

1. MASTER AND SERVANT—INJURIES TO SERVANT—SAFE PLACE TO WORK.

Where the superintendent of defendant gas company ordered plaintiff's general foreman to attach a valve on a six-inch gas main Y while the gas was on, without providing a rubber bag as usual to prevent the escape of gas from the pipe, knowing that the work was dangerous, and plaintiff was without knowledge of the danger, and was injured by an explosion which followed, whether defendant was guilty of negligence in failing to provide plaintiff with a reasonably safe place in which to work was for the jury.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Master and Servant, § 1014.]

2. SAME—KNOWLEDGE OF PLAINTIFF.

In an action for injuries to a servant while assisting in attaching a valve to a six-inch gas pipe Y while the gas was turned on, whether plaintiff, from his knowledge of the business and his familiarity with the situation, knew or should have known that the gas was on, and that the work was dangerous, was for the jury.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Master and Servant, §§ 1072, 1096.]

3. SAME—CAUSE OF ACCIDENT—EVIDENCE.

Where, in an action for injuries to a servant by an explosion of gas alleged to have been caused by contact of gas escaping from defendant's mains with a gas jet on the floor above, there was evidence that no spark alleged to have been emitted by a chisel which plaintiff's fellow servant was using on the gas pipe was seen prior to the explosion, but that the workmen heard an explosion before they saw a light, a nonsuit was not sustainable on the ground that the explosion was caused by the chisel spark.

4. SAME—FELLOW SERVANTS.

Where a master was negligent in putting his servant in a place surrounded by dangers unknown to and unexpected by the servant, the master could not shield itself from liability for injuries to the servant by proof that the act of plaintiff's fellow servant brought about the injury which the hidden dangers of the place made probable.

5. SAME—ASSUMED RISK—QUESTION FOR JURY—EMPLOYERS' LIABILITY ACT.

Where an action was brought by a servant for injuries by an explosion, under Employers' Liability Act, Laws 1902, p. 1748, c. 600, and plaintiff testified that he had no knowledge of the danger, that he believed that

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the gas pressure on the pipe he was working on had been turned off, and that the gas that was in the pipe was only such as would naturally form in the pipe after the pressure was turned off, the question of plaintiff's assumption of the risk was for the jury.

Appeal from Trial Term.

Action by Timothy Cadigan against the Glens Falls Gas & Electric Light Company. From a judgment dismissing the complaint, plaintiff appeals. Reversed. New trial ordered.

The plaintiff, under the direction of one Moran, the general foreman of defendant's works, and with him and two other men, was taking a plug from a six-inch Y branching off from an eight-inch pipe in the basement of the defendant's works, and inserting a valve in place thereof. It was the duty of the two men to lift and put the valve, which weighed about 100 pounds, in place after the plug was removed. It was the duty of the plaintiff to hold a burlap bag in the pipe to prevent the escape of gas after the plug was taken out and while the valve was being inserted, and of Moran to fit the valve and finish the work. The eight-inch pipe connected the works with the main holder, which supplied gas in the village. The work was being done in the basement of the building, a room about 8 by 11 feet and about 6 feet high. The gas works were not shut down while the change was being made, and in some way an explosion occurred, threw down the walls of the building, caused a fire, and quite seriously injured the plaintiff, who brings this action to recover for such injury. He had worked for the defendant about 3½ years, principally upon the streets in making connections in the open air with small pipes. He had assisted twice before in making connections somewhat similar to this in the building, but then the works were shut down so there was no pressure to force the gas from the pipes. Immediately over the room where this work was going on was the meter room, and there was an opening of about two feet in the floor between the rooms, which hole was nearly, but not quite, over the pipe where the plug was removed and where the plaintiff was standing, and a gas jet near the hole was always burning in the meter room, with a small light, to show the quality of the gas at any time. The plaintiff knew that, if the gas escaped in an inclosed place and came in contact with the flame, an explosion would result. If the pressure is turned off and the pipe opened, the gas in the pipe naturally comes out into the open air, and the plaintiff swears he supposed the pressure was turned off and that the burlap bag was only being used to hold in the pipe the gas naturally remaining there and which would otherwise escape. When the superintendent directed Moran, the general foreman, to do this work, he told him the gas must not be shut off, as the amount in the tank was low, and Moran told him there was no rubber bags to put in the pipes and that with the pressure on and without the bags the work was dangerous, and the superintendent said they could not wait, the work must be done, and they must take the chance. The plaintiff was not told of the danger, or that the pressure was still on the pipes. In making changes similar to this, the pressure is usually shut off, or a small hole is drilled in the pipe, a rubber bag inserted and then expanded by the air pump, so that it will fill the pipe and prevent the escape of gas. The evidence shows that it is probable that, if either of these methods had been resorted to, the accident would not have happened. It is not quite clear whether the lighted gas in the room above caused the explosion, or whether it arose from a spark caused by Moran using a chisel upon the iron pipe The witnesses say that they saw no spark or light before they heard the explosion. The notice was served under the employers' liability act. Laws 1902, p. 1748, c. 600.

Argued before PARKER, P. J., and SMITH, CHESTER, KELLOGG, and COCHRANE, JJ.

J. Edward Singleton, for appellant.

Potter & Kellogg (J. A. Kellogg and J. H. Barker, of counsel), for respondent.

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JOHN M. KELLOGG, J. The defendant owed the plaintiff a reasonably safe place in which to work, free from hidden unexpected dangers known to the master, but unknown to the servant, and by ordering this connection made with the pressure on and without the use of the usual bag a fair question was presented whether the defendant was not negligent in discharging the duty it owed to the plaintiff. The defendant knew that the manner in which it was doing this work was unusual and was dangerous.

The serious question is whether the plaintiff knew that the pressure was on, appreciated the danger, and assumed the risk. His former work had been in making connections in the open air, with small pipes, which connections usually are, and safely can be made, without turning the pressure off. From his knowledge of the business and his familiarity with the situation, did he know, or should he have known from the manner in which the work was being done, that the pressure was still on? He swears the burlap bags were used, as he supposed, to retain in the pipe the gas which was there and which would naturally escape, even though the pressure was turned off. Is that true? If he had reason to believe that the pressure had been turned off, was he negligent in staying at the work after the discovery that such was not the fact? Here the evidence is not entirely clear. Some of it tends to show that some time elapsed between the time the plug was pulled out and the explosion. Others put the explosion at about the time the plug was pulled out. If some time elapsed after the plug was pulled out, would a reasonably prudent man throw down his bag and run, knowing that there was a light over his head which might cause an explosion, or would he deem it his duty to remain and try and hold the gas in the pipe with the burlap bag, hoping to prevent an explosion?

The nonsuit cannot be sustained upon the theory that Moran, while acting as a fellow servant, caused the explosion by producing a spark with his chisel. It is not clear that the explosion did not occur from the gas jet above, and the fact that no spark was seen, and that the workmen heard an explosion before they saw a light, was proper to be considered as to whether a spark or the gaslight caused the explosion. Besides, if the defendant was negligent in putting the plaintiff in this place, surrounded by dangers unknown and unexpected by him, it cannot shield itself by showing that the act of the fellow servant brought about the injury which the hidden dangers of the place made probable. It seems that these questions, and the inferences to be drawn from all the circumstances, were peculiarily for the consideration of the jury, and not for the court. The Employers' Liability Act, Laws 1902, p. 1748, c. 600, required the question of assumption of risk to be submitted to the jury.

The judgment should be reversed, and a new trial ordered, with costs to the appellant to abide the event. All concur.

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## WAKLEY v. KING.

(Supreme Court, Appellate Division, Third Department. May 2, 1906.)

1. CONTRACTS—DURESS—QUESTION FOR JURY.

Defendant's testator was a married man living with his wife and family. For about 20 years he had maintained secret illicit relations with plaintiff, a married woman living apart from her husband. Testator was a man of strong mind and will, engaged in large business transactions, and left an estate valued at $100,000. He discontinued maintaining plaintiff in January, 1900, when in consideration of $12,000 she executed a general release to him. Prior to August, 1900, plaintiff discovered that testator had seduced her minor daughter, and a settlement was made by which testator agreed to pay for the benefit of the daughter $500 a year for 20 years. A settlement was also made with plaintiff's husband in March, 1901, by which the husband, in consideration of $10,000, executed a release to testator. About this time plaintiff discovered that, while testator was maintaining relations with her, he was also having illicit relations with her sister, and this resulted in an agreement by which testator agreed to pay to the sister's brother, in trust for her, $1,500, and at the same time he executed the contract in question, agreeing to pay plaintiff $500 a year for 15 years, and not to revoke a provision in his will made in plaintiff's favor, provided plaintiff kept the contract on her part to make no further demands. Testator paid installments on plaintiff's contract until he died, and three days before his death he made a new will, affirming the provision in a former will in plaintiff's favor. *Held*, that the contract with plaintiff was not void as a matter of law, as obtained by duress.

2. SAME—BREACH.

Prior to the making of such contract, a magnetic healer had instituted suit against plaintiff for services, alleging in his complaint that testator had seduced plaintiff's minor daughter, and that plaintiff had consulted him in reference to the matter, and agreed to pay him $10 for each consultation; demanding judgment for $590, which plaintiff in her answer in such suit denied. After the contract was made, plaintiff wrote advising testator that a settlement of this suit could be made for $500 and attorneys' fees, and asking his advice, stating that she would pay the whole amount if testator said so. Testator's attorneys directed her to settle, and offered to pay half of the amount, which they subsequently did. *Held*, that such transaction did not constitute a breach of the contract on plaintiff's part relieving testator from further performance.

Appeal from Trial Term, Warren County.

Action by Mary Wakley against H. Prior King, as executor of William Moore, deceased. From a judgment dismissing the complaint, and from an order denying a motion for a new trial, plaintiff appeals. Reversed.

This is an appeal by the plaintiff from a judgment entered in Warren county dismissing the plaintiff's complaint upon the merits on a verdict by direction of the court, and from an order denying the plaintiff's motion for a new trial upon the minutes. The action is brought to recover an installment of $500 which became due upon a contract July 1, 1904, from defendant's testator to the plaintiff. The contract was made under seal June 29, 1901, and provided for the payment of $500 for each year for 15 years from its date. The prior installments were paid. The testator died November 21, 1903. The contract also provided that the testator was not to revoke a provision in his will, dated June 29, 1900, in favor of the plaintiff. It recites as its consideration that the plaintiff has surrendered all the testator's letters and writings in her possession and under her control, and will not make any demand or claim upon him, or his representative, growing out of any matters prior thereto, except a contract of August 8, 1900, and that the pay-

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ments to her shall only continue so long as she keeps said contract on her part. and shall be null and void in case of her default. The defendant was a married man, living with his wife and family, and for about 20 years had maintained secret illicit relations with the plaintiff, a married woman living apart from her husband. He was about 67 years of age at the time of his death, a man of strong mind and will, engaged in large business transactions, and had the personal direction and control of his business to the time of his death. He left an estate of the value of $100,000. He discontinued his maintenance of the plaintiff and ceased to visit her prior to January 27, 1900, and at that time, in consideration of $12,000, she executed a general release to him.

Prior to August 8, 1900, she discovered that he had seduced her minor daughter, and a settlement was made by which the daughter, her husband, and the plaintiff made a release to him, and he made an agreement with the plaintiff, as trustee for the daughter, to pay her $500 per year for 20 years. Prior to March, 1901, the plaintiff's husband had threatened him with legal proceedings, and about March 30, 1901, the husband executed a release to him, and he paid the husband $10,000. About this time the plaintiff discovered that, while he was maintaining relations with her, he was having illicit relations with her sister, Mrs. Brown. Many letters were written by plaintiff to him. His part of the correspondence was presumably returned to him when the contract in suit was executed, so that but one side of the correspondence is produced. She claimed that in order to save his good name and to keep secret their relations and his relations with the daughter and the sister, and to pacify the husband, she had necessarily expended a great part of the money she had received, and she demanded that he make proper reparation to the sister, and that he make some further provision for her support, which correspondence finally resulted in the contract in suit, and an agreement of the same date by which he was to pay to John D. Wakley, the brother of the sister, in trust for the latter, $1,500. Prior to the agreement in suit, a so-called magnetic healer, at Buffalo, brought an action against plaintiff for his services and his instructions to her, and also alleged in his complaint that said Moore had seduced the plaintiff's minor daughter, and the plaintiff had consulted him with reference to the matter at various times, and was to pay him $10 for each consultation, and had had 50 consultations with reference to said matter, and demanded judgment for $590. In her answer she denied that the treatment or instruction received by her was of any value, and denied the employment, or any agreement to pay him with reference to the matter of the daughter. After the contract in suit was made, she wrote testator that there was an opportunity to settle that action out of court, and advised with him whether the suit better be settled by paying $500 and attorney's fees, saying: "What you and I know is that our affairs all told are better kept out of court. Your reply will decide me, and if he won't settle for $500 before court begins, I will pay the whole amount, if you say so." His attorneys replied to this letter to settle, and he would pay one-half the amount. She did settle, and then claimed that the attorneys would not remit his half and were resorting to unnecessary delays and requirements, and in very vigorous language required that the money be paid at once. It was finally paid. After this claim was settled he paid several installments upon the contract in suit, and three days before his death re-executed his will, and in it incorporated the provision which in said contract he had agreed to retain for the plaintiff's benefit. The trial court felt that the contract in suit was obained by duress, but placed its decision upon the ground more particularly that the contract was one for peace, and she had violated it by bringing up the Buffalo suit and the correspondence with relation to it. Several letters are in evidence written by Moore to the plaintiff in March, April, May, June, July, August, and September, 1903, of a friendly nature, telling her of his bad health and more particularly of the condition from time to time of his wife, who was then in a critical condition, and in the letter of September 24, 1903, he returns her a clipping relating to the Van Rensselaer estate. The provision in the testator's will for her, and which was to be retained by the contract, relates to his interest in said estate. He tells her he returns the clipping, and she had better preserve it: that the name in it might be of use.

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Argued before PARKER, P. J., and SMITH, CHESTER, KELLOGG, and COCHRANE, JJ.

Chambers & Finn (J. A. Kellogg, of counsel), for appellant.
Edward M. Angel, for respondent.

JOHN M. KELLOGG, J. Whether the agreement in suit was obtained by duress was clearly a question of fact for the jury. This is especially so when we consider the voluntary payments made by the testator upon it, and the making of his last will three days before his death, of which she could have no knowledge until after his death, reaffirming to her the provision which he in this contract had agreed would not be revoked. It is not clear that the letters written by the plaintiff were much different than would be written by the ordinary woman who had given the greater part of her life to him, and it is not clear that she was demanding any more than under all the circumstances was a reasonable and adequate provision which he fairly ought to make for the wrong done her. Neither is it clear that in making the contract he was actuated by fear or was the subject of duress. It may be that the correspondence had quickened his conscience, and led him to believe that he was not treating the plaintiff properly in discarding her in her old age without further provision for her support. He was a man of strong mind and will, and apparently able to take care of himself. He either destroyed his letters which were returned to him, or his estate has suppressed them, and the correspondence in evidence cannot be fully understood without drawing inferences as to what the letters written by him contained. Something may be inferred as to their contents from the tenor of her answers to him, and something from his letters which were written her after the contract in suit was made. If he feared for his good name and valued it higher than the money involved, it is evident that his estate does not take the same view of the matter. It cannot be said as a matter of law that he was coerced into making the agreement, or that it was anything more than what he deemed a suitable and proper reparation to her under all the circumstances. It cannot be said as matter of law that the correspondence with reference to the Buffalo suit was a violation of the contract in suit, and forfeited her rights. She had the right to advise with him about the settlement of the suit and to inquire whether he thought it ought to be settled in order to keep the scandal from coming to the public. It is evident that both of them had spent a great part of their lives in trying to keep their affairs from the public. In any event, after this correspondence, and after he paid the money, he recognized the agreement as binding by continuing the payments upon it, and his correspondence showed a good feeling towards the plaintiff, and his will indicates clearly that she was still the subject of his solicitude, and that he desired to carry out his contract with her. It was error to direct a verdict against the plaintiff.

The judgment and order should therefore be reversed, and a new trial ordered, with costs to the plaintiff to abide the event. All concur.

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## WALSH v. HYDE & BEHMAN AMUSEMENT CO.

(Supreme Court, Appellate Division, Second Department. May 9, 1906.)

1. APPEAL—MODIFICATION OF JUDGMENT.
In an action for personal injuries, the court authorized the jury to award compensatory and punitive damages, but directed them to divide such damages. The jury rendered a verdict for a specified sum for compensatory damages, and a specified sum for punitive damages. *Held*, that where the verdict for compensatory damages was justified, and the court erred in allowing punitive damages, the judgment will be modified by striking out the amount allowed for the latter.

2. DAMAGES—PUNITIVE DAMAGES—WHEN AWARDED.
Plaintiff was ejected from a theater though in possession of a ticket. Defendant's witnesses testified that plaintiff was drunk and was using obscene language, and that no more force than was necessary to eject him was used. It was not shown that the servants of defendant who ejected plaintiff were known to defendant to be improper servants, or that they had been guilty of conduct which should have given notice of their vicious tendencies. Defendant defended the conduct of the servants under the theory that plaintiff was drunk. *Held* not to authorize the jury to award punitive damages.

Appeal from Trial Term, Kings County.

Action by Percy Walsh against the Hyde & Behman Amusement Company. From a judgment for plaintiff, and from an order denying a motion for a new trial on the minutes, defendant appeals. Modified and affirmed.

Argued before HIRSCHBERG, P. J., and WOODWARD, JENKS, GAYNOR, and RICH, JJ.

Hugo Hirsh, for appellant.

John M. Ward, for respondent.

WOODWARD, J. The plaintiff was concededly ejected from the defendant's theater in the borough of Brooklyn on the evening of January 18, 1902. On the part of the plaintiff it is contended that he was thrown down three flights of stairs and badly beaten and bruised, such force being wholly unnecessary in ejecting him; that this was done while the plaintiff was in possession of a ticket entitling him to a seat, and without any provocation on his part. The defendant's witnesses testified to the effect that the plaintiff was drunk, and that he was using vile and obscene language, and that no more force than was necessary was used. The case was submitted to the jury, no motion to dismiss the complaint or for the direction of a verdict being made, upon a charge to which there was no exception upon the merits of the case, and the jury has found in favor of the plaintiff.

The learned court in its charge to the jury told them that if they reached the point where it was necessary to determine the amount of the damages, that the plaintiff was entitled to compensation for the pain and suffering, and also for the humiliation, and that they might go farther and "give him damages for the purpose of punishing the defendant." To this the defendant excepted, and if the matter had rested here we should be inclined to hold that the evidence

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did not show a state of facts charging the defendant with liability for punitive damages, for it was not shown that the servants of the defendant who ejected the plaintiff were known to the defendant to be improper servants, or that they had ever been guilty of conduct which should have given notice of their vicious tendencies, though the fact that the defendant defended the conduct of its servants under the theory that the plaintiff was drunk, where it appears that he had not been drinking that day at all, might have a tendency to show ratification. But counsel for the plaintiff asked the court to permit the jury to divide the damages, stating what amount was found for compensation and what amount for punitive, and the court directed the jury to comply with this request, with the result that the jury found a verdict for $1,500 for compensatory damages, and $100 for punitive damages. This, it seems to us, protected the defendant. There can be no doubt that the charge of the court in respect to compensatory damages was clear and correct, no exception being taken to that portion of the instruction; and the jury having found that the damages sustained by the plaintiff by his injuries and for the humiliation which he suffered amounted to $1,500, so much of the verdict is entirely warranted by the evidence and affords no ground for complaint. As to the $100 for punitive damages, we are of the opinion that the evidence did not warrant the submission of that question to the jury, and that the judgment should be modified by striking out the $100, and, as thus modified, the judgment should be affirmed.

The judgment should be modified as suggested above, and, as so modified, should be affirmed, together with the order appealed from, without costs. All concur.

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## GICK v. STUMPF.

(Supreme Court, Appellate Division, Third Department. May 2, 1906.)

EXECUTORS AND ADMINISTRATORS—DISCOVERY OF ASSETS.

Code Civ. Proc. § 2707. permits an inquiry concerning the property of deceased persons withheld from the personal representative. Section 2709, as amended by Laws 1903, p. 1195, c. 526, provides that on the attendance of a person to whom a citation is issued he may submit a verified answer showing cause why the examination should not proceed, and that the surrogate may then dismiss the proceeding or direct an examination when he may be examined fully as to the property of decedent, the extent of the examination to be in the discretion of the surrogate. Section 2710, as amended by Laws 1903, p. 1195, c. 526, provides that, if the facts admitted show that witness is in control of property to whose possession the petitioner is entitled, the surrogate may decree that it be delivered to the petitioner, and that if witness admits having control of the property, but the facts as to his right are in dispute, the proceeding shall end unless the parties consent to its determination by the surrogate. *Held*, that since the amendments surrogates have power, under the statutes, to examine a person proceeded against notwithstanding the interposition of an answer alleging title to the property in question.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 347.]

Appeal from Surrogate's Court, Saratoga County.

In the matter of the application of Frank Gick, as executor of



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Rosina Stumpf, deceased, for a discovery against Frank Stumpf. From an order denying a motion to dismiss the proceeding and from an order of the surrogate (98 N. Y. Supp. 299) resettling the first-mentioned order, defendant appeals. Affirmed.

Argued before PARKER, P. J., and SMITH, CHESTER, KELLOGG, and COCHRANE, JJ.

George B. Lawrence, for appellant.
Walter A. Chambers, for respondent.

COCHRANE, J. Pursuant to section 2707 of the Code of Civil Procedure, the petitioner, who is the executor of the last will and testament of Rosina Stumpf, deceased, presented to the Surrogate's Court a petition wherein he alleged that the appellant, Frank Stumpf, had in his possession money and property belonging to the estate of the said deceased, and that the appellant withheld the same from the petitioner, together with documents and papers belonging to the deceased and all knowledge and information relating thereto, and wherein the petitioner prayed an inquiry respecting such property and that the said appellant be cited to attend such inquiry and be examined accordingly. A citation was thereupon issued, and on the return thereof the appellant submitted an answer, duly verified, putting in issue the title to the property mentioned in the petition and claiming ownership of such property and thereupon he demanded a dismissal of the proceeding. From the order refusing to dismiss the proceeding this appeal was taken.

It is the contention of the appellant that on the submission of such answer placing in issue title to the property in question it was the duty of the surrogate to dismiss the proceeding, and that he had no power to proceed with the examination of the appellant. Section 2709 of the Code of Civil Procedure, relating to this proceeding, provides that:

"On the attendance of a person to whom a citation is issued, as prescribed in this article, he may submit an answer duly verified showing cause why the examination should not proceed. The surrogate may then dismiss the proceeding or direct the examination to proceed. In the latter case he must be sworn to answer truly all questions put to him, touching the inquiry prayed for in the petition; and he may be examined fully and at large respecting property of the decedent. * * * The extent of the examination shall be in the discretion of the surrogate. If the witness is examined concerning any personal communication or transaction between himself and the decedent, all objection under section eight hundred and twenty-nine to his testimony as to the same in future litigation is waived. Either party may produce further evidence in like manner and with like effect as on a trial."

Section 2710 of the Code of Civil Procedure provides that:

"If the facts admitted by the witness show that he is in the control of property to whose immediate possession the petitioner is entitled, the surrogate may decree that it be delivered to the petitioner. If the witness admits having the control of the property, but the facts as to the petitioner's right are in dispute, the proceeding shall end, unless the parties consent to its determination by the surrogate, in which case it shall be so determined."

These sections of the Code of Civil Procedure were materially amended in 1903; the sections as amended being as above set forth.

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Whatever construction may have been placed on them prior to such amendments, there is no doubt that since the amendments surrogates have power to examine a person proceeded against, notwithstanding the interposition of an answer alleging title to the property in question. It was doubtless the legislative purpose in making such amendments to enlarge the power of surrogates in a proceeding of this kind. Formerly a surrogate was bound by an answer such as was interposed herein. But under the present statute he may proceed and examine the person cited as to the facts alleged in his answer. He may inquire into the verity of the answer, and is not bound thereby. It is the facts disclosed by the evidence, and not the allegation of the answer, which determines the proceeding. Of course, the surrogate can make no order adverse to the person cited affecting the property in question, unless it conclusively appears as matter of law from the evidence produced that his claim of title is not well founded. But the purpose of the statute is to enable the surrogate to say whether the claim of title alleged in the answer rests on a sound foundation, or is a mere subterfuge on the part of the claimant to deprive the executor or administrator of the property or of information concerning the same. The case of Matter of McGuire's Estate, 106 App. Div. 131, 94 N. Y. Supp. 97, is not pertinent to this case. There the order appealed from directed the delivery of property without any examination, notwithstanding an answer showing the right of the appellant to hold the property.

It is said that this construction of the statute vests in surrogates much inquisitorial power, and that the statute may thereby be made oppressive. This argument assumes that surrogates will not wisely exercise the discretion vested in them. That much discretionary power is given them is apparent. When an answer is submitted, "the surrogate may then dismiss the proceeding or direct the examination to proceed." "The extent of the examination shall be in the discretion of the surrogate." It is a discretion which should be wisely exercised and carefully guarded against abuse. But there are cases and circumstances where such power may properly be exercised by surrogates, and the extent of the examination permitted in each case should depend on a sound exercise of discretion.

The orders should be affirmed, with $10 costs and disbursements. All concur.

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## EVERETT v. VILLAGE OF POTSDAM et al.

(Supreme Court, Appellate Division, Third Department. May 2, 1906.)

ELECTIONS—BALLOTS—DIFFERENT PROPOSITIONS — MUNICIPAL CORPORATIONS—ISSUANCE OF BONDS—VALIDITY.

The village law, Laws 1897, p. 438, c. 414, § 241, provides that a proposition may be submitted at a village election for the establishment of a lighting system, and section 60 (page 383), provides that the provisions of the election law relating to ballots shall apply to propositions submitted. Election law, Laws 1896, p. 937, c. 909, § 82, provides that if there be more than one proposition or question to be submitted the different propositions or questions shall be separately numbered and printed. *Held*, that a proposition authorizing a lighting system to be

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operated by a village water power, by steam power, by a purchased electric current, or by any approved method of combining any of such methods, was not violative of section 82, as the details embodied in the proposition were within the discretion of the village officers, and were unnecessarily included in the proposition.

Appeal from Trial Term, St. Lawrence County.

Action by Edward A. Everett against the village of Potsdam and others. From a judgment dismissing the complaint, plaintiff appeals. Affirmed.

At an election held in the village of Potsdam March 21, 1905, there was submitted a proposition for the establishment or acquisition by said village of a system for supplying the village and its inhabitants with light at a cost not exceeding $40,000. The proposition was adopted by the voters. Pursuant thereto the officers of the village offered for sale bonds of the village to the amount of $40,000, and were proceeding to sell the same. Thereupon this action was instituted by the plaintiff a taxpayer of the village against the village and its officers to restrain them from issuing or delivering said bonds, and from taking any other proceeding in reference to the establishment or acquisition of such lighting system, on the ground that the question submitted to the electors of the village combined more than one proposition within the meaning of the village law, and that the proposed lighting system and the issue of bonds therefor were not on that account lawfully authorized.

Argued before PARKER, P. J., and SMITH, CHESTER, KELLOGG, and COCHRANE, JJ.

Lowen E. Ginn and Ledyard P. Hale, for appellant.

A. X. Parker, Thomas D. Watkins, and T. H. Swift, for respondents.

COCHRANE, J. Section 241 of the village law (Laws 1897, p. 438, c. 414) is as follows:

"A proposition may be submitted at a village election for the establishment of a system for supplying the village and its inhabitants with light by any approved method or for the acquisition of an existing private system at an expense in either case not exceeding the sum stated in the proposition."

Section 60 of the village law provides that:

"The provisions of the election law relating to ballots apply to propositions submitted under this chapter."

And section 82 of the election law, Laws 1896, p. 937, c. 909, provides:

"If there be more than one constitutional amendment or proposition or question to be submitted to the voters of that district, the different amendments or propositions or questions shall be separately numbered and printed."

The plaintiff claims that this last provision has been disregarded, because there was more than one proposition or question submitted to the voters without separately numbering and printing the same. Consideration of the proposition in question must be within the limits by which the plaintiff has surrounded himself by the allegations of his complaint. The specific grounds of objection to such proposition are alleged in the complaint and the plaintiff by the form of his pleading has precluded himself from having any other objection considered. The complaint reasonably and properly construed alleges the invalidity of the proposition in question for the reason that

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it authorizes a lighting system to be operated (1) by village water power; or (2) by steam power; or (3) by a purchased electric current; or (4) by any approved method of combination of any of the foregoing methods.

The question submitted to the electors of the village did not offend section 82 of the election law above set forth, by reason of the fact that it authorized the village officers to use in their discretion water power, steam power, an electric current, or a combination of any of those methods. Those matters were mere details which were within the discretion of the village officers. Had nothing been said in the proposition as to those matters they could use their discretion in reference thereto. It was unnecessary that the proposition should contain any reference to those matters as without such reference the officers would have had full authority to use their judgment and discretion in the same manner as they might have used their discretion in reference to the extent and capacity and character of the system, the nature of the material out of which the plant was to be constructed, or the kind of machinery to be used, or many other details of construction. The insertion in the proposition of these unnecessary details was unimportant and harmless. The objections to the proposition raised by the complaint are untenable.

The judgment should be affirmed, with costs. All concur, except PARKER, P. J., not voting.

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## PEOPLE ex rel. JOHN SINGLE PAPER CO., Limited, v. EDGCOMB, Sup'r, et al.

(Supreme Court, Appellate Division, Fourth Department. May 2, 1906.)

1. CONTRACTS—LEGALITY—PUBLIC POLICY—PREVENTION OF COMPETITION FOR PUBLIC WORK.

   A requirement by a county board of supervisors that bidders for the publication of the journal of the board shall use the printers' union label is against the public policy and unlawful.

2. COUNTIES—CONTRACTS—BIDS—CONTRACTOR'S BOND—SUFFICIENCY.

   Where the advertisement of a board of county supervisors for bids for a contract for county printing required bidders to use the printers' union label, the absence from the bond tendered by the accepted bidder of any provision requiring the use of the union label did not justify the supervisors in refusing to approve the bond.

3. ESTOPPEL—ACQUIESCENCE IN ILLEGAL REQUIREMENT.

   Where the advertisement of a county board of supervisors for bids for a contract for county printing contained a requirement that the label of the printers' union should be used on the work, the act of the bidder in submitting a bid upon the specifications containing the illegal clause did not estop it from afterward asserting its illegality.

4. MANDAMUS—SCOPE OF REMEDY—APPROVAL OF BOND.

   Where a county board of supervisors wrongfully refused to approve the bond of a successful bidder for county printing, mandamus was the proper remedy to require them to approve the bond.

   McLennan, P. J., and Kruse, J., dissenting.

Appeal from Special Term, Onondaga County.

Mandamus proceedings by the people of the state of New York, on the relation of the John Single Paper Company, Limited, against

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Ernest I. Edgcomb, as chairman of the board of supervisors of the county of Onondaga, and another. From an order denying the writ, relator appeals. Reversed.

The following is the opinion of ANDREWS, J., at Special Term:

In the fall of 1905, pursuant to a resolution of the board of supervisors of the county of Onondaga, advertisements were published for proposals for printing the journal of its proceedings and the court calendars. Contained in the advertisements were specifications as to the manner in which the work should be done, and requiring a bond in the sum of $1,000 for its faithful performance. The further provision was also inserted "Allied Printing Trades Council label required to be used." In pursuance of such advertisement, on the 5th day of December the relator submitted a bid in writing to the board, by which it agreed to publish the journal of proceedings as per specifications at $2.79 a page, and further agreed to furnish the required bond. This bid was the lowest one received, and by subsequent resolution the board decided to let the contract to the relator, according to the specifications, upon the filing of the proper bond. On the 11th day of December the relator did file a bond conditioned for the faithful performance of its work, as required by the specifications, "except the portion of said resolution purporting to require the use of the Allied Printing Trades Council label." This bond was disapproved, and the board passed a resolution that the contract in question be awarded to the relator "upon its filing with the clerk of this board a bond conditioned for the faithful performance of said work, and deemed by the chairman and clerk to be in conformity with the specifications prescribed by this board according to advertisement, such bond to be in such form and with such conditions as shall be prescribed by them, and to be filed within five days, and approved by the chairman and clerk; but, if such bond is not filed and approved as above, then the chairman and clerk are hereby authorized and empowered to enter into contract for the performance of said work with such person or persons and upon such terms as they shall deem for the best interests of the county." The board then adjourned. Subsequently the relator presented to the chairman and clerk a bond similar to that filed with the board. It was also disapproved. Thereupon the relator began this proceeding to obtain a writ of mandamus requiring the respondents, as chairman and clerk of the board of supervisors, to approve such bond.

It is probably the law that the requirement contained in the specifications that the Allied Printing Trades Council label shall be used is illegal. Davenport v. Walker, 57 App. Div. 221, 68 N. Y. Supp. 161; Marshall & Bruce Co. v. Nashville, 109 Tenn. 495, 71 S. W. 815. While I have found no statute which requires a board of supervisors to let a contract to the lowest bidder, or to invite general competition, yet it is probably also true that where a contract is advertised for it would be a waste of public funds unreasonably to let it except for the lowest price offered, or to narrow competition by unreasonable, unnecessary, or unlawful requirements. If this be so, such a contract as was proposed would be unlawful, and any taxpayer has an appropriate remedy. Yet it does not follow that the petitioner is entitled to a peremptory writ of mandamus. It says that the requirement with regard to the Trades Council label is illegal. Conceded. It says also that this requirement results in higher prices than would otherwise obtain. Yet it enters into a competition, one of the conditions of which is that the label in question shall be used, without so far as appears notifying either the board or its competitors that it did not intend to be bound by that condition. The result can hardly fail to be that its competitors, if they supposed they were bound by the same condition, would increase their prices. The petitioner might also increase the price which it would otherwise offer to a somewhat less extent, and yet be sure of success. There would be no fair competition based upon the same requirement, and the public would inevitably be wronged. It may be said that every man is presumed to know the law, and that therefore the competitors of the petitioner stood upon an equal footing with itself. This purely technical maxim, however, which is simply a rule of convenience, and does not represent the fact, should never be invoked where the interests

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of the public are concerned in a purely business proposition. As a matter of discretion, therefore, the writ should not be granted in this case.

As a matter of law as well the petitioner must fail. Assuming, as I do, that the requirement in question was illegal, the petitioner should not be heard to question it. It at least has offered to do the work advertised for in the manner and subject to the conditions of the specifications. It has voluntarily entered into this agreement. How can it now be heard to say that it will accept the conditions favorable to it and reject the one that is unfavorable. It at least is estopped from raising such a question. In so far as Marshall & Bruce Co. v. Nashville may be claimed to hold otherwise, I do not follow it.

The question as to the authority of the board to delegate to its officers the powers conferred by its resolution has not been raised by either party, and it is unnecessary to examine it here.

The application for a writ of mandamus is denied, with costs.

Argued before McLENNAN, P. J., and SPRING, WILLIAMS, NASH, and KRUSE, JJ.

Frank Hopkins, for appellant.
William L. Barnum, for respondents.

SPRING, J. The defendants are, respectively, the chairman and clerk of the board of supervisors of the county of Onondaga, The board at its session in November, 1905, advertised for sealed bids for the publication of the journal of the board for that year. The specifications contained the statement, "Allied Printing Trades Council label required to be used." The relator submitted a bid, which was the lowest, and was formally accepted by the board. The specifications required the successful bidder to give a proper bond, to be approved by the board. On the 15th day of December, the relator, in attempted compliance with this requirement, presented to the board a bond, which excepted from the obligations undertaken by the obligor the use of the Allied Printing Trades Council label, and was rejected by the board solely because of that omission. On the 20th day of December, the day of its final adjournment, the board passed the following resolution:

"That the contract for printing the journal of proceedings for the year 1905 be awarded to the John Single Paper Company upon its filing with the clerk of this board a bond conditioned for the faithful performance of said work, and deemed by the chairman and clerk to be in conformity with the specifications prescribed by this board according to advertisement, such bond to be in such form and with such conditions as shall be prescribed by them, and to be filed within five days, and approved by the chairman and clerk."

And further empowering the chairman and clerk to enter into a contract for such work "if the bond is not filed and approved as above." On the 23d the relator presented another bond to the respondents, in the main conforming to the one previously rejected, with a copy of the specifications attached, except that the clause "Allied Printing Trades Council label required to be used" was stricken out. The bond was disapproved, on the ground that it was identical with the one rejected, and because it eliminated the clause mentioned. Thereupon this proceeding was commenced to compel the respondents to accept said bond.

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The Allied Printing Trades Council label can only be used by printing concerns which employ members of Typographical Union No. 55, and not one-half of the printers in Onondaga county belong to this union. The requirement that the label mentioned must be used when its use limits the bidders to members of the particular union is against public policy and is unlawful. Davenport v. Walker, 57 App. Div. 221, 68 N. Y. Supp. 161; City of Atlanta v. Stein, 111 Ga. 789, 36 S. E. 932, 51 L. R. A. 335; Inge v. Board of Pub. Works of Mobile, 135 Ala. 187, 33 South. 678, 93 Am. St. Rep. 20; State ex rel. Mitchell Furn. Co. v. Toole, 26 Mont. 22, 66 Pac. 496, 55 L. R. A. 644, 91 Am. St. Rep. 386; Paterson Chronicle Co. v. Paterson, 66 N. J. Law, 129, 48 Atl. 589; Marshall & Bruce Co. v. Nashville, 109 Tenn. 495, 71 S. W. 815; Adams v. Brenan (Ill.) 52 N. E. 314, 42 L. R. A. 718, 69 Am. St. Rep. 222; Holden v. City of Alton, 179 Ill. 318, 53 N. E. 556; Fiske v. People, 188 Ill. 206, 58 N. E. 985, 52 L. R. A. 291. A provision of this kind tends to create a monopoly in that it restricts the competition to a special class of printers. The board, with just as much propriety, so far as its legal right is concerned, might have permitted only Baptist or Unitarian printers to enter the bidding list. The policy of the law is to prevent any discrimination of this kind by public officials, and the courts, so far as our research extends, have unvaryingly condemned this attempted violation of our fundamental law. The enactments which in recent times have found their way upon our statute books intended to discriminate for or against any particular class of people, or to restrict the freedom of contract, have been repeatedly held to transgress the constitutional rights of the citizen. People v. Gillson, 109 N. Y. 389, 17 N. E. 343, 4 Am. St. Rep. 465; Curran v. Galen, 152 N. Y. 33, 46 N. E. 297, 37 L. R. A. 802, 57 Am. St. Rep. 496; People ex rel. Tyroler v. Warden of Prison, 157 N. Y. 116, 51 N. E. 1006, 43 L. R. A. 264, 68 Am. St. Rep. 763; Schnaier v. Navarre Hotel & Importation Co., 182 N. Y. 83, 74 N. E. 561, 70 L. R. A. 722; Wright v. Hart, 182 N. Y. 330, 75 N. E. 404; Lochner v. New York, 198 U. S. 45, 25 Sup. Ct. 539, 49 L. Ed. 937; People ex rel. Appel v. Zimmerman, 102 App. Div. 103, 92 N. Y. Supp. 497.

The more serious proposition is whether the relator can obtain the benefits of its bid, inasmuch as the obnoxious clause was contained in the specifications, and we may assume that it joined in the competition knowing this fact, and also that the clause exacted an illegal requirement.

It is well to note that there is no claim by the respondents that the relator's bid was not awarded to it after a full and fair competition. Nor is it contended that the addition of the label to the journals would add to the cost of the printing to any appreciable extent. The ground for the refusal to approve the bond was solely that it did not contain the unlawful provision referred to. There is, therefore, this condition of affairs: The board, in order to restrict the bidding to a certain class of printers, inserted an unauthorized clause in its specifications, and which was to be embodied in the agreement. The supervisors did this knowing its illegality, and that its tendency,

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if adhered to, would be to increase the cost of publication to the taxpayers, because it narrowed the list of bidders. The relator's bid as the lowest was accepted, but the contract would not be let to it without the unlawful provision. It did not belong to No. 55, and consequently cannot perform the agreement if the objectionable clause is to be a part of it. If it should enter into the agreement and perform, barring the furnishing of the label, it may be that the relator could recover the contract price (People ex rel. Rodgers v. Coler, Compt., 166 N. Y. 1, 59 N. E. 716, 52 L. R. A. 814, 82 Am. St. Rep. 605); but that is not certain. If its bond is approved, and the board should still refuse to enter into the contract with it, mandamus would not lie to compel its execution, for it contains the unlawful provision, and its execution or enforcement would not be decreed against the supervisors, for the public interests are to be subserved. If, however, the agreement should be entered into, a taxpayer, if he can show a waste of or injury to the county, may maintain an action, and obtain judgment enjoining the performance of the agreement. Section 1925, Code Civ. Proc.; Davenport v. Walker, 57 App. Div. 221, 68 N. Y. Supp. 161. The only way open to the relator, therefore, was to proceed upon the assumption that the supervisors would not insist upon the illegal clause if their attention was directed to it, or that said clause was surplusage. The relator adopted that course, but the board were still persistent in adhering to the form of their specifications. The relator is entitled to the benefit of his agreement, unless other printers refrained from bidding because of the vicious clause, or for some other tangible reason. The respondents have not, in their return to the writ, raised any issue impugning the fairness of the bid, or tending to show that there was a lack of competitors. Their defense rests only upon the ground that the bond of the relator did not comply with the specifications, in that it omitted the clause mentioned. This ground we deem untenable, and no warrant for refusing to approve the bond tendered.

It is urged that the relator, having submitted its bid upon specifications containing the illegal clause, is estopped from now asserting its illegality; in other words, the relator must enter into the agreement knowing it cannot fulfill, disregard the provision, and run the risk of getting pay for the work performed, or else abandon its bid, and allow the respondents to contract with some other printing establishment, which will perform the unlawful part of it. The first provision, if carried out, would place a premium upon deception, and the other would enable the board to accomplish indirectly the illegal purpose intended by the resolution. The principle of estoppel in any event is not applicable. Marshall & Bruce Co. v. Nashville, 109 Tenn. 495, 71 S. W. 815. Before the respondents can successfully raise the question of estoppel against the relator, they must show that they are acting in good faith themselves. They ought not to be heard to complain of the lack of fairness on the part of the bidder, when their only reason for declining to accept his bond is that it does not contain a condition requiring the obligor to violate the organic law. The principle of estoppel applies where a man by his conduct has deceived another to his damage, and it therefore

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precluded from repudiating that conduct. There is no claim that the county of Onondaga has suffered any damage by the refusal of the relator to subscribe to the obnoxious provision. The principle of estoppel was never carried to the fanciful extent of permitting public officers to bind a man to an unlawful contract, or to repudiate an agreement because a proposed party to it declines to be held to the illegal provision. If the proposed agreement is rendered unjust because of the acts complained of, it may have been canceled; but no such claim was raised by the affidavits or suggested on this appeal. If the defendants had insisted on disregarding all bids, and called for new proposals with the illegal clause expunged, an entirely different situation would be presented for our consideration. Apparently, the board of supervisors intentionally abstained from that course. We think mandamus is the proper remedy. People ex rel. West Side St. R. R. Co. v. Barnard, 110 N. Y. 548–556, 18 N. E. 354 et seq.; Baird et al. v. Supervisors, 138 N. Y. 95, 33 N. E. 827, 20 L. R. A. 81.

The court below did not exercise its discretion in refusing to grant the writ, but placed its decision upon the claimed failure of the relator, as matter of law, to show his right to it.

No adequate excuse is offered by the respondents for their declination to approve the bond of the relator. If the price of the plaintiff's bid is unduly enhanced because of few competitors, or if for any just reason the agreement should not be entered into, those issues may still be raised in some way; but on the record presented to us the bond tendered should be approved.

Order should be reversed, with $10 costs and disbursements, and the writ granted, compelling the respondents to approve the bond presented by the relator, with $10 costs. So ordered. All concur, except McLENNAN, P. J., and KRUSE, J., who dissent on opinion of ANDREWS, J., at Special Term.

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## SUTHERLAND v. CITY OF ROCHESTER.

(Supreme Court, Appellate Division, Fourth Department. May 2, 1906.)

1. MUNICIPAL CORPORATIONS—OFFICERS—COMPENSATION—CORPORATION COUNSEL.

   Under the act for government of cities of the second class (Laws 1898, p. 435, c. 182, § 418), providing that the corporation counsel shall be entitled in actions and proceedings in which the city shall be successful to receive to his own use all costs and allowances which shall be collected from the adverse party, such officer is required to establish, not only that the city was successful, but that the costs have been paid, before he is entitled to recover therefor from the city.

2. SAME.

   The mere fact that the title to the property against which a city's lien for taxes had been enforced in an action brought by its corporation counsel had been taken in its own name on a purchase thereof at public sale does not establish the right of such officer to costs accruing to him, under Laws 1898, p. 435, c. 182, § 418, relating to cities of the second class.

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3. SAME—LIEN.

Where judgment has been entered in favor of a city of the second class in an action instituted by its corporation counsel to enforce tax liens in favor of the city, the corporation counsel has no lien thereon for securing payment of costs accruing to him, under Laws 1898, p. 435, c. 182, § 418.

Submission of a controversy on an agreed statement of facts, pursuant to Code Civ. Proc. § 1279, between William Sutherland, as plaintiff, and the city of Rochester, as defendant. Judgment ordered in favor of defendant.

Argued before McLENNAN, P. J., and SPRING, WILLIAMS, NASH, and KRUSE, JJ.

James S. Havens, for plaintiff.
William W. Webb, for defendant.

KRUSE, J. The question submitted for our determination is whether the plaintiff, William A. Sutherland, is entitled to recover judgment against the defendant, the city of Rochester, for the sum of $89, with interest from December 11, 1902, or any part thereof, being a claim for costs of that amount awarded in an action prosecuted by the plaintiff as corporation counsel for the city to enforce the payment of taxes against certain lands in the city, and which were bid in by the city upon the sale recovered in that action. The plaintiff was corporation counsel for the city from January 1, 1902, to January 1, 1904. His salary was fixed at $3,800. Rochester belongs to cities of the second class.

Section 414 of the "Act for the government of cities of the second class" (Laws 1898, p. 434, c. 182), provides as follows:

"Sec. 414. The salaries of the corporation counsel, his assistant, clerk and other subordinates shall be fixed by the board of estimate and apportionment and they shall receive no fees or other compensation of any kind whatever, except that the corporation counsel may receive to his own use the costs of suits, as hereinafter provided. But all costs, allowances and disbursements in proceedings for the opening of streets, and the acquirement of land by condemnation proceedings, shall be collected and paid over to the city treasurer."

And section 418 provides as follows:

"Sec. 418. He shall be entitled in actions and proceedings in which the city shall be successful to receive to his own use all costs and allowances which shall be collected from the adverse party, but he shall repay to the city treasurer all amounts disbursed in the progress of such actions and proceedings, which were taxable as disbursements therein, and which shall have been paid by the city treasurer, whenever and as soon as such amounts are collected."

Section 416 of the same act defines the duties of the corporation counsel. It reads:

"Sec. 416. He shall be and act as the legal adviser of the common council and of the several officers, boards and departments of the city, and he shall appear for and protect the rights and interests of the city in all actions, suits and proceedings brought by and against it or any city officer, board or department; and such officers, boards or departments shall not employ other counsel."

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The plaintiff as corporation counsel, and pursuant to a resolution of the common council so requesting, commenced an action for the foreclosure, under the provisions of its charter, being section 104 (Laws 1880, p. 48, c. 14), of certain tax liens held by the city to foreclose all interest of certain persons in lands known as the "Warner Property" in said city, consisting of several acres of land, and incumbered by taxes for upwards of $40,000, covering the years 1893 to 1902, inclusive. The action was commenced in behalf of the city July 25, 1902. The defendants appeared in the action, but no answer was served, and the usual judgment of foreclosure and sale was granted on August 26, 1902. The amount found due the city for taxes upon said premises, with interest thereon, was $42,987.41. The premises were sold under the judgment December 11, 1902, for $17,150. They were sold in parcels, and bid in by the plaintiff for the city at the direction of the mayor. There was another bidder who bid for responsible parties, $17,000 and upward, so the record states, but evidently less than the city did, for it was struck off to the city.

After the city acquired the title, a much larger offer was made to the city for one of the parcels than it paid, but, not being accepted, the offer was withdrawn.

The judgment provided, among other things, that, after deducting the referee's fees and expenses of sale, the referee pay to the plaintiff the sum of $125.18 for costs and charges in the action. No money was paid to the referee on the sale, but the city paid the referee's fees and paid the plaintiff his disbursements, leaving unpaid of said $125.18 the costs, $89, which the city refuses to pay, and is the subject of this controversy.

When the plaintiff became corporation counsel, there had accumulated in tax arrearages upon real estate in the city upwards of $500,000, covering upwards of 2,000 parcels of real estate, running back many years. It became necessary to bring a large number of actions similar to the one out of which this controversy arose. In doing this work the plaintiff paid for outside and additional legal assistance at the rate of $125 a month, which was personally paid by the plaintiff from October 1, 1902, to June 1, 1903. At the latter date the plaintiff transferred to the city treasurer the costs thereafter recovered in the actions, and the city paid for the outside assistance at the rate of $125 a month during the remainder of the plaintiff's term of office as corporation counsel, and the city continues to pay the salary of a legal assistant for tax collections at that rate per month, and in addition $50 a month for a stenographer, and pays the present corporation counsel a fixed salary of $5,000 per annum; he transferring to the city the costs to which he is entitled under the provisions of section 418, above referred to.

The question presented for our determination is, whether the plaintiff has a legal claim against the city for this sum of $89, costs, included in the judgment above referred to. We think we are required to answer this question in the negative. Under the provisions of section 418, above referred to, which the plaintiff contends entitle

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him to these costs, he is required to establish, not only that the city was successful, but that the costs have been collected from the adverse party. The evident design of the statute was to pay over to the corporation counsel in such actions whatever sums the city recovered for costs, in addition to the amount of its claim for which the action was brought by the corporation counsel in behalf of the city.

Counsel for the plaintiff strenuously urges that, had the city not overbid the individual who bid at this sale, the property would have been sold to the individual bidder, the amount of the bid paid to the referee, and then, according to the terms of the judgment, the plaintiff would have received his costs out of the moneys so paid to the referee upon such sale.

We are not prepared to assent to this view. The city is not concluded by this provision in the judgment. The question would still arise whether the condition had been met that the city was successful, within the meaning of that section. Does it mean that the city shall be successful in recovering judgment or in collecting its claim? If the latter, does it mean that the city must be successful in collecting the entire claim, or will it answer the requirements of this section if but a part of its claim is collected? My own view is that the reasonable construction of this provision is that the city must not only be successful in recovering the judgment, but that it must as well be entirely successful in recovering the whole judgment. This view, I think, is reinforced by the provision contained in the section that it is such costs and allowances as shall be collected from the adverse party to which the corporation counsel is entitled. But, even if I am wrong in this view, under the circumstances of this case, assuming that the city has been successful, it has not collected the costs from the adverse party. It is true that it has taken the title to the property in its own name. It may ultimately realize the amount of its claim and these costs, but so far as the record discloses there is no proof that the property bid in by the city was worth its claim for taxes. Indeed, the price for which the property was sold at this public sale was less than half of its claim.

Counsel for the plaintiff also urges that the plaintiff has a lien upon this judgment for securing the payment of his costs out of the first proceeds of the judgment. This is the usual rule between attorney and client, and such are the rights of an attorney ordinarily in a judgment which he obtains for a client; but if the attorney has been paid or has no claim, then it follows that he has no lien upon the judgment. I do not regard the plaintiff's right to his costs superior to that of the claim of the city. My view is quite the reverse. I think the city's claim is superior to that of the claim of the corporation counsel. A fixed salary was the compensation provided for all of his services, except where the city was successful in collecting its claim and the costs for prosecuting such claim from the adverse party. Then, and only in that event, was the corporation counsel entitled to this additional compensation beyond his fixed salary

As has been stated, the question for our determination is whether

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the plaintiff is entitled to recover a judgment against the defendant for this sum of $89 and interest, or any part thereof, and that question we must answer adversely to the plaintiff.

Judgment should be ordered for the defendant, with costs.

**Judgment ordered for defendant, with costs. All concur.**

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## REWITZER v. SWITCHMEN'S UNION OF NORTH AMERICA.

**(Supreme Court, Appellate Division, Fourth Department. May 2, 1906.)**

1. INSURANCE—MUTUAL BENEFIT INSURANCE—SUSPENSION OF MEMBER—REINSTATEMENT.

The rules of a mutual benefit association provided that dues and assessments should be paid monthly in advance on or before the last day of each month; that any member failing to make payments as required should be suspended, the suspension taking effect on the first day of the current month; that a member suspended for nonpayment "for one month," wishing to be reinstated, must pay all arrearages, and make application at a meeting of the lodge, and that an applicant for reinstatement should furnish a certificate of health after one month, and after two months furnish a medical certificate. A local officer of a subordinate lodge retained the money collected by him during each month, and made his remittance to the grand lodge on the last day of the month. *Held*, that the rules, together with the conduct of the officers, showed that it was only where default had continued for a month that an application for reinstatement was required to be made in order for a member to regain his former standing.

2. SAME—RULES—CONSTRUCTION.

Where a rule of a mutual benefit association provided that, if a member not in arrears should sustain an injury or become sick, he could not become delinquent while injured or be deprived of his weekly benefits, but his dues and assessments should be deducted therefrom, it could not be construed as referring only to the special assessments made by a local or subordinate lodge.

3. SAME—DELINQUENCY OF MEMBER—WAIVER.

Where the rules of a mutual benefit association required payment of dues of each month to be paid on the last day of the preceding month, and provided for a suspension for nonpayment, and a member's dues for a certain month were paid on the 10th thereof, and accepted by the local officer, and transmitted to the proper officer of the grand lodge at the end of the month, as was the usual practice, and the member died on the 21st of the month, and the grand lodge retained the moneys until the 10th of the following month, when they were returned to the local officer, who tendered them to the member's brother, who had paid them, the conduct of the association amounted to a waiver of strict performance on the part of the member.

Appeal from Judgment on Report of Referee.

Action by Mary B. Rewitzer against the Switchmen's Union of North America. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

The action is brought to recover upon a certificate of life insurance issued by the defendant, a fraternal insurance society, to one George L. Rewitzer, who has died, in which his mother is named the beneficiary.

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Argued before McLENNAN, P. J., and SPRING, WILLIAMS, NASH, and KRUSE, JJ.

V. H. Riordon, for appellant.

D. V. Murphy, for respondent.

KRUSE, J. The defendant is a domestic fraternal insurance society, organized under chapter 690, p. 1930, of the Laws of 1892 of this state relating to fraternal beneficiary societies. It consists of a grand lodge and subordinate lodges organized by it. On or about October 14, 1903, the defendant organized a subordinate lodge in the city of Columbus, Ohio, known as "Subdivision Lodge 215," and George L. Rewitzer became a member thereof, and a certificate of membership was issued to him, naming his mother (the plaintiff) the beneficiary. Class B, to which the insured belonged, insured the member for $1,200. The insurance was made subject to certain conditions therein named, and the laws, rules, and regulations were made part of the contract of insurance. The insured paid his dues and assessments in advance for each of the first three months, as required by the rules, but those for the fourth month (February) he did not pay until February 16th, when he paid the dues and assessments for that month and also for March and April. The dues and assessments for May were payable April 30th, but at that time he was sick, and this illness terminated fatally on May 21, 1904. His dues for May and June were paid by his brother on May 10, 1904, accepted by the proper officer of the local lodge, and transmitted by him to the proper officer of the grand lodge at the end of the month, as usual. The practice was for the local officer to retain the moneys so collected by him during the month, making his remittance on the morning of the last day of the month. The moneys so paid by the brother for the insurance on May 15th, and remitted to the grand lodge on the last of the month, were retained until June 10th following, when they were returned by the grand lodge to the local treasurer, who tendered them back to the brother, who had paid them. The rules of the defendant provide as follows:

"Sec. 213. Dues and assessments of all members for the following month must be paid monthly in advance to the treasurer on or before the last day of each month.

"Sec. 214. Any member failing or declining to make payment of his dues and assessments as herein provided stands suspended, such suspension taking effect on the first day of the current month."

"Sec. 250. A member under suspension shall forfeit all rights and privileges of membership, including the traveling card, password, and seat in the lodge room."

But these rules must be read in connection with the following:

"Sec. 240. A member of the union who has been suspended for nonpayment of an assessment or dues for one month, wishing to be reinstated, must pay all arrearages in advance, make written application to, at a stated or special meeting of, the lodge from which he was suspended, upon a blank issued by the grand lodge.

"Sec. 241. An applicant for reinstatement shall furnish a certificate of health after one month, and after two months shall, at his own expense, furnish the union with a medical certificate, on form prescribed for applicants for original membership, from a medical examiner of the union, or a quali-

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fied physician authorized by the grand secretary and treasurer, as to his health and fitness for membership, which certificate must be approved by the grand medical examiner and grand secretary and treasurer, the same as upon original membership."

"Sec. 247. A member suspended for nonpayment of dues and assessments shall stand suspended for the month he is suspended, and shall not be entitled to admission to the lodge until all dues and assessments shall have been paid for that month."

And rule 116 forbids the payment of any claim "unless the dues and assessments of the member to whom the certificate was issued were paid to the subordinate lodge treasurer at the time his death or total disability occurred."

It is contended by the defendant that the insured became suspended by omitting to pay his dues and assessments for May on the last day of April, and his insurance was forfeited thereby, and that he could not avoid the effect thereof without being reinstated, under sections 240 and 241 and those following, relating to a vote in the local lodge and approval of the medical examination. We think this view is unfounded.

1. It will be observed that section 240 provides for reinstatement of a member who has been suspended for nonpayment of an assessment or dues for one month, and section 241 requires the furnishing of the certificate of health after one month. The reasonable construction of these sections, as a whole, is that, if a member pays his dues and assessments past due within one month after they become payable, he regains his good standing without being reinstated, as is provided by sections 240, etc., but in no event is the insurance to be paid if the dues and assessments were not paid to the subordinate lodge at the time of his death. That it is only where the default has continued for a month that the application for reinstatement is required to be made to regain his former standing and save his membership and insurance. I think this is obvious from these rules when read together, supplemented by the conduct of the officers of the grand lodge and those of the local or subordinate lodge. At the end of each month the report of the local lodge officer to the grand lodge showed that members were delinquent for the month, none was ever suspended, but the dues and assessments were uniformly afterwards accepted. Indeed, that was done with the insured as regards the dues and assessments for February. This course of conduct by the defendant is a circumstance that may properly be considered upon the construction to be put upon these rules if there be any ambiguity in their meaning. Another circumstance which I think sustains this view is the fact that the local officer did not transmit these moneys until the end of the month, not at the close of the day, but in the morning, so that the inference is permissible that the dues and assessments for that month were not expected to be transmitted to the grand lodge until the end of the month, although the members were required to pay them the last of the preceding month.

2. Again, this case seems to come exactly within section 302 of the rules, which provides:

"If a brother not in arrears should sustain an injury or become sick, he cannot become delinquent while injured or be deprived of his weekly benefits, but his dues and assessments must be deducted from such benefits."

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The proof shows the assured became ill April 24th, and was ill when his dues and assessments became due, and never recovered from his illness. The rule expressly provides that the sick or disabled members cannot under such circumstances become delinquent, and makes provision for the payment of his dues and assessments out of the weekly sick benefit. I think it cannot be said that the dues and assessments here referred to are only the special assessments made by the local or subordinate lodge, as is claimed by the defendant. If there is any such restriction in the rules or by-laws of the defendant, it has not been disclosed by the record.

3. We are also inclined to agree with the learned referee that, if there was such a default in payment of dues and assessments as is claimed by the defendant, accepting and retaining the dues and assessments, as was done, constituted a waiver of strict performance upon the part of the assured, and that the defendant cannot now insist upon its right to forfeit this insurance.

The judgment should be affirmed, with costs. All concur.

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## ROCK et al. v. ACKER PROCESS CO.

**(Supreme Court, Appellate Division, Fourth Department. May 2, 1906.)**

**NUISANCE—ACTION—DAMAGES—EVIDENCE.**

**In an action for damages caused by the escape of poisonous gases from defendant's factory, evidence *held* to justify a finding that plaintiff was damaged in the sum of $4,000.**

**Williams and Nash, JJ., dissenting.**

Appeal from Judgment on Report of Referee.

Action by James E. Rock and others against the Acker Process Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Argued before McLENNAN, P. J., and SPRING, WILLIAMS, NASH, AND KRUSE, JJ.

A. K. Potter, for appellant.

P. S. King, for respondents.

KRUSE, J. The only question here for consideration relates to the rule of damages and the ruling of the court in reference thereto, so counsel for appellant states in his brief, and this statement is acquiesced in by counsel for respondent, although the proceedings, if the record discloses fully and correctly what took place in the court below, are somewhat anomalous, for it seems that the referee upon whose report the judgment was entered was only authorized to take the evidence, and report the same to the court with his opinion thereon, and no formal decision was made by the trial judge, as is required by sections 1010 and 1022 of the Code of Civil Procedure, unless the report of the referee, taken in connection with the direction of the trial judge before whom the action was pending, which seems to be in the form of a special term order, initialed by him, may be so regarded. Counsel for the parties desires to have it so regarded, hav-



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ing stipulated in writing to that effect, and we will accordingly so treat the matter.

The plaintiffs own certain premises in the city of Niagara Falls, ornamented with shade and ornamental trees and shrubbery. The defendant is a corporation engaged in that city in the business of reducing common salt into its constituent elements, done by an electrical current, about 40 electric furnaces being in operation in the furnace room for that purpose. The process is known as the "Acke. Process." Common salt is composed of caustic soda and chlorine gas. The caustic soda is sold in that form, and the chlorine gas is combined with other products, and sold in different forms. At the time in question the chlorine gas was mixed with powdered lime, and became chloride of lime, commonly known as bleaching powder. The defendant erected its works and commenced operations in 1900, and thereafter these gases and fumes were detected. That chlorine gas escaped, and that it kills vegetation and did kill trees and plants in the neighborhood of the factory, is not denied by the defendant. It is found that the defendant from time to time, and frequently from the time it commenced operations down to November, 1903, permitted large quantities of chlorine gas and lime dust to escape from its factory, and that the gas injured and destroyed the trees, shrubs, and vegetation on the plaintiff's premises, and injured the paint and woodwork and metal work on plaintiff's residence, and corroded the metal work and furnishings therein, and made the air in and around the house uncomfortable and unwholesome to breathe; that chlorine gas is poisonous, having a pungent and disagreeable odor, and when present in sufficient quantities in the air is injurious and destructive to animal and vegetable life. But there was a further finding that between November, 1902, and 1903, the defendant by various devices, among others the building of a chimney 240 feet, had minimized the escape of gas and dust so that the escape of gas had not been, since the erection of the chimney in 1903, sufficient in quantity to be injurious to the plaintiffs' property or health, or to render the occupation of the premises by plaintiffs unsafe, or materially injure the person or property of plaintiffs. The plaintiffs' damages were determined to be $4,000, but the injunctive relief was denied.

It is not contended on defendant's behalf that the plaintiffs were not entitled to recover some damages, but it urges that the damages awarded are excessive, that an erroneous rule of damages was adopted, and that exceptions taken to rulings by the referee upon the admission of evidence respecting damages were well taken. Exceptions were taken to the rulings of the referee upon questions of evidence, but he was authorized only to take the proof with his opinion, and the trial judge does not appear to have specifically ruled upon the questions; but the question of practice is not raised, and we will assume, under the peculiar circumstances of this case, that the exceptions taken before the referee are available on this appeal.

1. We have re-examined the record and briefs of counsel in the case of Wattengel v. Acker Process Co., decided by this court in October, 1904, 97 App. Div. 643, 90 N. Y. Supp. 1117, affirmed 183 N. Y. ——, 76 N. E. 1115, where a like action was brought against

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the same defendant. The questions of the measure of damages and the admissibility of evidence relating thereto, of like character as here, were raised there, and the judgment was affirmed in this court and likewise upon appeal to the Court of Appeals. We therefore must regard those questions settled adversely to the defendant.

2. As regards the claim of defendant that the damages awarded are excessive, we think the evidence sustains the conclusion reached by the referee and trial court. At all events, we are not satisfied that the amount of the recovery is so far against the evidence that we ought to interfere with the judgment in that regard.

Judgment should be affirmed, with costs. All concur, except WILLIAMS and NASH, JJ., who dissent.

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## GLAZER v. HOME INS. CO.

**(Supreme Court, Appellate Division, First Department. May 11, 1906.).**

**1. INSURANCE—PROOFS OF LOSS—SUFFICIENCY.**

**Under a fire policy providing that, within 60 days after loss, the insured should render a sworn statement of the time and origin of the fire, the interest of insured, and cash value of each item of loss, a statement merely giving the name of insured, the number of the policy, a list of articles claimed to be damaged, but not sworn to and not stating the time and origin of the fire or the interest of insured, is not sufficient.**

**[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 1358, 1349.]**

**2. SAME—PLEADING—WAIVER.**

**In an action on a fire policy, an allegation that plaintiff served on defendant, as proof of loss, a complete inventory of the property destroyed and injured, that the same was retained by defendant without objection, and that defendant had required no further or other proofs or loss, was not sufficient, as an allegation that proofs of loss had been waived.**

**3. SAME—WAIVER—OFFER OF SETTLEMENT.**

**Evidence that, after loss under a fire policy, an adjuster employed by the defendant visited insured and made him an offer of settlement which was immediately declined, and which was not renewed, or any other negotiations had during the period within which insured was required to furnish proofs of loss, did not show a waiver of the requirements of the policy as to proofs of loss.**

**[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 1390, 1406.]**

**O'Brien, P. J., and Houghton, J., dissenting.**

Appeal from Appellate Term.

Action by Joseph Glazer against the Home Insurance Company. From a judgment of the Appellate Term (96 N. Y. Supp. 136), reversing a judgment for plaintiff, plaintiff appeals. Affirmed.

Argued before O'BRIEN, P. J., and INGRAHAM, McLAUGHLIN, CLARKE, and HOUGHTON, JJ.

Sigmund S. Rotter, for appellant.

Alfred E. Nathan, for respondent.

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INGRAHAM, J. The action was brought upon a policy of fire insurance. The policy was a New York standard policy, and contained the following clause:

"If fire occur the insured shall give immediate notice of any loss thereof in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon, and, within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession or exposure of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of the fire."

The defense relied on by the defendant is a failure to comply with this provision of the policy. The fire took place on September 30, 1903. On October 2, 1903, there was served upon the defendant by mail the following:

"Dear Sirs: Please call to investigate the fire at 137 Essex St. of Joseph Glazer, am's of policy $500. Policy No. 98,243. Damage as follows: [Then follows a list of articles of personal property, with a number of dollars opposite each item aggregating $242; and then followed the following:] Many things were thrown out in the street. Sideboard and lookingglass damaged."

It is evident that this paper was not the proof of loss required by the policy. It was not signed or sworn to by the insured; did not state the time and origin of the fire, the interest of the insured in the property; by whom or for what purpose the building in which the fire occurred was occupied. This clause of the standard policy provides for two acts of the insured. One is that the insured shall give immediate notice of any loss thereof in writing to the company, and this paper is sufficient to comply with this provision; but, in addition to this immediate notice, the policy required that the insured should within 60 days "render" a sworn statement of the loss. In addition, therefore, to notice of any loss to the property required to be immediately given to the company, the insured was bound to furnish the proof of loss within 60 days after the fire. O'Reilly v. Insurance Company, 60 N. Y. 169, 19 Am. Rep. 151. The plaintiff, however, claims that this requirement of the policy was waived by the defendant, and this is the question presented upon this appeal.

The defendant claims that there is no allegation in the complaint that this clause was waived, and therefore the plaintiff could not sustain the cause of action based upon a waiver. The complaint alleges that the plaintiff duly fulfilled all the conditions of the said agreement on his part, and more than 60 days before the commencement of this action, to wit, on or about the 2d day of October, 1903, served on the defendant, as the proof of loss, a complete inventory of the property destroyed and injured, with the quantity and costs of each article and the amount claimed thereon, and the same has

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been retained by the defendant without objection, and that the defendant has required no further or other proofs of loss to be furnished. I do not think this allegation is sufficient to justify proof of a waiver of the provision of the policy. It is an allegation of the performance of the provisions of the contract, and that the proof of loss as served was received and retained by the defendant, and that the defendant has required no further or other proof of the loss to be furnished. The notice that was furnished was only the immediate notice of any loss required by the first clause of this provision of the policy. The mere service of this notice was not in any sense a service of the proof of loss required by the policy; nor was its retention a waiver of the further proof of loss required, as the insured was bound to give this notice, and in addition the proof of loss. So, that the allegation that this statement was received by the company was not an allegation of a waiver by the defendant of its right to insist upon the verified proof of loss. Nor is the fact that the defendant required no further or other proof of loss to be furnished an allegation that it has waived the requirements of the policy. The policy required the plaintiff to furnish the proof of loss and did not require the defendant to demand it. I think therefore that the plaintiff, having alleged performance of the conditions of the policy, was bound to prove such performance, and could not rest a right to recover upon a waiver by the company of a condition upon which its liability depended.

Assuming, however, that the allegation of the complaint was sufficient, I do not think the evidence sustained a finding that the defendant had waived this provision of the policy. This waiver is based upon the fact testified to by the plaintiff that on Friday morning, two days after the fire, an adjuster for the defendant was on the premises. On Saturday, October 3d, the plaintiff was at the company's office accompanied by an insurance agent by the name of Richmond and saw the adjuster, who said to Richmond that he would give to the plaintiff $38. This offer the plaintiff at once refused. Richmond, the agent, testified that on the day of the fire he went to the plaintiff's house and subsequently made out the notice that was mailed to the insurance company at its office on Broadway; that afterwards he went to the office of the company and asked a Mr. Thomas to settle the loss with the plaintiff; that Thomas offered $38, but that the plaintiff did not accept it; that this was a couple of days after the fire; that Thomas had the notice that had been served on the insurance company by mail and retained that notice; that, a few days after, he called again upon Thomas, when Thomas again offered him $38, which the plaintiff again declined, and that was the last interview that was had with any of the officers of the defendant in relation to this loss. Upon cross-examination the witness testified that the only conversation that he had with Thomas, the adjuster for defendant, was that he told him of the fire, whereupon Thomas said, "My offer is $38"; that, while Thomas had this notice of October 1st in his hands, nothing was said about it. The plaintiff also introduced a letter from the adjuster of the defendant, dated November 30, 1903, addressed to the plaintiff's attorney, which stated:

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"Please take notice that your client Joseph Glazer, of 137 Essex street, city, has failed to file within the 60 days required (as per lines 67 to 80 inclusive), a sworn proof of loss covering his claim for alleged damage by reason of fire under policy No. 98,243 issued to him by this company; nor has he filed up to-day a schedule showing the value of each item and the amount claimed on each article. According to our inspection, we have been unable to discover any damage exceeding $38, which has been tendered the assured on the 3d day of October. Without waiving any of our rights, and as a matter of equity only, we are ready to advocate payment by this company in accordance with our ascertainment of loss as above reported."

Upon this evidence the plaintiff rested, and the defendant moved to dismiss the complaint, one of the grounds being that there was no evidence in the case that the proof of loss was filed in accordance with the conditions of the policy; that there was no waiver shown by the defendant of the terms required as to the filing of the proof of loss. That motion was denied, and the defendant excepted. Thomas was called by defendant. He testified that he went to the building immediately after the fire and examined the articles that he saw there which were claimed to have been injured; that he made an offer to the insured of $38; that at the time he made the examination of the premises he did not have the notice dated October 1st with him, and did not know of its existence; that he had been connected with the defendant for 16 years as an adjuster, being sent out by the defendant to investigate the cause of fires, and his duty also included the settlement of claims.

It seems to me that this falls far short of proving a waiver of the requirements of the policy that the plaintiff should render the defendant, within 60 days after the fire, a verified proof of loss. The company had notice of the fire given by the plaintiff, as required by the policy. It sent its adjuster to the place of the fire to make an examination, and that adjuster stated to the plaintiff that the defendant would be willing to pay $38. That offer was at once refused. No further negotiations took place. Nothing was said or done by any representative of the company which would in any way waive the right of the company to require of the plaintiff proper proof of the extent of the damage. The defendant did not then, and does not now, claim that the policy was invalid, but offered to pay to the plaintiff $38 in settlement of his claim against the company, and, when he refused that offer, the company was entitled to insist upon a compliance by the plaintiff of the provision of the policy as to the proof of the amount of the loss. If this negtiation had been continued until after the 60 days had expired, or if the defendant had said or done anything that recognized its obligation to pay to the plaintiff the amount of his loss, whatever it was, of if the plaintiff had been in any way induced to refrain from filing proof of loss by any act of the company, or had in reality refrained because of such negotiations, a different question would be presented; but the agent of the plaintiff swore that he had no knowledge of the fact that proof of loss was required, and plaintiff's failure to furnish proof of loss was not because of anything that defendant did or did not do.

In an interesting opinion, delivered in the Third Department, in the case of Nugent v. Rensselaer County Mut. F. Ins. Co., 106 App.

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Div. 308, 94 N. Y. Supp. 605, the cases in relation to a waiver by an insurance company of a condition in the policy are collated; but in none of the cases cited, and in none of which I have any knowledge, is the fact that a company makes an offer to settle a claim immediately after a fire and before proofs of loss are required by the policy, which offer is at once refused and the negotiation ended before the time in which service of the proof of loss is required, has been held to be a waiver of the requirement that such proof must be furnished. In Gibson Electric Company v. Liverpool & London & Globe Ins. Co., 159 N. Y. 418, 54 N. E. 23, where the defense was that the policy was void, the Court of Appeals say:

"The insured must have been misled by some act of the insurer, or it must, after knowledge of the breach, have done something which could only be done by virtue of the policy, or have required something of the assured which he was bound to do only under a valid policy or have exercised a right which it had only by virtue of such policy."

In this case the defendant did not dispute the validity of the policy, but disputed the amount of the loss that appeared in the notice of the loss served by plaintiff, and immediately after the fire made an offer which, if accepted, would have avoided the necessity of a compliance with the provisions of the policy. This offer was at once refused, and the parties were then left in exactly the same position that they were in before the offer was made. The breach by the plaintiff was in not rendering proof of loss to the company within 60 days after the fire. The defendant did nothing after that breach had occurred, and it did nothing to waive the breach. The plaintiff was not misled by any act of the defendant, and did not refrain from serving proof of loss in consequence of any act of the defendant. The offer was made and rejected long before the proof was due.

My conclusion therefore is that, as the plaintiff failed either to allege or prove that the defendant waived this condition of the policy, and as it is conceded that the plaintiff cannot recover, unless he has complied with the conditions of the policy or the defendant waived the condition, the plaintiff was not entitled to recover.

It follows that the determination appealed from should be affirmed, and judgment absolute awarded to the defendant under the stipulation, with costs. All concur, except O'BRIEN, P. J., and HOUGHTON, J., who dissent.

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## DOWLER v. SWIFT & CO.

(Supreme Court, Appellate Division, First Department. May 11, 1906.)

1. SALES—CONTRACTS—EVIDENCE.

In an action on a contract, evidence *held* to show that certain goods were consigned to be sold by plaintiff as defendant's agent, and at defendant's risk, and not purchased absolutely by plaintiff.

2. FACTORS—QUESTIONS FOR JURY—NEGLIGENCE IN HANDLING GOODS.

In an action by a consignee of merchandise to recover from the consignor under an agreement to reimburse the consignee for any loss resulting from the handling of the goods, evidence *held* to require submission to the jury of the question whether the consignee was negligent in not inspecting the goods upon their arrival at port or afterwards.

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**3. SAME—CONSTRUCTION.**

**Where goods were consigned by defendant to plaintiff under an agreement that plaintiffs should sell the goods if possible, and in the event of not being able to get full value should cable the best price obtainable, it was not the duty of plaintiffs to give notice of the fact that they were unable to obtain any offer at all for the goods.**

Appeal from Trial Term, New York County.

Action by Arthur E. Dowler against Swift & Co. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Argued before O'BRIEN, P. J., and PATTERSON, McLAUGHLIN, LAUGHLIN, and HOUGHTON, JJ.

Herman Aaron, for appellant.

Edward Swann, for respondent.

PATTERSON, J. At the trial of this action the court directed a verdict for the defendant, and from the judgment entered thereon, and from an order denying a motion for a new trial, the plaintiff appeals.

At the close of the proofs the defendant moved for a nonsuit, but no ruling was made upon that motion by the court, and hence we have only to consider the correctness of the course pursued by the trial justice in instructing the jury to find the verdict they rendered.

The plaintiff sued to recover a sum of money which he alleged his assignors, Arnhold, Karberg & Co., had advanced to the defendant corporation upon merchandise, namely 300 tierces of pickled beef shipped by the defendant to that firm at Shanghai in China. It is alleged in the complaint that the defendant requested Arnhold, Karberg & Co. to act as its agent in endeavoring to effect a sale of 300 tierces of beef at Shanghai, China, the merchandise to be consigned to them, and that the defendant requested the firm to advance upon the invoice or bill of lading of such beef the sum of $6,272.10, and promised and guarantied to and with the firm to repay said advance and make good any loss which the consignees might sustain by reason of the transaction; that Arnhold, Karberg & Co. did, pursuant to the request, advance the sum mentioned on or about November 28, 1900, and received the invoice or bill of lading of the beef, and promised and agreed with the defendant to act as its agent in the transaction; that the beef was consigned to, and was received by, the firm at Shanghai, which in and about the business of that agency was obliged to, and necessarily did, pay out sums of money on account of the defendant; that prior to the commencement of the action the beef was, at the request of the defendant, returned to it by shipment to America; that at the time of the commencement of the action there was a sum of $7,162.89 due from the defendant to plaintiff's assignor, which was demanded of the defendant, who refused and neglected to pay the same. The answer of the defendant contains a denial of all the allegations of the complaint except the formal ones relating to the copartnership of the plaintiff's assignors and the incorporation of the defendant, and then proceeds to set up affirmatively for a first defense that the plaintiff's assignors failed and neglected to perform their legal duties and obligations

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to the defendant in and about the transaction set forth in the complaint, in that they failed and neglected to exercise skill, care, or diligence in protecting the goods from the known severe climatic conditions prevailing at their place of destination in China, but, on the contrary, negligently allowed the goods to be exposed, so that they became damaged and unmarketable. They further set up that, as part of the contract between the plaintiff's assignors and the defendant, the former agreed that, if they could not sell the said goods for full value, they would promptly cable to the defendant the best price that could be obtained; that the goods arrived in China in due course on or about December 13, 1900, and remained there in the possession of the plaintiff's assignors, who failed and neglected to protect the same from the usual and natural deteriorating effects of the severe climatic conditions there prevailing, and failed and neglected to perform their express or implied obligations aforesaid to the defendant, and did not cable the defendant, or give it any notice whatever that they could not sell the goods for full value, or that such goods were being exposed or were becoming damaged, nor did they send notice of any nature or description, by cable or otherwise, to the defendant until June 5, 1901, at which time damage had been done, and the defendant could not do anything to protect itself from loss; that upon receiving the notice aforesaid it was agreed between the plaintiff's assignors and the defendant that the said goods should be returned from China, and sold by the defendant, "for the account of whom it may concern," without prejudice to either of the said parties; that, in accordance with such agreement, goods were thereafter reshipped from China to the United States, and sold by the defendant at the best price obtainable under the circumstances, after the use of due diligence; that the net amount of $1,326.60 was received therefor, which sum the defendant tendered to the plaintiff's assignors, and said tender was refused. For a second defense, it was alleged that the goods mentioned in the complaint were sold and delivered by the defendant to the plaintiff's assignors at a stipulated price of $6,272.10, with an agreement between the parties that, if the plaintiff's assignors with due diligence could not sell the goods at an amount equal to the agreed price, including freight, the defendant would refund to them the difference between such agreed price and the selling price, or the price obtained by plaintiff's assignors on a resale by them, and that the plaintiff's assignors simultaneously therewith on their part agreed that they would do their best to resell the goods promptly, and, in the event of their not being able to get the full value, that they "would cable to the defendant the best that could be done," and, in pursuance of such agreement, the defendant was paid and received $6,272.10, and at the same time shipped the goods to Shanghai, as directed by plaintiff's assignors; that such goods arrived in China on or about December 13, 1900; that the plaintiff's assignors failed to exercise reasonable care and diligence in endeavoring to sell said goods, and they negligently allowed the same to be exposed to the usual and natural deteriorating effects of the climate of Shanghai, without proper protection, without reselling the same at any price, and they failed and neglected to cable the defendant prompt

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ly, or give the defendant any notice whatever within a reasonable time of their failure to make a resale, or of the condition of the goods, until June 5, 1901, at which time the goods had been seriously damaged by the climate and exposure, so that the same became unmarketable for the purposes for which they were intended. Then follows a restatement of the agreement as to the return of the goods to the United States, and their being sold to the best advantage, and the tender of the net amount of such sale to the plaintiff's assignors.

It may be remarked at the outset that no question has been raised of the want of diligence on the part of the plaintiff's assignors to sell the merchandise upon and after its arrival in China. It was conceded on argument that they did make every effort to sell. The application to the court for the direction of a verdict was placed specifically on the ground "of the negligence of Arnhold, Karberg & Co. in failing to inspect the goods upon their arrival in China, and for the failure on their part to perform the condition precedent in failing to notify Swift & Co., by cable, or promptly, or otherwise, that the goods had not been resold." In ruling upon this motion the court said:

"Assuming, without so deciding, that the transaction between the parties was that of a consignment, and not a sale of the goods in suit, it was nevertheless the duty of the plaintiff's assignors to inform the defendant of every fact in relation to their agency which came to their knowledge, and which might have been important for the defendant to know for the protection or for the promotion of their interests. The undisputed evidence shows that the plaintiff's assignors neglected to observe this duty, and that in consequence thereof the loss of the goods in question ensued, except to the extent of $1,326.60, that being the amount realized upon the sale of the remainder of the goods upon their return to this country. This sum, it is conceded, has been tendered to the plaintiff and refused."

What precise or particular duty the plaintiff's assignors failed to perform is not indicated, but by his ruling the trial judge, in effect, held that the plaintiff's assignors were liable for not giving prompt notice to the consignors, by cable or otherwise, that the goods had not been resold, and for not giving notice promptly that such goods were in bad condition, which would involve the performance of a prior duty to inspect the goods from time to time, to ascertain their actual condition.

We are unable on this record to find justification for this ruling. The contract made between the parties respecting this merchandise is contained in correspondence between the agent of Arnhold, Karberg & Co. at the city of New York and an agent of the defendant at Jersey City; but, in order that the relations established by that correspondence may be understood, it is necessary to advert to matters appearing on the trial without objection, and which occurred anterior to the correspondence, and which disclose the circumstances in which the ultimate agreement concerning the merchandise was made. In October, 1900, Arnhold, Karberg & Co. at Shanghai, in China, were negotiating a contract with the German government for the delivery of 300 tierces of beef, to be guarantied sound on arrival, for use by the German troops forming part of the allied forces then in China. That firm informed Mr. Dowler, its agent in New York, of the pending transaction, and thereafter Mr. Hudson, acting on behalf of the

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defendant, made a proposal for a sale of the beef required by Arnhold, Karberg & Co., which proposal was accepted by Mr. Dowler, who cabled to Shanghai, saying that the order of the German government had been executed, and thereupon the Shanghai firm entered into a binding contract with that government. On the 16th day of October, 1900, Mr. Dowler wrote, in the name of Arnhold, Karberg & Co., a letter to the defendant, stating that they had accepted the offer made through Mr. Hudson of the sale of the 300 tierces of prime pickled beef, guarantied to be in sound condition on arrival in China, shipment to be made the next day. On the evening of October 16th Mr. Hudson saw Mr. Dowler, and stated that he (Hudson) had made a mistake; that he could not guaranty the sound condition of the beef on delivery in China. Mr. Dowler referred to the seriousness of the situation in which he was placed, but Hudson repeated that he could not deliver the beef; whereupon, in view of the urgency of the matter, Mr. Dowler, as he testifies, canceled the contract with Swift & Co., and its agent accepted the cancellation. In order to meet his foreign engagement as to 300 tierces of beef, Mr. Dowler bought that quantity from Armour & Co. It is not controverted that after the cancellation of the contract another arrangement was made concerning the 300 tierces of the Swift & Co. beef, and it is not denied that that new arrangement is correctly set forth in correspondence which took place between Dowler, writing in the name of Arnhold, Karberg & Co., and an authorized representative of the defendant. On the 17th of October, 1900, Arnhold, Karberg & Co., through Mr. Dowler, wrote two letters to the defendant, referring specifically to the cancellation of the first arrangement as made with Mr. Hudson, and at that point the matter seems to have been dropped until about the middle of November, 1900, when Mr. Lowe, a representative of the defendant, called upon Mr. Dowler, who testified that Lowe told him that a great mistake had been made; that it was not intended that the purchase should be canceled, but he remarked that that was all finished, "and the best thing we have to look out for is what to do with the three hundred tierces." He said (according to Mr. Dowler) that the goods were on the way to China, and asked whether Dowler would take charge of the 300 tierces, or endeavor to sell them for the account of Swift & Co., and Dowler responded that he would do so; that he would not only take the trouble to write about it, but would cable out. Mr. Lowe testified that he knew that Mr. Hudson, acting for the defendant, declined to carry out "the deal" made with Mr. Dowler, and that the firm in China had been put in a bad position by that refusal "to carry out a deal which had been distinctly made," and that he requested Mr. Dowler to cable to China, and see if he could not also place the 300 tierces that belonged to Swift & Co.; that Mr. Dowler informed him that he (Dowler) would sell the beef in China if he could; that he would take it if the defendant would guaranty the sale; that is, if it would guaranty Dowler's firm against loss. After the conversation between Lowe and Dowler last adverted to, Swift & Co. write to Arnhold, Karberg & Co. in New York the following letter:

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"Dear Sirs: Inclosed we hand you invoice and B/L for 300 tcs. beef sold to you at $15,00 f. o. b. Chicago freight to be prepaid at $1.10 per hundred, amounting to $6,272.10. We fully appreciate your kindness in agreeing to take this beef, and pay for same, with a thorough understanding that you are to use every effort to place same without loss, but should you incur a loss we to make same good to you. Thanking you for the courtesy which you have extended to us through the whole affair, and regretting very much the errors which caused this not to be a positive sale, we remain,

"Yours respectfully, Swift & Co., Per S. B. L."

To this letter Arnhold, Karberg & Co. replied as follows:

"Dear Sirs: We beg to acknowledge receipt of your favor of the 16th inst., inclosing invoice for 300 tierces beef consigned to our Shanghai friends to sell for your account, and, in the event of there being any loss, it is understood that you agree to make same good to us promptly. We inclose you herewith our invoice showing the total value of the 300 tierces, plus charges at this end, as $6,356.98, and we now hand you our check for $6,272.10, being the amount of your invoice which we agreed to advance under your guaranty to make good any loss should any be sustained. Our firm will do their best to realize this lot promptly, and, in the event of their not being able to get full value, we shall cable you the best that can be done. Owing to your only handing us the bill of lading on the 16th inst., the day the steamer left the Pacific coast, we have had to get the S. S. Co. to cable their people to deliver the goods to us in Shanghai without documents, and we trust that no trouble will occur on this account. Requesting your kind acknowledgment, we remain,

"Yours very truly, Arnhold, Karberg & Co."

On November 30, 1900, Swift & Co., by Lowe, wrote the following letter to Arnhold, Karberg & Co:

"Dear Sirs: We are in receipt of yours of November 28th, inclosing your check for $6,272.10, covering our invoice of Nov. 15th for 300 tierces beef which we hope you will be enabled to sell without loss, so that it will be unnecessary to call on us to make the same good to you. Again thanking you for all courtesies extended, and hoping to have the pleasure of doing more business with you, which we assure you will be attended to in a better manner than this deal was, should we be so fortunate, we remain,

"Yours respectfully, Swift & Co., Per S. B. L."

It is to be observed that in the above correspondence Swift & Co., in the letter in which they inclosed the bill of lading refer to the transaction as not being a positive sale, and that in the letter of Arnhold, Karberg & Co., forwarding their check, they state that the goods were accepted for account of Swift & Co., and also that in the letter of Swift & Co. acknowledging receipt of the check there is no repudiation or question made of Arnhold, Karberg & Co.'s declaration that the goods were consigned for sale on account of Swift & Co. It sufficiently appears, therefore, that the relation established between the parties to the transaction was that of consignor and consignee; that Arnhold, Karberg & Co. assumed an agency to sell for Swift & Co. the 300 tierces of beef. The firm had nothing to do with shipping it to China. It was prepared for shipment and sent from Chicago to the Pacific coast and put on board the steamer bound for Shanghai by Swift & Co. But that corporation by error entered the transaction on its books as an actual sale made to Arnhold, Karberg & Co., and they so treated it.

It appears in evidence, and attention is called to the fact by both parties, that the merchandise arrived in Shanghai in good condition. On its arrival it was placed in a warehouse, which has been shown

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to be a proper and sufficient place of deposit for the security or protection of that merchandise. There is nothing to show that it was not put in the warehouse as soon as conveniently and properly could be done after unloading, although it was not actually housed for several days. It arrived in Shanghai in December, 1900, which is the winter season in China. From that time and continuously thereafter there was no market for it. Its use in the army had been interdicted in consequence of the scurvy having broken out among the troops. As said before, every effort was made by Arnhold, Karberg & Co. to effect a sale, but without avail. The 300 tierces remained on hand until June, 1901, when the warehousemen informed Arnhold, Karberg & Co. that the beef had become putrid, and its condition was so offensive that it could no longer remain in the warehouse, and that it must be taken away. As soon as Arnhold, Karberg & Co. received that information, they imparted it, through their New York agent, by letter to Swift & Co. There happened to be at that time a representative of the defendant in China, who made a personal inspection of the merchandise, and ascertained that some 6 tierces were worthless and 97 others were affected and in bad condition. Thereupon some arrangement was made, after treatment had been given the beef, to return it to Swift & Co. in the United States, and in the middle of summer it was reshipped to America by way of the Suez Canal. It was thus in its then condition subjected to climatic influences during that summer transit. Upon arrival here, it was sold by Swift & Co. for a comparatively small amount of money. The evidence is convincing that in the summer the goods would naturally deteriorate in quality.

There is nothing in the evidence from which it can be held, as a clear legal conclusion, that it was incumbent upon the plaintiff's assignors to inspect the goods on their arrival in China by opening the packages and examining their contents. When they arrived, they were apparently in sound condition. The consignees did not by express agreement assume any duty of inspection, and the defendant failed to show facts which would devolve that duty on Arnhold, Karberg & Co. when the goods arrived. It is not shown that it was customary for consignees of such goods in China to inspect them on arrival, and in the state of the evidence, we are unable to see how it could be held, as matter of law, that the consignees were delinquent in not opening the packages when they arrived to ascertain the condition of the beef. If there were any negligence in this regard, it was a matter for the jury to determine under all the facts and circumstances appearing in evidence. Nor is it an inevitable conclusion of law that the consignees were negligent in the performance of duty because they did not from time to time inspect the goods when they were in the warehouse. Whether they should have done so or not is a matter of fact, also determinable from all the circumstances appearing in the evidence. Whether they did know, or should have known, that the merchandise would deteriorate and become spoiled, and should have made inspection from time to time, was a question for the consideration of the jury. The plaintiff gave evidence tending to show that his assignors had no knowledge of the inherent tendency

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of goods of this description to become spoiled in hot weather; that they had not dealt in such goods. It was shown that, immediately the consignees were informed in June of the foul condition of merchandise, they notified the defendant, whose special agent in China then undertook to preserve it from further deterioration; and here again the evidence fails to establish what, if any, duty, by custom or otherwise, was imposed upon the consignees to examine the goods from time to time. They had contracted to do so. If it were part of the general duty of a consignee to make such periodical inspection, proof should have been given to that effect. At all events, the record is not in such a situation as to have authorized the court to hold that the consignees had failed in their duty by omitting such inspection. Nor was the evidence sufficient to authorize the trial court to direct a verdict for the defendant on the ground that the consignees had failed to give notice that they were unable to sell the merchandise. How it could become part of their legal duty to give notice of what they could not do is not apparent. What they undertook was to do their best to realize "on this lot promptly," and, in the event of not being able to get full value, to cable the best that could be done. Here the obligation was assumed to give information when a price could be obtained. The consignees were to make a continuous effort to sell the goods which were in their hands for that purpose, and they were making diligent efforts to effect a sale. Had a price been offered, and they failed to communicate it, there would have been reason for complaint; but, as no information was received at all, the defendant, if it had had regard to its contract with the consignees, would have known from the lack of such information that no price had been offered. And indeed it appears in evidence that if the defendant had kept in mind the agreement it actually made with the plaintiff's assignors, it would have instituted inquiries itself concerning the goods. It made the mistake of entering upon its books the transaction with Arnhold, Karberg & Co. as being an out and out sale, and therefore paid no further attention to the subject until advice was received of the spoiled condition of the merchandise. We do not find from the evidence that the plaintiff's assignors were under any duty whatever to inform the defendant that a sale or sales had not been made of the consigned property.

On the whole evidence, as it appears in the record, we are of the opinion that the trial judge erred in directing a verdict for the defendant.

The judgment and order appealed from should be reversed, and new trial ordered, with costs to the appellant to abide the event. All concur.

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## GLEASON v. NORTHWESTERN MUT. LIFE INS. CO.

(Supreme Court, Appellate Division, First Department. May 11, 1906.)

1. APPEAL—APPEAL FROM INTERMEDIATE ORDER.

Two days after the entry of a judgment, and nine days after the entry of an order denying a motion for leave to serve a supplemental answer, defendant appealed "from the judgment * * * and also from the order * * * denying the motion for a new trial; * * * and take further notice that the defendant intends to bring up for review upon such appeal * * * the order * * * denying the defendant's motion for leave to * * * serve a supplemental answer herein." *Held*, that defendant directly appealed from the order denying the motion for leave to serve a supplemental answer.

2. INSURANCE—ACTION ON LIFE POLICY—PLEADINGS—SUPPLEMENTAL ANSWER.

A life policy was issued and delivered to a resident of Vermont. The insured assigned the policy, and after his death the assignee removed to New York, and brought an action thereon. After the bringing of the action, the administrator of the insured obtained judgment on the policy in the courts of Vermont; the statutes of that state authorizing the personal representative to collect the policy, and to hold the proceeds for the benefit of the assignee. *Held*, that the insurer was entitled to set up in a supplemental answer the fact of the rendition of the judgment by the courts of Vermont.

Appeal from Trial Term, New York County.

Action by Mary Agnes Gleason against the Northwestern Mutual Life Insurance Company. From a judgment for plaintiff, and from an intermediate order denying leave to serve a supplemental answer, defendant appeals. Reversed, and new trial ordered.

Argued before O'BRIEN, P. J., and PATTERSON, INGRAHAM, LAUGHLIN, and CLARKE, JJ.

Opdyke, Ladd & Bristow (Alfred Opdyke of counsel), for appellant.

Frayer, Stotesbury & Gregg (Eugene Frayer of counsel), for respondent.

CLARKE, J. This is an action by an assignee to recover on a policy of life insurance. The insured, Oliff F. Harrison, resided at Rutland, Vt., and upon his application, dated August 31, 1891, there was issued and delivered to him at Rutland by the defendant a policy dated at its office in Milwaukee, Wis., September 3, 1891, under which the company agreed to pay "unto the executors, administrators, or assigns of Oliff F. Harrison, the insured, of Rutland, in the county of Rutland, state of Vermont, two thousand dollars in sixty days, after due proof in usual form of the fact and of the cause of his death during the continuance of this policy." The plaintiff was then living in Rutland, Vt., and testified that at that time she had been acquainted with Mr. Harrison and his family for 20 years; that on or about the 12th day of September, 1891, Harrison brought the policy to her, and gave it to her as a gift, and at the same time signed an assignment of the policy, and requested her to sign also. Said assignment was duly filed with the company, and is as follows:

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"Rutland, Vt., Sept. 12, 1891.

"For a valuable consideration, the receipt whereof is hereby acknowledged, I hereby assign and transfer to Mary Agnes Gleason (no relation) of Rutland, Vt., and for her sole use and benefit, all my right, title, and interest in and to policy No. 237,880, issued by the Northwestern Mutual Life Insurance Company. In case of the death of said assignee before the policy becomes due, then and in that case it shall be payable when due to the executors, administrators, and assigns of O. F. Harrison.

"Oliff Frank Harrison. [L. S.]
"Mary Agnes Gleason. [L. S.]"

The premiums on the policy were regularly paid by Mr. Harrison down to the last one, which was paid by plaintiff, "because," as she testified, "I heard he was too ill to transact any business, and I thought perhaps the policy would lapse, and I paid it." Harrison died at Rutland on the 11th of October, 1903. A few days thereafter plaintiff removed from Rutland to the city of New York. On or about March 17, 1905, she brought this action. In October, 1905, this case being on the day calendar for trial, defendant by order to show cause applied for leave to serve and file a supplemental answer. This proposed answer set up that on the 6th of October, 1905, judgment was duly rendered and entered in an action in the county court of Rutland, Vt., a court of general jurisdiction, wherein Percival W. Clement, as administrator of the goods and chattels of Oliff F. Harrison, deceased, was sole plaintiff, and the defendant herein was sole defendant, in favor of said administrator, in the sum of $2,200; that said action was commenced in November, 1904, was brought to recover on the same policy as in the case at bar, and that defendant gave notice of the pendency of said action to the plaintiff herein on March 2, 1905, and prior to the commencement of this action in the state of New York; that subsequent to the commencement of this action the defendant duly filed in said county court of Rutland an amended or supplemental plea to the plaintiff's declaration there pending, alleging as a defense that the said policy was claimed by this plaintiff to have been duly assigned by the said Harrison during his lifetime to her; that the plaintiff herein had on March 23, 1905, commenced this action in the county of New York against the defendant to recover upon said policy, and that said action was then pending and being pressed for trial by the plaintiff herein; that the matters of fact so stated were all duly established upon the trial in Vermont, but were by said court held to constitute no defense under the laws of Vermont to the action brought by the administrator, and judgment was ordered, as aforesaid. The proposed answer further set up the delivery of the policy and the assignment in Vermont, the continued residence of Harrison and of the plaintiff in Vermont up to the time of the death of Harrison, and that after Harrison's death letters of administration on his estate were duly issued, and proceeded:

"(3) Under and by virtue of the laws of the state of Vermont as the same have existed since prior to the year 1891, a policy of life insurance issued upon the life of a resident of the state of Vermont, payable at or after the death of the insured, is payable, in the event of the death of the insured while a resident of the state of Vermont, solely to the executors or administrators of the insured, whether or not the policy was by its terms made payable to some beneficiary named therein, or whether or not the policy was by its terms

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**made payable to the assigns of the insured during his lifetime. Under and by virtue of the laws of the said state of Vermont, payment of a policy of life insurance, which has been assigned within the state of Vermont by the insured during his lifetime to the assignee thereof, is no bar or defense to a claim to the proceeds of said policy made by the personal representatives of the insured after his death. Under and by virtue of the laws of the said state of Vermont, if a policy of life insurance has been duly assigned within the state of Vermont by the insured, and the proceeds of the said policy have been collected by the personal representatives of the insured, the said personal representatives hold the proceeds of the said policy for the benefit of the said assignee."**

The motion for leave to serve said supplemental answer was denied, the order being entered on October 16, 1905. The trial came on on October 20, 1905, and at the opening of the case counsel for defendant asked to amend the answer as set forth above, stating, "I want it to appear on the record that on every occasion when we came to court we tried to get in that fact." The motion was denied, and the trial proceeded, and at its close the court directed a verdict for the plaintiff in the sum of $2,205, judgment thereon being duly entered for $2,309 on October 23, 1905; so that it appears that upon this same policy of insurance the company has a judgment for the full amount thereof entered against it and in favor of the insured's administrator in the state of Vermont, and a judgment for the full amount in favor of the assignee thereof in this state, it having made but one promise to pay, and having received but one set of premium payments. And it further appears that it attempted without success, in the suit first commenced and first tried in Vermont, to interpose the New York action as a defense, and, judgment having gone against it in Vermont, with equal unsuccess attempted to interpose that judgment in New York. There seems to be something unfair in requiring even an insurance company to submit to a double recovery on the same obligation. On the 25th of October, 1905, two days after the entry of judgment, and nine days after entry of the order denying the motion for leave to serve the supplemental answer, and hence before the time to appeal from said order had expired, the defendant appealed to this court "from the judgment * * * entered and filed * * * on the 23d day of October, 1905, * * * and also from the order * * * denying the defendant's motion * * * for a new trial; * * * and take further notice that the defendant intends to bring up for review upon such appeal from the said judgment the order of the said court herein denying the defendant's motion for leave to make and serve a supplemental answer herein, said order being dated October 16, 1905, and being entered and filed in the office of the clerk of the county of New York on the same day; * * * the defendant hereby appealing from said last two mentioned orders, and from each and every part of each thereof, to the Appellate Division of the Supreme Court of the State of New York for the First Department." So that the consideration of said order is brought up, not only under the provisions of section 1316 of the Code of Civil Procedure, as an intermediate order necessarily affecting the final judgment, but also by direct appeal taken by notice thereof within the time limited for appeal. If the time in which to appeal had ex-



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pired, the question would have been squarely up whether this order could have been reviewed on the appeal from the judgment—a question not free from doubt. It was an intermediate order, "because made after the commencement of the action and before the entry of judgment." Fox v. Matthiessen, 155 N. Y. 177, 49 N. E. 673; Taylor v. Smith, 164 N. Y. 399, 58 N. E. 524. But as said in Taylor v. Smith, 24 App. Div. 527, 49 N. Y. Supp. 47: "The question whether any particular order necessarily affects the judgment will always be an open one," and as whether or not this is such an order is not necessary for the decision of this appeal, I do not pass upon it. The order is before us on direct appeal. I think it would have been so if the notice of appeal had only stated the "intention to review on such appeal" the said order. Hymes v. Van Cleef (Sup.) 15 N. Y. Supp. 341; Brumfield v. Hill (Sup.) 8 N. Y. Supp. 143; Piper v. Van Buren, 27 Hun, 385. But the notice of appeal is direct, full, and sufficient, and if, as stated by Chief Judge Parker, considering the provisions of section 1316 of the Code of Civil Procedure in Fox v. Matthiessen, supra, "the object of the statutory provisions on this subject is to prevent multiplicity of appeals in the same action," it seems reasonable that but one record should have been made on appeal in this case. The case was on the day calendar. It was tried within four days after the entry of the order. Nothing could have been accomplished by an ad interim appeal. Defendant had a right to appeal any time within 30 days, and the appeal was taken with the utmost promptness after judgment.

The order appealed from should be reversed, and the supplemental answer allowed to be served, because it set up facts occurring since the commencement of the action which defendant ought to have been allowed to show in defense. Here was a defendant sued in two jurisdictions upon the same policy. It could bring in neither plaintiff in the other's state. The action was brought first in Vermont. It is claimed that it must there be brought on the policy of the administrator. If the plaintiff in the case at bar had a valid assignment, the administrator in Vermont was suing for her benefit, and, if he discovered, would hold the money for her benefit, and she could obtain it by action from him or upon his accounting. The defendant could not get her into Vermont. She was a nonresident. If it undertook there to pay the money into court, how would that have benefited it? If the courts of this state are not to regard the judgment there obtained, why should they regard money paid into court? The defendant could not bring the Vermont administrator into our court as being a nonresident, and as administrator having no extraterritorial authority. Nor would it have advantaged it to pay the money into our court. Its position would then have been with money deposited in both courts. Now it has judgments entered in both courts. I fail to see how the defendant could have protected itself as long as the courts of the two states declined to recognize the pending proceedings in the other. But the courts do not, and should not, allow such a condition to exist. The principle of state comity intervenes, and the jurisdiction is left with the court first obtaining it. In the case at bar the plaintiff is suing on what she claims to be a valid assignment

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of the policy. If her assignment is valid, then the administrator in Vermont, under the allegations as to the law of that state, had been suing to recover her debt, and now holds the judgment for her benefit. He is her representative. So the cause of action and the parties are in reality the same in the two jurisdictions. In Sulz v. Mutual Reserve Fund Life Ass'n, 145 N. Y. 563, 40 N. E. 242, 28 L. R. A. 379, the insured died in the state of Washington. His wife was then residing in Brooklyn. She was appointed administratrix in Brooklyn, and subsequently one Thomas was appointed administrator of the estate of her husband in the state of Washington. Thomas at once commenced an action in that state to recover upon the policy. Within a few days thereafter the wife commenced an action in this state to recover the amount due under the same policy. The defendant set up the pendency of the action against it in Washington, and claimed that the plaintiff had no right to maintain the action here because of those facts. Judge Peckham said:

"In such a case as this we think that the principle of comity between the states calls for the refusal on the part of the courts of this state to entertain jurisdiction."

It was claimed, in addition, that the plaintiff might recover in another aspect and in her own right, irrespective of her character as administratrix. The court said:

"We cannot, therefore, see any way by which the plaintiff ought to be permitted to maintain her action either as administratrix or as the widow and alleged sole beneficiary covered by the policy. We confess that we do not see how the money arising from the payment under this policy or certificate can be made liable for any of the debts of the deceased any more in the state of Washington than in case an action was brought here. The statute under which the company is organized makes provision upon that subject, but, as the courts of Washington have jurisdiction of that question, it will be matter for them to decide; which they will do in a manner consistent with their views of the law. The judgment in this action ought not to stand, and it must therefore be reversed, and, as the plaintiff cannot in any event succeed upon a new trial, her complaint should be dismissed."

The Sulz Case was followed in Traflet v. Empire Life Ins. Co., 64 N. J. Law, 387, 46 Atl. 204, where, an administrator having been appointed in New York and another in New Jersey, the action on the policy in New York was first brought and went to judgment; the court saying: "The jurisdiction of the court which is first in time will prevail," and "when the suit in another state has proceeded to final judgment, the judgment may be pleaded in bar," and therefore held the New York judgment a bar to the New Jersey suit.

It seems to me, therefore, that the order appealed from should be reversed, and leave granted to serve the supplemental answer, upon payment of costs to the time of trial, and that the judgment and order denying the motion for a new trial must be reversed, and a new trial ordered, with costs to the appellant.

O'BRIEN, P. J., concurs.

PATTERSON, J. I agree with Mr. Justice CLARKE that the appeal from the order denying defendant's motion for leave to make

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and serve a supplemental answer may be regarded as a direct appeal from that order, the notice having been served within the time allowed by law for such an appeal.

INGRAHAM, J. I agree with Mr. Justice CLARKE that the appeal from the order denying the motion for leave to serve a supplemental answer is now before us, the defendant having in due time taken an appeal directly from that order. I also agree that the court should have allowed the service of the supplemental answer, so that the questions as to whether an action brought by the personal representative of the insured in the state of Vermont, where the person insured resided at the time of his death, is a bar to an action in this state by an assignee of the policy, can be formally determined upon the trial of the action. The defendant having been refused permission to serve this supplemental answer, the action was tried, and the evidence offered to sustain the defense set up in the supplemental answer excluded. If we reverse the order denying the motion for leave to serve the supplemental answer, we are justified in reversing the judgment.

I do not concur in what Mr. Justice CLARKE has said in respect to the validity of the defense, or that Sulz v. Mutual Reserve Fund Life Ass'n, 145 N. Y. 563, 40 N. E. 242, 28 L. R. A. 379, is at all decisive of this question. In that case the policy was payable to the estate of the insured, and the personal representatives of the insured commenced an action in the state of Washington, where the insured resided. Subsequently, the personal representatives of the deceased appointed in this state commenced an action in this state to recover upon the same policy, and it was held that the representatives of the estate of the deceased, appointed by the state of the testator's domicile, having first acquired jurisdiction over the cause of action, a recovery in an action in that state was a good defense to the cause of action brought by the personal representatives appointed in this state to recover upon the same cause of action. An entirely different question is presented here. The plaintiff sues, not as representative of the estate, but to enforce a contract which she is entitled to enforce for her own benefit.

I concur, therefore, in the result of Mr. Justice CLARKE'S opinion, upon the ground that the defendant was entitled to have the facts set forth in this supplemental pleading before the court upon the trial, in which case there could be a determination of the validity of the defense, which can be properly reviewed upon appeal.

LAUGHLIN, J., concurs.

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## HORST v. LOVDAL et al.

(Supreme Court, Appellate Division, First Department. May 11, 1906.)

1. PLEADING—ISSUES—FAILURE OF PROOF.

Where a complaint alleged that defendant delivered 500 bales of hops to plaintiff to sell on commission, and agreed to pay the commission, though the hops should be withdrawn from plaintiff, and the proof showed the delivery of less than 500 bales, the variance did not authorize a dismissal of the complaint; defendants not having been misled to their prejudice in maintaining their defense on the merits.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 1838.]

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2. FACTORS—COMMISSIONS—ACTIONS.

Though defendant did not ask that recovery be limited to the bales delivered, plaintiff could only recover commissions on that number.

3. CUSTOMS AND USAGES—APPLICATION—VARYING TERMS OF CONTRACT.

In an action by a factor to recover commissions for a sale of hops, it was not error to refuse to permit defendant to answer a question as to the commercial custom with reference to consigning hops, and with reference to the payment of commissions, which question was put for the purpose of showing that the contract claimed by plaintiff was unusual and improbable, where it appeared without dispute that defendant had made such a contract with respect to some of the hops, and the only question was whether it applied to them all.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Customs and Usages, § 34.]

Appeal from Trial Term, New York County.

Action by Paul R. G. Horst against William E. Lovdal and others. From a judgment in favor of plaintiff and from an order denying a motion for a new trial, defendants appeal. Judgment and order reversed and new trial granted, unless plaintiff stipulate to a reduction of his judgment, in which event the judgment is modified and the order appealed from affirmed.

Argued before O'BRIEN, P. J., and McLAUGHLIN, PATTERSON, LAUGHLIN, and HOUGHTON, JJ.

D. Frank Lloyd, for appellants.

George A. Strong, for respondent.

PATTERSON, J. The defendants appeal from a judgment entered upon the verdict of a jury in favor of the plaintiff and from an order denying a motion for a new trial. The action was brought to recover commissions which the plaintiff claims to have earned upon an employment by the defendants under a special contract. The allegations of the complaint are that on or about the 9th day of April, 1902, the defendants agreed with the plaintiff that they would then and thereafter put in his hands a quantity of hops, to wit, about 500 bales in all, to be sold upon a commission of 1½ cents per pound, buyers' names to be given, and sales to be subject to acceptance by the defendants, and that it was, among other things, agreed that, if the defendants should thereafter withdraw the said hops from plaintiff's hands, the aforesaid commission was to be paid as if a sale had been made by him; that the defendants at different times "delivered the said hops to the plaintiff," who proceeded to make efforts to find purchasers for the same, but before any sale could be effected the defendants withdrew the said hops from sale, and refused to permit plaintiff to proceed under the contract; that the hops so placed in the plaintiff's hands and afterwards withdrawn by defendants weighed about 100,000 pounds; that the plaintiff's commissions, at the rate agreed on, amount to $1,500, no part of which has been paid. The defendants' answer contains a general denial of those allegations of the complaint.

The controversy between the parties, as it developed at the trial, related to the nature and terms of some contract which was undoubtedly made between the plaintiff and the defendant William E. Lovdal on the day mentioned in the complaint. The evidence on both sides is to the

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effect that on that day a contract was made. The plaintiff testified that the agreement was that all hops to be consigned by the defendants to him should be subject to a commission of 1½ cents a pound, whether they were sold or not, and that he was specifically instructed that sales should be made at 25 cents per pound f. o. b. on the Pacific Coast, which price the defendants always insisted upon. It is not to be disputed (for the documentary evidence establishes it) that on that day the defendants consigned to the plaintiff 80 bales of hops at 1½ cents per pound commission, and delivered the bill of lading therefor, and that the understanding was that, in case that consignment was withdrawn, the plaintiff should nevertheless receive 1½ cents commission. The plaintiff also testified that it was agreed that 500 bales in all should be consigned subject to the same agreement as to commissions, while the defendant William E. Lovdal swore that no agreement was made as to commissions with respect to 500 bales, or to any other number of bales than the 80 above mentioned, except that he did agree to consign 500 bales conditionally—that is to say, if the plaintiff could, and should sell them —and he states that he was assured that the plaintiff had customers who would take that amount at the price the defendants demanded for the merchandise, and that he declared to the plaintiff that he did not want to pay commissions if the goods were not sold, and that the plaintiff told him he had a customer with whom he could place the merchandise almost immediately. The defendants, from time to time, placed in the hands of the plaintiff 260 bales of hops, 180 of which were sent forward by the defendants with full knowledge that the plaintiff had not sold any hops for them, and that he had no customer who would take them at the price required. Through their correspondence, which is in evidence, the defendants time and again admitted that 500 bales were to be consigned. On August 21, 1902, they wrote to the plaintiff that they were preparing 240 bales to be forwarded to New York, and that that would make up 500 bales they were to consign to the plaintiff, and in the meantime they hoped that he would sell the 260 bales he then had. On the 15th of October, 1902, they wrote to the plaintiff, referring to 500 bales than "within his reach." On August 28, 1902, the defendants referred in a letter to the plaintiff to 240 bales that were to be consigned to the plaintiff, and stating that they, with the bales already received by the plaintiff, would make up the 500 bales. There are various other statements in letters of the defendants which show that there was some agreement that 500 bales of hops should be consigned.

The plaintiff insists that the condition that he should make actual sales was not annexed to his employment. He and the defendant William E. Lovdal alone testified concerning the terms of the agreement. It is manifest that, so far as 80 bales at least are concerned, the plaintiff's version of what the contract was is correct. Whether it extended to all other merchandise to be consigned within the limit of 500 bales was a distinct issue of fact on which the testimony was conflicting, and the jury, with the parties before them, found that the commissions were to be paid upon a full lot to be consigned. The contract is no more unreasonable with respect to a large lot than it would be as to the 80 bales, concerning which it was manifestly made. But the plaintiff was permitted to recover commissions upon 500 bales when only 260 were

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received by the plaintiff and subsequently withdrawn from sale by the defendants and taken out of the plaintiff's hands. On the trial, at the close of the proofs, the defendants moved to dismiss the complaint on the ground that the allegation of 500 bales having been delivered to the plaintiff and withdrawn by the defendant was not proven, which motion was denied. There was not an entire failure of proof of the whole allegation such as would have authorized a dismissal of the complaint, and the defendants could not take advantage of a variance between the proof and the allegation, for they did not claim that they were actually misled, to their prejudice, in maintaining their defense upon the merits. They did not ask the court to limit the plaintiff's right of recovery to commissions on the 260 bales actually received and withdrawn, but notwithstanding that omission, under the contract as proven, the plaintiff could only recover commissions as such on the hops delivered to him. That will necessarily require a reduction of the judgment. While the contract referred to 500 bales, commissions as such were only earned on the goods delivered and withdrawn.

There are no exceptions to the charge of the court which require consideration, but it is claimed that an error was committed in the rejection of evidence. On the examination of the defendant William E. Lovdal he was asked the following question: "What is the commercial custom with reference to consigning hops and with reference to the payment of commissions?" That was objected to generally, and the objection was sustained. It is now claimed by the appellants that by this question they sought to show the improbability of their making a contract which they assert to be of an unusual and extraordinary character. It has been held that in an action to recover commissions for services claimed to have been rendered on a specific agreement as to compensation, where the making of the agreement is denied, the defendant may give in evidence the value of the services, it being competent as bearing upon the issue (Weidner v. Phillips, 114 N. Y. 458, 21 N. E. 1011; Rubine v. Scott, 118 N. Y. 662, 22 N. E. 1103), but such evidence would relate only to the local rates of commissions, and would be material only as affecting the probability of the defendant having made the contract sued upon. The question asked the witness here was not with respect to the rate of commissions for selling hops in the city of New York, but to a general commercial custom with reference to consigning hops and to the payment of commissions. Two subjects were embraced in one question. The witness was a hop grower and merchant residing and doing business in San Francisco. It was not shown that he knew of the customary or ruling rate of commissions in the city of New York. There was no error in refusing to allow the witness to answer this question, even if it or either branch of it were material, in the presence of the indisputable fact that he did make the agreement with respect to 80 bales, and the only question being whether it applied to other bales.

The judgment and order should be reversed, and a new trial granted, with costs to appellant to abide the event, unless the plaintiff stipulate to a reduction as herein suggested, in which event the judgment as modified and the order appealed from will be affirmed, without costs. All concur.

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## HART v. JOHN H. WOODBURY DERMATOLOGICAL INSTITUTE.

(Supreme Court, Appellate Division, First Department. May 11, 1906.)

1. LIBEL AND SLANDER—COMPLAINT—INNUENDOES.

Innuendoes in a complaint for libel do not limit plaintiff to the meaning thereby ascribed to the publication complained of, but the complaint is good if without them the article appears libelous per se.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Libel and Slander, § 208.]

2. SAME—WORDS HOLDING ONE UP TO SCORN AND CONTEMPT.

The statement that plaintiff allowed her picture to be taken and used as an advertisement, when it was repulsive to look at, is libelous per se, as holding her up to scorn and contempt.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Libel and Slander, § 1.]

3. SAME—EXCITING PITY AND CONTEMPT.

An article falsely imputing to one a letter, stating that because of the condition in which smallpox left the writer's face she was an object of scorn and pity, that one side of her face had been cured by the addressee's treatment, and that when he should cure the other side she would once more take her place in the world, and enjoy the pleasures of life denied to persons afflicted as she had been, is libelous per se; its natural effect being to excite pity and contempt.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Libel and Slander, § 1.]

Appeal from Special Term, New York County.

Action by Grace Hart against the John H. Woodbury Dermatological Institute. From an interlocutory judgment sustaining a demurrer to the complaint, plaintiff appeals. Reversed, with leave to answer.

Argued before O'BRIEN, P. J., and McLAUGHLIN, PATTERSON, LAUGHLIN, and HOUGHTON, JJ.

Arthur Ofner, for appellant.

William W. Pellet, for respondent.

PATTERSON, J. This is an appeal from an interlocutory judgment sustaining a demurrer to a complaint in an action to recover damages for an alleged libel. The decision of the court below was evidently placed upon the ground that the matter complained of as having been composed and published by the defendant was not libelous per se, and, in the absence of an allegation of special damage, the action could not be maintained. There are two causes of action set forth in the complaint; the first, in substance, being that the defendant maliciously composed and published of and concerning the plaintiff, in a newspaper published in the city of New York, an advertisement which exhibited a picture or portrait of the plaintiff, who was a patient of the defendant, a corporation engaged in the treatment of diseases of the skin, and in the correction and removal of irregular physical conditions of the human body; that in that advertisement the statement is made that the plaintiff, having been afflicted with the smallpox, after her recovery was treated by one John H. Woodbury, and that her facial condition was appalling, that she was mentally depressed and morbid, and that she shunned association with her old friends and even her own family; that she, in

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order that others similarly afflicted might come to know of the blessings in store for them, consented to cast aside her prejudice, and permit a photograph of herself to be taken when half the face had been treated and smoothed. The advertisement then proceeds as follows:

"As you can see, clear skin has replaced the repulsive ravages of the smallpox. When half the task had been finished, true to her word, this noble woman not only sent willingly to the photographer, but felt that in so doing she would be the means of relieving hundreds of others who were suffering the anguish that she herself had known."

In connection with some of the statements concerning the plaintiff in this advertisement, the complaint contains innuendoes which undoubtedly enlarge the tenor of such statements. But the plaintiff is not confined to the meaning ascribed to such statements in the innuendoes, and if, eliminating them, sufficient remains to show that the article is libelous per se, the action can be maintained. Morrison v. Smith, 177 N. Y. 366, 69 N. E. 725.

This first cause of action does hold the plaintiff up to scorn and contempt in the extract last quoted. There is the statement which the plaintiff claims to be false, viz., that she allowed her picture to be taken and used as an advertisement when it was repulsive to look at it; in other words, that she permitted herself to be exhibited as a repulsive spectacle. Any person who would allow that to be done would necessarily be an object of scorn and contempt.

In the second cause of action the plaintiff, after reiterating and realleging the allegations contained in the first cause of action, alleges that the defendant maliciously composed and published of and concerning her and distributed a circular containing an advertisement exhibiting a portrait or picture of her representing the condition of her face after a partial and incomplete treatment, showing the left side pocked, pitted, and scarred, and the right side in a smooth, clear, and normal condition; and in conjunction therewith, and as part of the same advertisement, that the defendant falsely and maliciously composed and published of and concerning the plaintiff the following false and defamatory matter:

"A Letter to Woodbury."

"Dear Sir: When I first went to the Woodbury Institute, and after a consultation was told that the smallpox pittings that covered my entire face could be removed, I had no faith whatever in your ability to fulfill your promise. Now I know better. Half my face is as smooth and firm as it was before the dread disease made me an object of scorn and pity, and I look forward now to the day when the other side has been restored as the happiest day in my whole life, for on that day I shall feel at liberty to once more take my place in the world, and enjoy the pleasures of life that are denied to those who are afflicted as I have been. I promised to send you this picture when half my face was restored, and now I hope you will hurry and finish the other side. Very truly yours."

Then follow the statements contained in the advertisement concerning the plaintiff which have been previously referred to as being set-forth in the first cause of action.

The plaintiff alleges that the letter above quoted was composed and published by the defendant. It was, therefore, not her production, and in it she is proclaimed as having stated that she was "an object of scorn and pity," and that through the instrumentality of the defendant and

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the treatment which was afforded her she could once more take her place in the world, and enjoy the pleasures of life that were denied to those who were afflicted as she had been. The effect of such a statement naturally would be to excite the pity and contempt of those with whom she was acquainted, as indicating that through the visitation of a disease she had become so morbid as to admit that she was an object of the scorn of her friends; that she was virtually an outcast from society, and had not the strength of mind to endure a misfortune which had come upon her without her fault. Falsely imputing to her the authorship of such a letter we regard as libelous per se. The imputation of poverty and squalor or alleged misery may be so put as to excite ridicule and amount to defamation. Battersby v. Collier, 24 App. Div. 89, 48 N. Y. Supp. 976. It will not do to claim that those parts of the publications made by the defendant which constitute the substance of the libel are rendered innocuous because in other places the plaintiff is referred to as a noble woman, and complimented in other ways. Such remarks do not condone nor mitigate nor palliate the defamatory portions of the articles. The whole matter may be summed up in a few words: The purport of the allegations of the complaint is that the defendant composed, attributed to the plaintiff, and published a letter which defames her, in that it attributes to her a declaration that she was an object of scorn and pity. That letter was used in connection with statements in the advertisements issued by the defendant that the plaintiff's condition before she was subjected to treatment was such as horrified herself, and she presented an appalling sight; that she became mentally depressed and morbid, and that she shunned association with her friends and family, and it was impossible for her to overcome the embarrassment and self-consciousness that possessed her.

The demurrer was improperly sustained, and the interlocutory judgment should be reversed, with costs, and the demurrer overruled, with costs, and the defendant permitted to withdraw demurrer and to answer on payment of costs in this court and in the court below. All concur. HOUGHTON, J., concurs as to second cause of action.

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## GUEUTAL et al. v. GUEUTAL et al.

(Supreme Court, Appellate Division, First Department. May 11, 1906.)

1. EQUITY—JURISDICTION.

A court of equity does not exercise its powers except to accomplish some purpose, and it will not construe an instrument creating a void trust.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, § 8; vol. 13, Cent. Dig. Courts, § 11.]

2. TRUSTS—EXPRESS TRUSTS—VALIDITY—INDEFINITENESS.

A grantor conveyed premises to a grantee named, followed by the words "trustee, etc." The grantee simultaneously with the delivery of the deed executed an instrument reciting that she held and would continue to hold the premises in trust "for the use * * * of the estate of C., and also for the use * * * of" A. and M. and grantee, and "for our respective heirs, executors, and administrators." *Held* that the trust, if consid-

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ered as an active trust, was void for indefiniteness, since it could not be determined what was meant by "the estate of C."

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trusts, § 30.]

3. PERPETUITIES—SUSPENSION OF POWER OF ALIENATION.

The trust, so considered, is void as creating a perpetuity, in violation of Laws 1896, p. 565, c. 547, § 32, making void every future estate which shall suspend the absolute power of alienation for a longer period than during the continuance of not more than two lives in being at the creation of the estate.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Perpetuities, § 49.]

4. TRUSTS—OPERATION—PASSIVE TRUSTS.

The trust created by the deed and instrument was a passive trust, so that the title conveyed passed to the beneficiaries of the trust, and not to the trustee, who at most took a naked trust, abolished by Real Property Law, Laws 1896, pp. 570, 579, c. 547, §§ 72, 73, 129.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trusts, § 179.]

Appeal from Special Term, New York County.

Action by George Gueutal, 2d, and others, against Adele Gueutal and others. From an interlocutory judgment overruling a demurrer to the complaints, defendants appeal. Reversed, and demurrer sustained.

See 90 N. Y. Supp. 138.

Argued before O'BRIEN, P. J., and McLAUGHLIN, INGRAHAM, CLARKE, and HOUGHTON, JJ.

Rastus S. Ransom, for appellants.

I. Newton Williams, for respondents.

McLAUGHLIN, J. This appeal is from an interlocutory judgment overruling a demurrer to the complaint, upon the ground that it does not state facts sufficient to constitute a cause of action.

The complaint alleges that on the 2d of January, 1880, George Gueutal conveyed the premises therein described to Louise C. Gueutal, "trustee, etc."; that simultaneously with the delivery of the deed she made and delivered an instrument, which is annexed to and made a part of the complaint, designated "Exhibit A." This instrument was recorded immediately prior to the recording of the deed. It recites that:

"Whereas George Gueutal * * * has, by deed bearing even date herewith, granted and conveyed to me in fee simple as trustee. [Here follows description of land conveyed.] Now know ye, that I, said Louise C. Gueutal do by these presents make known, admit, and declare that said premises were so conveyed to me, and that I now hold and will continue to hold the same in trust only for the use and benefit of the estate of Catharine Gueutal, and also for the use and benefit of Adele Gueutal, Marie Gueutal, and myself, and for our respective heirs, executors, and administrators. The respective interests of the said cestui que trust in same being as follows, viz.: Interest estate of Catharine Gueutal in said property being thirty-nine hundred and sixty, sixty-one hundred and sixty-eighths (3960/6168) of the same, and the respective interests of the said Adele Gueutal, Marie Gueutal, and myself in said property being seven hundred and thirty-six, sixty-one hundred and sixty-eighths (736/6168) of the same."

The complaint further alleges that Louise C. Gueutal accepted the trust, entered into possession of the real estate described, received the rents and profits thereof, and applied the same according to the terms of the trust until she died on the 17th of March, 1895, and on the 4th of

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March, 1904, letters of administration de bonis non were granted to the defendant George Gueutal, 2d, who duly qualified, and since has been and now is acting as such administrator; that at the time of the execution and delivery of the deed and the declaration of trust, Louise C. Gueutal was the administratrix of Catharine Gueutal, deceased, who died leaving George Gueutal, her husband, and certain heirs at law, who are named; that the husband died on the 26th of August, 1884, unmarried and intestate, leaving, him surviving, certain heirs at law, who are named.

The complaint further alleges that the trustee named in the conveyances not only entered into possession of the property conveyed, but that she collected and applied the rents according to the terms of the trust until her death in 1895; that in 1904 one Edward J. McGuire was appointed by the court to execute, under its direction, the trust created by the deed and the declaration of the same, and that he qualified, entered upon the discharge of his duties, ever since has been, and now is, acting as such, and that the defendant Meyers, executor of the will of the defendant Pauly, prior to 1894 took possession of the land under a claim of right, the nature and extent of which is unknown to the plaintiffs, and has since received the rents, issues, and profits of the same, notwithstanding the order of the court, although possession of such property and the rents has been duly demanded by the trustee appointed as above stated.

The judgment demanded is that the deed and the declaration of trust be construed by the court, and that it declare and direct the trustee to enforce the same by a sale and a division of the proceeds derived therefrom among the persons entitled thereto, and that Meyers, and such other defendants as shall appear to have received any part of the rents, issues, and profits, account.

I am of the opinion that the demurrer should have been sustained, and for that reason the judgment must be reversed. The action is in equity, and its purpose is to procure a construction of the conveyance and the declaration of trust, a sale of the subject matter of the trust, and a division of the proceeds, together with an accounting by the persons who have received any income from such property prior thereto. A court of equity never exercises its powers except to accomplish some purpose (Chipman v. Montgomery, 63 N. Y. 221), and here it would accomplish no purpose to construe the deed of conveyance and the declaration of trust in connection therewith, because the trust attempted to be created is void. If it be considered as an active trust, it is void (1) because it is so indefinite it cannot be enforced (People v. Powers, 147 N. Y. 104, 41 N. E. 432, 35 L. R. A. 502); and (2) because it suspends the power of alienation for a longer period than two lives in being (section 32, c. 547, p. 565, Laws 1896).

Just what is meant by "the estate of Catharine Gueutal" cannot be determined from the conveyance or the declaration of trust, nor is there anything in either or both of such instruments which throws any light on that subject. If it be assumed that those words mean the legal representatives, which, in the absence of anything to the contrary, mean the administrators or executors (Griswold v. Sawyer, 125 N. Y. 411, 26 N. E. 464), then it must also be assumed that such legal representa-

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tives were to receive the same for the purposes for which an administrator may receive the personal property of an intestate. An administrator cannot take title to real estate. Such title must be taken by a person or a corporation created for that purpose designated by the owner. Tilden v. Green, 130 N. Y. 29, 28 N. E. 880, 14 L. R. A. 33, 27 Am. St. Rep. 487. The trust attempted to be created is a perpetuity. It is to hold the land conveyed "in trust only for the use and benefit of the estate of Catharine Gueutal, and also for the use and benefit of Adele Gueutal, Marie Gueutal, and myself, and for our respective heirs, executors, and administrators." But for the interposition of this supposed trust term the beneficiaries would be entitled to possession. There is no limit fixed for the duration of the trust; on the contrary, the words used indicate it is to continue indefinitely. This makes it void under the statute cited. Crooke v. County of Kings, 97 N. Y. 421; Greene v. Greene, 125. N. Y. 506, 26 N. E. 739, 21 Am. St. Rep. 743. But this is not an active trust. The deed and the declaration of trust made by Louise C. Gueutal did nothing but create a passive trust, which, in effect, did not create any trust at all, the result of which is that the title conveyed immediately passed to the beneficiaries of the trust, and not to the trustee; in other words, the trustee was the mere conduit through which the title passed from George Gueutal, the grantor, to the beneficiaries named by Louise C. Gueutal in her declaration of trust. She, at most, took a mere naked trust, which was abolished by the Revised Statutes and Real Property Law, Laws 1896, pp. 570, 579, c. 547, §§ 72, 73, 129. The legal or equitable estate never vested in her, but did vest, immediately upon the execution and delivery of the instrument, in the persons in whose favor the trust was declared. (Wendt v. Walsh, and cases cited, 164 N. Y. 154, 58 N. E. 2), and the grantee in the deed did not receive even a power in trust. This being so, there is no necessity for resort to a court of equity, inasmuch as they may maintain an action at law for a partition of the property conveyed, or, if possession be withheld, then to an action in ejectment.

If the estate of Catharine Gueutal has a valid claim to any portion of the rents and profits of the land, then such claim is personal property, and the title thereto is in the administrator of her estate, who may enforce the same by an appropriate action, or by a proceeding in the Surrogate's Court.

If the foregoing views be correct, then it follows the interlocutory judgment appealed from must be reversed, with costs, and the demurrer sustained, with costs, with leave to serve an amended complaint upon payment of costs in this court and the court below. All concur.

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## In re COOLEY'S ESTATE.

(Supreme Court, Appellate Division, First Department. May 11, 1906.)

1. TAXATION—TRANSFER TAXES—CAPITAL STOCK—ASSESSMENT STATUTES—CONSTRUCTION.

Shares of stock, owned by a nonresident of New York, in a Massachusetts railroad corporation formed by the consolidation of a New York railroad company with a Massachusetts company, under the authority of the Legislature of Massachusetts and the direct provisions of Laws 1869, p. 2399, c. 917, are subject to the transfer tax law of New York, the same as shares of stock of a domestic corporation owned by a nonresident decedent, and assessable for the purpose of the tax at their full market value on the New York Stock Exchange at the time of the owner's death.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, §§ 1681-1683.]

2. SAME.

The provisions of Laws 1869, p. 2399, c. 917, authorizing the consolidation of a New York railroad company with a Massachusetts company, and providing that the assessment and taxation of the consolidated company's capital stock should be in the proportion that the number of miles of its railroad situate in New York bears to the number of miles of its railroad in the other state, are not applicable to an assessment under the transfer tax law of the stock of the company owned by a nonresident.

3. SAME—NATURE OF TAX.

The transfer tax is not a property tax.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, § 1673.]

Ingraham, J., dissenting.

Appeal from Surrogate's Court, New York County.

In the matter of the appraisal, etc., of the property of Francis B. Cooley, deceased. From an order of the Surrogate's Court, affirming an order confirming the report of appraisers fixing the transfer tax on certain shares of stock owned by decedent, his executors and beneficiaries under his will appeal. Affirmed.

Argued before O'BRIEN, P. J., and PATTERSON, INGRAHAM, LAUGHLIN, and CLARKE, JJ.

C. P. Howland, for appellant.

C. M. Russell, for respondent.

PATTERSON, J. The executors of and beneficiaries under the last will and testament of Francis B. Cooley, deceased, appeal to this court from an order of one of the surrogates of the county of New York, affirming a former order assessing a transfer tax on shares of capital stock of the Boston & Albany Railroad Company, which shares formed part of the testator's estate. He was a nonresident of the state of New York; his residence being at Hartford in the state of Connecticut, where he died. He owned 426 shares of the capital stock of the Boston & Albany Railroad Company. Appraisers appointed by one of the surrogates of the county of New York assessed such shares for the purposes of the transfer tax law of the state of New York, at their market value on the New York Stock Exchange as of the time of the decedent's death. An order was entered in the

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Surrogate's Court fixing a tax upon the basis of such assessed value, and the present appeal brings up for consideration the correctness of that order. The shares have been assessed and taxed, as are those of capital stock of a domestic corporation held and owned by a nonresident decedent, and as representing an interest in property within the jurisdiction of the state of New York which may be assessed and taxed upon its transfer by operation of law or by act of the owner. If they are of the character ascribed to them by the appraisers and the surrogate, the power to impose some tax existed under the transfer tax law. The Matter of Bronson, 150 N. Y. 1, 44 N. E. 707, 34 L. R. A. 238, 55 Am. St. Rep. 632, is a conclusive authority upon that subject. The power to tax the shares, however, depends upon the statute in the state of New York of the corporation by which they were issued. Is it a domestic corporation? It was organized under the laws both of the state of Massachusetts and of the state of New York. It was formed in 1870 by the consolidation or merger of the Boston & Albany Railroad Company, a Massachusetts corporation, and the Albany & West Stockbridge Railroad Company, a New York Corporation; and that consolidation or merger was had pursuant to the authority of a special act of the Massachusetts Legislature, and an act of the Legislature of the state of New York. Chapter 917, p. 2399, Laws 1869.

It has been held that a corporation thus formed, although deriving its chartered existence from different states, may be regarded in each state as a domestic corporation. In the Matter of Sage, 70 N. Y. 220, a railway corporation organized under the act of 1869, by the consolidation of various foreign and domestic railroad companies, was held to be a domestic and not a foreign corporation; and therefore certain provisions of law relating to domestic corporations were held applicable to the new corporation. In St. Louis & San Francisco R. R. Co. v. James, 161 U. S. 562, 16 Sup. Ct. 627, 40 L. Ed. 802, it was said that it is competent for a railroad corporation organized under the laws of one state, when authorized so to do, with the consent of the state which created it, to accept authority from another state to extend its road into such state and receive a grant of powers to own and control, by lease or purchase, railroads therein, and to subject itself to such rules and regulations as may be prescribed by the second state; and that "such corporations may be treated by each of the states whose legislative grants they accept as domestic corporations." In Moody v. Shaw, 173 Mass. 375, 53 N. E. 891, which related to the imposition of a transfer tax upon shares of stock of this same Boston & Albany Railroad, the certificates of which were held by a resident of Maine at the time of his death, it was said that, so long as the railroad held a Massachusetts charter, so long could that state prescribe the payment of a transfer tax as a condition of the right to succeed to stock issued under that charter; and "it does not matter that there is also a New York charter, and that, as things are now, stock issued under one is also stock under the other. The fact that it is so is a privilege granted by the two states reciprocally. But, whenever either state has an interest in distinguishing between the two franchises, it has a right to do so." It is also suggested in the opinion in that case that the fact that all rights are represented by one certificate might possibly create difficulties as to apportionment

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where important fractions of the property were in different states, but it would not affect the principle. That suggestion intimates the real question mooted in this case.

The learned counsel for the appellants argues that the shares of stock involved in this proceeding are, if subject to a transfer tax at all, liable only to one, proportionate either to the value of the corporate property, or to the railroad mileage within the state. He has very cogently presented the hardship and inequity of subjecting to a tax, upon the full value, shares which may be held liable to another transfer or inheritance tax in another state, and he has pointed out that, where a tax is levied in the state of New York upon the capital or franchise of a corporation organized as this was, the tax is levied upon an equitable basis. Thus, by the provision of section 6, c. 917, p. 2403, Laws 1869, under which the Boston & Albany Railroad was organized, the assessment and taxation of its capital stock is to be in the proportion that "the number of miles of its railroad situate in this state bears to the number of miles of its railroad situated in the other state," and under section 182 of the general tax law of the state of New York (Laws 1896, p. 856, c. 908), the franchise tax on corporations is based upon the ground of capital employed within the state. If by analogy, or otherwise, the assessment of the shares of stock in this case could be assimilated to or put upon the basis of an assessment of the capital or property or franchise of a corporation within the state, we think the courts would not be reluctant to adopt such a course; but, having regard to the nature of the ownership of the shares as defined by judicial authority, and the interpretation given to the pertinent provisions of the transfer tax law, we are unable to do so.

The assessment of capital, property, or franchise of a corporation for the purposes of taxation, under the general tax laws, differs in nature radically from an assessment made for the purpose of the transfer tax law. In speaking of this subject, more particularly with relation to the franchise tax upon such a corporation, the court said, in the Matter of Palmer, 183 N. Y. 240, 76 N. E. 17, that it is an error to assume that the assessment of corporate franchises for taxation purposes proceeds upon the same principle upon which the interest of a holder of capital stock is taxed. In the former case, the assessment is to be computed upon the value of the property within the state in which the corporate capital is invested. "The assessment of the stockholder, however, is computed upon the value of his interest in the whole of the corporate property, as evidenced by the number of shares of stock which he holds. * * * They evidence the extent of his proprietary interest, and their assessment for taxation purposes must be upon that interest regarded as an entirety, and is unapportionable with reference to the situs of the corporate properties." In the present case, so much of the railway of the Boston & Albany Railroad as is maintained and operated in Massachusetts must be regarded as property owned by it outside of the state of New York. In the case cited, Mr. Palmer, a resident of the state of Illinois, owned at the time of his death a large number of shares of the stock of the New York Central & Hudson River Railroad. It appeared that 36 per cent. of the corporate capital of that company was invested in properties without the state of New York, and it

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was contended that allowance should be made for that in the assessment of the shares for the purposes of taxation under the transfer tax law. The court held that, notwithstanding the fact that the corporation itself was not taxable upon the property so owned by it, the value of that property should not be excluded in the ascertainment of the value of the shares for taxation under the transfer tax law. The nature of the interest of the holder of those shares is described as being his right to participate in the net earnings of the corporation as a going concern, or in that of its assets upon a dissolution; that the shares represent an interest in the corporate assets and property regarded as a whole.

If, therefore, the Boston & Albany Railroad is to be regarded as a domestic corporation, and the shares held by the nonresident owner at the time of his death are subject to a transfer tax in this state, we think the Palmer Case is plain authority for the proposition that they are taxable as a whole, and that there can be no separation of those shares into fractional parts, assigning so much of their value to property of that corporation within this state, and so much to the property of that corporation outside of the state; for in the same case it is held that the tax imposed under the transfer tax law, as applied to these shares, is not a tax upon property. It is stated in the opinion of the court that the tax imposed by the state upon the transfer of such property (meaning shares of stock of the corporation held by a nonresident), upon the decease of its owner, is not upon the property which passes; it is upon the right of succession to it. "The transfer tax act operates upon that general right to succeed to the interest of the deceased in the corporation, and it is inconceivable that the value of the interest upon which the tax is computed is determinable by the location of the corporate properties."

It is argued that, under the construction above given, the provision of the transfer tax law applicable here would be unconstitutional. It is unnecessary to enlarge upon that subject. The proposition was advanced and relied upon by counsel in the Palmer Case, supra, but the court did not deem it necessary to refer to it in its opinion.

The order appealed from should be affirmed, with costs.

O'BRIEN, P. J., and LAUGHLIN and CLARKE, JJ., concur.

INGRAHAM, J. (dissenting). The deceased being a nonresident, it was only the transfer of his property in this state at the time of his death that was taxable. He was the owner of capital stock of the Boston & Albany Railroad Company. That corporation was formed by the consolidation of two railroad corporations, one in the state of New York, and the other in the state of Massachusetts, authorized by an act of the Legislature of the state of New York (chapter 917, p. 2399, Laws 1869) and an act of the state of Massachusetts. The act of 1869 authorized a railroad corporation organized under the laws of this state to consolidate with railroad corporations organized under the laws of other states for the purpose of operating railroads or bridges, either wholly within or partly within and partly without the state, and enacted that, upon the consummation of said consolidation, all the rights, privileges, ex-



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emptions, and franchises of each of the said corporations shall be deemed to have been transferred to and vested in the new corporation. A similar act was passed by the state of Massachusetts, and, under the authority conferred by these two acts, several railroads consolidated and became the Boston & Albany Railroad Company, and they have operated a railroad from the city of Boston, Mass. to the city of Albany, N. Y. The deceased was a resident of the state of Connecticut, and the only ground upon which he can be said to have any property within this state is the fact that this corporation was by this act created a domestic corporation, and that by the transfer of the stock upon the death of the testator there was a transfer of property within this state. While the new corporation that was created by the consolidation became a domestic corporation, so far as it owned and operated a line of railroads in this state, it was also a foreign corporation, so far as it owned and operated a railroad in the state of Massachusetts. Its right to exist and operate its railroad in Massachusetts depended, not upon the law of this state, but upon the law of the state of Massachusetts, and its property that it owned in that state, it seems to me, it owned as a foreign and not a domestic corporation. It is undoubtedly true that the transfer of the shares of stock was taxable in this state; but I think that, where a corporation owns property in this state under its domestic charter, and owns property in the state of Massachusetts under a Massachusetts charter, a transfer of its stock cannot be said to be a transfer of property in this state, so far as that property is represented by its road and real property in Masachusetts owned and operated under the law of that state. Just how this property shall be apportioned it is not necessary now to decide, but it seems to me to be a gross injustice to require a stockholder in this Massachusetts corporation, not a resident of this state, to pay taxes upon property held and operated under the authority of the Massachusetts charter, over which this state has no control. A stockholder of a domestic corporation is liable to a tax upon the value of his interest in the whole of the corporate property, as evidenced by the number of shares of stock which he holds (Matter of Palmer, 183 N. Y. 238, 76 N. E. 16), as, the stock being that of a domestic corporation, the transferee of the stock must come into this state to transfer the stock and secure his rights in the corporation. But the stock of this corporation is actually transferred in Massachusetts. The owner is not dependent upon the law of this state to secure his rights in the corporation, except so far as it effects the property of the corporation within this state. The courts of this state would have no authority or control over the property of this corporation in the state of Massachusetts, and I do not think that the proportion of the property in the state of Massachusetts is subject to taxation in this state.

I dissent therefore from the affirmance of this order.

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## In re BULLARD.

### Appeal of CUNNINGHAM.

(Supreme Court, Appellate Division, First Department. May 11, 1906.)

1. INTOXICATING LIQUORS—REGULATIONS—CONSENT OF ADJOINING OWNERS.
   Under Laws 1896, p. 59, c. 112, § 17, requiring the written consent of two-thirds of the owners of buildings used exclusively for residence purposes, the nearest entrance to which was within 200 feet of the nearest entrance to a building to be used for the sale of liquor, a consent signed by the husband of the owner of a building in his own name, and without the authority or knowledge of his wife, was not valid.

2. SAME.
   On proceedings for the revocation of a liquor tax certificate, evidence *held* to show that the written consents of two-thirds of the owners of residences, the nearest entrances to which were within 200 feet of the nearest entrance of the place of sale of liquors, had not been procured, as required by Laws 1896, p. 59, c. 112, § 17.

3. COSTS—ANNULMENT OF LIQUOR TAX CERTIFICATE.
   Where one procured a liquor tax certificate relying on consents of adjacent residence owners, filed by a former owner of the premises at which he wished to sell liquor, and no action had been taken by the state or by the adjoining property owners to annul the certificate held by the prior owner on the ground of insufficiency of the consents filed, and the certificate of the subsequent owner is annulled on this ground, costs will not be awarded against him.

Appeal from Special Term, New York County.

In the matter of the application of Sibbel D. Bullard for revocation of the liquor tax certificate No. 1,898, issued to Edward F. Cunningham. From an order canceling the certificate, Cunningham appeals. Affirmed.

Argued before O'BRIEN, P. J., and PATTERSON, INGRAHAM, LAUGHLIN, and CLARKE, JJ.

Emanuel Blumenstiel, for appellant.

James R. Knapp, for respondent.

LAUGHLIN, J. The petition for the revocation of the liquor tax certificate was made by a citizen, a resident taxpayer of the city of New York, who owned premises together with a building occupied exclusively for residence purposes, the nearest entrance to which was within 200 feet of the nearest entrance to the premises in which the traffic in liquor was carried on, and for which premises a consent in the form required by section 17 of the liquor tax law (Laws 1896, p. 59, c. 112) had been executed by her husband, but without her knowledge or authority. After the appellant and the deputy commissioner of excise filed answers to the petition, the court appointed a referee to take evidence on the issues raised by the answers, and the order was made upon the pleadings, proceedings, and evidence taken and reported by the referee. The learned justice who presided at the Special Term filed a memorandum opinion, indicating that the decision was made upon the ground that the necessary consents of the owners of buildings occupied exclusively as residences, the entrances to which were within 200 feet of an entrance to a hallway of the building in which the licensed

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premises were situated, from which hallway a door opened into the saloon, had not been obtained. The final order, however, recites that the court found that all of the material facts stated in the petition were true. In these circumstances, even if the views expressed in the opinion of the court were erroneous, it does not follow that the appellant is entitled to a reversal of the order.

If any ground assigned in the petition is sustained by the evidence, the order must be affirmed. The ground stated in the opinion of the court presents an interesting legal question as to where the measurements should start from the saloon. It is conceded that there was an entrance to the saloon from Forty-Second street, some distance west of Madison avenue, and from both Forty-Second street and Madison avenue at the corner of the building at the junction of the two streets. The premises for which the license was sought and obtained constitute all of the ground floor, except a hallway along the southerly end or side, of a three-story building. The upper floors were leased to other tenants. The only entrance to the building, other than those to which allusion has already been made into the licensed premises, was from Madison avenue, some 30 or 35 feet south of Forty-Second street. From the hallway stairways led to the basement and to the upper floors, and there was also an elevator for the use of tenants and their customers. There is evidence tending to show that after appellant's predecessor obtained his lease, but before the liquor tax license was issued, a door was cut through the wall separating the licensed premises from the hallway. The appellant contends that neither the entrance from the street to the hallway nor from the hallway to the saloon was an entrance to the licensed premises, within the intent of the statute. The respondent contends that tne entrance from the street to the hallway was an entrance to the licensed premises, from which the measurements should be taken, and evidently the trial court was of that opinion. In the view we take of the case, however, it is not necessary to decide that point.

The appellant obtained no consents of property owners when he filed his application for a license in the year 1905. He referred to and relied upon the consents obtained the previous year by Patrick O'Keefe, to whom the first liquor tax certificate for trafficking in liquors on the premises was issued. In these circumstances, the right of the appellant to the liquor tax certificate depends upon the validity and sufficiency of the consents filed by his predecessor. Matter of Tonatio, 49 App. Div. 84, 63 N. Y. Supp. 560; Matter of Lyman, 34 Misc. Rep. 296, 69 N. Y. Supp. 781; sections 17 and 28 of the liquor tax law (Laws 1896, pp. 59, 69, c. 112). O'Keefe filed with his application for a liquor tax certificate formal consents, purporting to be Nos. 302, 306, 308, and 310 on the westerly side of Madison avenue, and Nos. 305 and 309 on the easterly side of the same avenue, and he represented in his application that there were only seven buildings used exclusively as dwellings the nearest entrance of which was within 200 feet of the nearest entrance to the licensed premises, and that he filed therewith consents signed by the owners of six of those dwellings. The building which it is conceded should have been counted, and for which no consent was filed, was No. 303 Madison avenue. The evidence shows that the consent filed

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for No. 302 Madison avenue was signed by the husband of the owner of the building in his own name, and without the knowledge or authority of his wife. It is clear that under the statute that was no consent, and cannot be counted. There is a serious question about the consent filed for No. 309 Madison avenue. Evidence was introduced by respondent tending to show that it was obtained on misrepresentation, but that is controverted. It was in form revoked after it and the application had been filed, but before the liquor tax certificate was issued. Inasmuch as we have reached the conclusion that there were at least eight instead of seven buildings that should have been counted, figuring on the basis that the corner entrance was the proper and only point for commencing the measurements, it also becomes unnecessary to decide whether the consent for No. 309 Madison avenue was valid, or whether the revocation of the same was timely made.

The respondent contends that No. 304 Madison avenue should be counted, but the appellant claims otherwise. The undisputed evidence shows that the building thereon was erected as a private residence, and that it had been so occupied by the present owner for a period of 22 years. He is a physician, and his sign was upon the door and side of the house. No part of the house is set apart exclusively for his office. He receives his patients in the library and in other parts of the house. The members of his family use the entire house as a private residence. It is exceedingly doubtful whether that building is not used exclusively as a dwelling, within the spirit and intent of the statute. Matter of Lyman, 34 Misc. Rep. 296, 69 N. Y. Supp. 781; Matter of Ruland, 21 Misc. Rep. 504, 47 N. Y. Supp. 561; Matter of Rasquin, 37 Misc. Rep. 693, 76 N. Y. Supp. 404. It is not essential to a decision of this appeal that we should decide whether such use of his own residence by a professional man debars him under the statute from a voice in the question as to whether trafficking in liquors should be permitted within 200 feet of his home, and, therefore, probably a definite opinion on the subject should not be expressed.

The evidence shows that the entrance to the building No. 301 Madison avenue is on Madison avenue, and while it does not show a precise measurement from the entrance thereof to the entrance of the licensed premises at the corner of Madison avenue and Forty-Second street, it shows that the entire front of the building No. 301 Madison avenue is within 200 feet of said corner entrance to the saloon, and therefore the entrance to No. 301 Madison avenue must be within the 200 feet measurement made from the entrance conceded to be the proper starting point.

The appellant in his application for a liquor tax certificate filed on the 19th day of April, 1905, to continue trafficking in liquors on the premises for which O'Keefe obtained a liquor tax certificate in 1904, stated that he filed no consents, but relied upon the consents filed by O'Keefe, and represented that there were eight buildings occupied as dwellings, the entrances to which were within 200 feet of the entrance to the licensed premises, and that O'Keefe had filed the consents of the owners of six of such dwellings. The fair inference is that the eighth building was No. 301 Madison avenue, although it is not so stated in the application. The learned counsel for the appellant does not point

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to any evidence showing that No. 301 is not within the statutory distance. In his points as printed the only claim he makes with respect to No. 301 is that it has not been satisfactorily shown that it was used exclusively as a dwelling. In the discussion of the evidence in his points he classes it with buildings conceded to be within 200 feet of the corner entrance, and with others which he expressly points out are not within the distance; but further on in his points he summarizes his claims concerning each building, and, after stating in the brief as printed that his contention concerning it is that there was "no sufficient proof of the building being used exclusively as a dwelling," we find added in writing the following, "Not within the distance." We find the same notation in writing on his points with respect to No. 303, which elsewhere in the points is expressly conceded to be within the statutory distance.

A survey was introduced by each party, each of which was shown to have been drawn to a given scale. No. 301 is the second building on the east side of Madison avenue north of Forty-First street. Applying a rule to either of these surveys, it appears that no point in the front of the building No. 301 Madison avenue is more than 200 feet distant, measured in a straight line, from the entrance to the licensed premises at the corner of Forty-Second street and Madison avenue, unless the premises No. 299, at the northeast corner of Madison avenue and Forty-First street, have a frontage of less than 15 feet on Madison avenue. The respondent's survey shows that the frontage of that building on Madison avenue is more than 25 feet, which are the figures given on the diagram annexed to the moving papers. Counsel for respondent contends that said building No. 301 Madison avenue is undisputably within the statutory distance. We find evidence that it is and no evidence to the contrary.

We now come to a consideration of the appellant's contention that the building No. 301 was not shown to have been used exclusively as a dwelling. The building was used by Miss Ida Bliss. She was an invalid, and was absent from the city owing to ill health at the time of the hearing, and her testimony was not obtained. Her butler, who had been in her employ about nine years, testified that she occupied the building as a private residence, and that no business was conducted therein. She closed her house for the summer on the 2d day of June, 1904, and it remained closed until the 28th day of September thereafter, when she returned with her servants and reoccupied it. Mr. Frederick Bullard, the son of the petitioner, who resided at No. 302 Madison avenue, and had lived there all his life (27 years), was well acquainted with her, and had on occasions visited Miss Bliss at 301 Madison avenue, testified that she had occupied the building as her residence since she was born; that there was no sign on the building, and never had been. It is difficult to see how there can be any question as to the sufficiency of the evidence. It clearly shows that the building was exclusively used as a dwelling. It thus appears that there were at least eight dwellings the nearest entrance to which was within 200 feet, measured in a straight line, from the entrance to the licensed premises at the corner of Madison avenue and Forty-Second street. There being only five legal consents, at most, which was less than two-thirds, it

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clearly appears that the necessary statutory consents of property owners to traffic in liquors upon the premises for which the liquor tax certificate was issued were not obtained and filed, and that the liquor tax certificate was properly revoked. The state and the property owners should have investigated the validity and sufficiency of the consents during the life of the first certificate, and not have suffered a subsequent purchaser to be misled to his prejudice by appearances. The affirmance should therefore be without costs.

It follows that the order should be affirmed, without costs. All concur.

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## JOHNSTON v. GUNDBERG.

(Supreme Court, Appellate Division, First Department. May 11, 1906.)

FRAUDULENT CONVEYANCES—SETTING ASIDE—PARTIES.

Under Personal Property Law, Laws 1897, p. 509, c. 417, providing that a creditor of a deceased insolvent debtor may without obtaining judgment upon his claim maintain an action to set aside as fraudulent a conveyance by debtor, etc., it is not necessary in an action to set aside a conveyance by a deceased insolvent, who died without any property, and for whose estate no administrator has ever been appointed, and whose executor is dead, to make any personal representative of the estate a party.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Fraudulent Conveyances, § 744.]

Appeal from Special Term, New York County.

Action by John W. Johnston against Katharine Gundberg, individually, and as administratrix of the will of Dora Parks, deceased. From an interlocutory judgment overruling a demurrer to the complaint, defendant appeals. Affirmed.

Argued before O'BRIEN, P. J., and PATTERSON, INGRAHAM, LAUGHLIN, and CLARKE, JJ.

Wallace A. Kroter, for appellant.

George S. Daniels, for respondent.

INGRAHAM, J. The complaint alleges that in September and October, 1903, the plaintiff loaned and advanced to one Samuel Parks $1,500; that Parks died on May 4, 1904, leaving a last will and testament, which was duly admitted to probate on the 10th day of August, 1905; that by his will the said Parks left all his real and personal property to his widow, Dora Parks, and also appointed his said wife executrix; that no letters testamentary were issued to said Dora Parks, or to any other person; that said Dora Parks departed this life on or about the 27th day of September, 1905, leaving a last will and testament, which was duly admitted to probate by the surrogate of the county of New York on the 4th day of January, 1905, by which will said Dora Parks devised and bequeathed all her property, real and personal, to her mother, the defendant, Katharine Gundberg; that no executor or executrix was appointed in said will, and letters of administration with said will annexed were issued to the defendant,

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Katharine Gundberg, on or about the 3d day of February, 1905. The complaint then alleges:

"That at the time of the creation of the above indebtedness to plaintiff, the said Samuel Parks was the owner of bonds of the United States Steel Corporation of the par value of ten thousand ($10,000) dollars, and that thereafter, with the intent to hinder, delay, and defraud his creditors, including this plaintiff, the said Samuel Parks transferred, assigned, and delivered all the said bonds to his wife, Dora Parks, without any consideration therefor. That thereafter said bonds remained in the possession of said Dora Parks until her death, and are now in the possession of said defendant, Katharine Gundberg, as administratrix with the will annexed of said Dora Parks, deceased. That said Samuel Parks was wholly insolvent at the time of his death, and had no assets or property in his possession. That this action is brought for the benefit of all creditors of said Samuel Parks, deceased."

The relief demanded is that the transfer of the bonds of the United States Steel Corporation be declared fraudulent and void as against the plaintiff and the other creditors of the decedent; that the defendant may be adjudged to hold the same in trust for said creditors; that a receiver of said bonds be appointed, with power to sell the same under the direction of the court, and to pay the proceeds thereof to some suitable person for distribution among the just creditors of said Samuel Parks; that the plaintiff be adjudged a creditor of said Samuel Parks in the sum of $1,500, with interest. To this complaint Katharine Gundberg, as administratrix, demurred, on the ground that it appears upon the face thereof that there is a defect of parties defendant, in that the executor, administrator, or legal representative of the estate of said Samuel Parks, deceased, is not made a party defendant. This demurrer was overruled, and from the judgment entered thereon the defendant appeals.

The complaint expressly alleges that no administrator or executor of Parks had been appointed, although his will had been admitted to probate; that he was insolvent at the time of his death, and had no assets or property in his possession; that the only question presented is whether, under those circumstances, a personal representative of Parks was a necessary defendant. This action was brought under the provisions of section 7 of the personal property law (chapter 417, p. 509, Laws 1897), which provides:

"A creditor of a deceased insolvent debtor, * * * may, without obtaining a judgment on such claim, in like manner, for the benefit of himself and other creditors interested in said estate, disaffirm, treat as void and resist any act done or conveyance, transfer or agreement made in fraud of creditors or maintain an action to set aside such act, conveyance, transfer or agreement. Such claim, if disputed, may be established in such action. The judgment in such action may provide for the sale of the property involved, when a conveyance or transfer thereof is set aside, and that the proceeds thereof be brought into court or paid into the proper Surrogate's Court to be administered according to law."

The remedy given by this statute is not a new one, but is the extension of an old and familiar remedy, by relieving the creditor of the necessity of recovering judgment and issuing execution when that would be impossible owing to the death of the debtor. Shoe & Leather Bank v. Baker, 148 N. Y. 581, 42 N. E. 1077.

We may concede that, if a representative of the estate of the debtor

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had been appointed, such representative would have been a proper party to an action under this section of the personal property law; but where it appears that no personal representative of the estate has been appointed, and that the debtor died without property, I do not see that a personal representative of the debtor is a necessary party. It appears upon the face of the complaint that there is no estate of the debtor, and that no personal representative of the debtor has been appointed who can be made a party. The estate of the debtor has no interest in this controversy. The transfer which is sought to be avoided in this action devests the estate of the debtor of the property, and it can only be set aside to protect the creditors of the decedent. The controversy, therefore, is between the creditor and the transferee, and while the statute provides that the plaintiff must establish that he is a creditor of the deceased in a sum exceeding $100, he can establish that fact without the presence of a representative of the estate, as well as with one. He is bound to establish the fact that he is a creditor by competent legal proof before he can maintain the action at all, and the defendant, by putting that fact at issue, can compel that proof just as well as if a representative of the estate was a party. Cook v. Lake, 50 App. Div. 92, 63 N. Y. Supp. 818. This provision of the personal property law avoids the necessity of a creditor having obtained a judgment against the personal representative of a decedent, where the debtor has transferred property in fraud of his creditors, and died before judgment has been obtained against him.

The courts have maintained these actions constantly without making the representative of the deceased debtor a party. Shoe & Leather Bank v. Baker, 148 N. Y. 581, 42 N. E. 1077; Continental Nat. Bank. v. Moore, 83 App. Div. 419, 82 N. Y. Supp. 302. The distinction is plain between the present case and an action brought by a stockholder to recover money or property of the corporation which has been fraudulently diverted by its directors or officers; for in such a case the corporation or its receiver is a necessary party, as it is the right of the corporation which is being enforced in the action, but in an action under this provision of the personal property law it is the right of the creditor only that is being enforced, and the question is directly between the creditor and the fraudulent transferee. Under no possibility could the estate of the deceased debtor recover any of the property fraudulently transferred, as the transfer would be good as between the estate and the transferee. The court has ample power to protect the defendant upon the trial, and his protection did not require that a personal representative of the debtor should be made a party defendant.

I think, therefore, that the demurrer was properly overruled, and that the judgment should be affirmed, with costs, with leave to defendant to withdraw demurrer, and to answer on payment of costs in this court and the court below. All concur.

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(Supreme Court, Appellate Division, First Department. May 11, 1906.)

1. PLEADING—DEMURRER—QUESTIONS RAISED.

Under Code Civ. Proc. § 494, providing that a counterclaim or defense consisting of new matter may be demurred to on the ground that it is insufficient in law upon the face thereof; section 495 providing that when a counterclaim demands an affirmative judgment it may be demurred to on various grounds, including the ground that it does not state facts sufficient to constitute a cause of action, the sufficiency of a demurrer to a pleading entitled a "defense and by way of set-off and counterclaim," must be tested by determining whether the facts alleged in the defense constitute either a defense, set-off or counterclaim.

2. SALES—ACTION FOR PRICE—DEFENSES—RETENTION OF GOODS.

In an action for the price of a refrigerating plant plaintiff alleged that the plant was erected under a contract requiring it to be of certain efficiency, which requirement the plant did not fulfill because of defendant's fault. It was alleged that defendant took possession of the plant, accepted it and used it for several years and recovery was sought for the reasonable value of it. *Held* that, an answer alleging that the plant did not satisfy the requirements of the contract, that defendant had refused to accept it, demanded that plaintiff remove it, and seeking to recover a portion of the purchase price which had been paid, stated a defense although it was disclosed by the pleading that defendant retained and used the plant.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 972.]

3. SAME—REMEDIES OF BUYER.

Where a refrigerating plant, erected by plaintiff for defendant under a contract, failed to meet an express warranty contained in the contract defendant had a right to retain it and recover or offset as damages the difference between the value of the plant as erected and its value had it been as required by the contract.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 1214.]

4. PLEADING—DEMURRER TO COUNTERCLAIM.

The fact that a defendant who sets up a counterclaim cannot, on the facts pleaded, recover the damages which he demands, or that the rule of damages is not as he asserts it to be, is not ground for demurrer to the counterclaim if the facts stated show a good cause of action.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 439.]

5. SALES—BREACH OF WARRANTY—DAMAGES.

Where plaintiff erected a refrigerating plant for defendant under a contract expressly warranting that it would cool a certain number of pounds of brine with a certain amount of steam, defendant could not, after discovering that more than the contract quantity of steam was required to do the work, hold plaintiff liable for the expense of producing the increased quantity of steam during the time the plant was used.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 1290.]

Appeal from Special Term, New York County.

Action by the Isbell-Porter Company against Isaac Heineman. From an interlocutory judgment sustaining a demurrer to two separate defenses in the answer, defendant appeals. Reversed and remanded, with directions.

Argued before O'BRIEN, P. J., and INGRAHAM, McLAUGHLIN, CLARKE, and HOUGHTON, JJ.

William C. Rosenberg, for appellant.

Jay E. Whiting, for respondent.

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HOUGHTON, J. By its complaint the plaintiff alleges that it entered into a contract with the defendant for the installing of a refrigerating plant at the agreed price of $5,000, under a specific guaranty as to the efficiency of the plant when completed; that it was installed according to specifications, and that upon test, owing to adverse conditions for which the defendant was responsible, only 90 per cent. of the duty required by the guaranty was shown. Then follow allegations that the defendant took possession of the plant as erected, accepted and used the same for nearly four years, refusing to permit plaintiff to remove the same, and that the reasonable value of such plant was $4,700, only $2,500 of which has been paid, and judgment is demanded for the balance. While, therefore, the plaintiff sets up a contract to erect the plant, with a guaranty of efficiency, the action is in realty one on quantum meruit for the value of the plant actually installed and retained and used by the defendant.

The defendant answered admitting the entering into of the contract, but denying that it contained all of the agreement had between the parties, and also denying the other allegations of the complaint, except the incorporation of the plaintiff, and the name under which defendant was carrying on his business. Then follow three separate answers, each styled "a separate and distinct defense" and "by way of set-off and counterclaim." In the first defense the defendant alleges the making of the contract for the installing of the refrigerating plant, with guaranty as to its efficiency, and that it had never shown an efficiency equal to the guaranty, and that he refused to accept the plant and demanded that plaintiff remove it; and that during the erection thereof he paid $2,500 to plaintiff at its special instance and request, on the understanding that the same was to be applied on such contract in case the plant was completed in accordance therewith, and that the repayment of such money had been demanded and refused; and that by reason of all these facts the defendant had been damaged in the sum of $2,500, with interest theron from the time of payment. The third defense alleges that the contract guaranteed that the machine would cool a certain number of pounds of brine per minute by the use of a certain number of pounds of steam per hour, and that it has always required a greater amount of steam to cool a less amount of brine, and that the defendant has been damaged in the sum of $2,000 by being compelled to produce this excess amount of steam in order to operate the plant. In his final prayer defendant combines these two amounts, and asks judgment against the plaintiff therefor, with costs.

The plaintiff demurred to these two "separate and distinct defenses, and by way of set-off and counterclaim" on the ground that each was insufficient in law upon the face thereof, and such demurrers were sustained, and from the interlocutory judgment entered thereon the defendant appeals.

The Code, under the heading "when plaintiff may demur to answer, provides that the plaintiff may demur to a counterclaim or a defense consisting of new matter, contained in the answer, "on the ground that it is insufficient in law upon the face thereof." Code Civ. Proc. § 494. Under the heading of "demurrer to counterclaim when defendant demands an affirmative judgment" various grounds of demurrer are pro-

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vided, amongst them being that the counterclaim is not of the character specified in section 501 of the Code of Civil Procedure, and that it does not state facts sufficient to constitute a cause of action. Code Civ. Proc. § 495. It is therefore apparent that provision is made by the Code for demurring to different kinds of counterclaims. Where the counterclaim is in the nature of a complaint several special grounds of demurrer are provided. Where the counterclaim set up is for the purpose of defeating the plaintiff's recovery, with no demand for affirmative judgment, it partakes of the nature of a special defense, and it can be demurred to only on the ground that it is insufficient in law upon its face. A demurrer to a defense consisting of new matter can be taken only on that ground. The special answers demurred to are denominated both as defenses and counterclaims and set-offs. The sufficiency of the demurrer is therefore to be tested by determining whether the facts pleaded allege any one of the three. With respect to the first separate answer, we think the facts pleaded show a good defense, and that the demurrer that it was insufficient on its face, was improperly sustained.

Although the complaint set forth the contract originally entered into for the installation of the refrigerating plant, recovery is sought not on the ground that the contract was performed, but upon the ground that defendant prevented completion and accepted a different plant, the value of which was demanded. It was entirely proper for the defendant to plead that this was not true, and that the plant was in fact installed under the contract, and that it did not conform to it, and did not do the work which it was guarantied to do. If the plant was in fact installed under the contract, then the plaintiff could not recover on quantum meruit for work performed and material furnished, if the plant did not meet the requirements specified. The facts plead by defendant in substance, are to the effect that the plant was erected in pursuance of the contract without waiver as to deficiency of duty, and that it did not meet the efficiency which was guarantied, and that defendant did not accept the plant as erected, but demanded that plaintiff retake it, which demand was refused. It is insisted that because it is disclosed by the pleading that the defendant retained and used the plant, and because he demands as damages the part of the purchase price which he has paid, that this plea is destroyed as a defense.

If the plant was in fact erected under the contract and failed to meet the contract requirements, there being an express warranty the defendant had a right to retain it and recover or offset his damages. Day v. Pool, 52 N. Y. 416, 11 Am. Rep. 719; Brigg v. Hilton, 99 N. Y. 517, 3 N. E. 51, 52 Am. Rep. 63; Cooper v. Payne, 103 App. Div. 118, 93 N. Y. Supp. 69. Such damages would be measured by the difference between the value of the plant as erected, and the value stipulated by the contract. Rochevot v. Wolf, 96 App. Div. 506, 89 N. Y. Supp. 142; Bates v. Fish Bros. Wagon Co., 50 App. Div. 38, 63 N. Y. Supp. 649, affirmed 169 N. Y. 587, 62 N. E. 1094. That the defendant alleged that he paid the $2,500 under the circumstances set forth, and that he had demanded its return and concluded that he was damaged in that sum, with interest from the time of payment, does not destroy the defense set forth by the other allegations. That the defendant cannot on the facts pleaded recover the damages which he demands, or that the rule

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of damages is not such as he asserts it to be, is not good ground for demurrer if the facts stated show a good cause of action or defense. Middleton v. Ames, 37 App. Div. 510, 57 N. Y. Supp. 443; Abbey v. Wheeler, 170 N. Y. 122, 127, 62 N. E. 1074.

It is not necessary for us to determine, as this defense now stands, whether the defendant could recover any damages at all. Tested as a defense, however, it does allege that the refrigerating plant was erected in pursuance of the contract, without waiver; that it did not comply with the contract, and that defendant refused to accept it, and demanded that plaintiff dismantle it and take it away. That the defendant may be embarrassed in this defense by the fact that he continued to use the plant, is another question not arising on this demurrer. With respect to the other defense demurred to, we think the demurrer was properly sustained. It is alleged that by the contract set forth in the complaint, a certain efficiency was guarantied by the production of a certain amount of steam. The contract so referred to provides that the fuel necessary for a test should be furnished by the defendant. That more steam was required than the contract stipulated, and hence that more fuel was necessary to be used, was made apparent by the test, the expense of which was to be borne by the defendant. After ascertaining this fact defendant could not continue running the plant and hold the plaintiff liable for such extra expense. Where a purchaser ascertains defects in a machine, sold with guaranty, and yet persists in using it, whereby losses and expenses are incurred, he does so in his own wrong, and cannot recover the amount of such losses and expenses as damages for a breach of the warranty. Draper v. Sweet, 66 Barb. 145; Bruce v. Fiss, Doerr & Carroll Horse Co., 47 App. Div. 273, 62 N. Y. Supp. 96.

The interlocutory judgment appealed from should be reversed as to the first defense, and the demurrer thereto overruled, and as to the third defense the judgment sustaining the demurrer should be affirmed, without costs of appeal or in the court below to either party, with leave to the plaintiff to withdraw its demurrer as to such first defense, and reply if so advised, and with leave to the defendant to amend his answer as to the third defense if he so desires. All concur.

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## McCRUM v. LEX REALTY CO. et al.

(Supreme Court, Appellate Division, First Department. May 11, 1906.)

LIS PENDENS—CANCELLATION.

Under Code Civ. Proc. § 1670, authorizing the filing of a notice of the pendency of an action relating to real property, and section 1671, as amended by Laws 1905, p. 71, c. 60, providing for the cancellation of such a notice where it appears to the court that adequate relief can be secured to the plaintiff by a deposit of money or the giving of an undertaking, on motion to cancel a lis pendens in an action for specific performance, the court should not examine the complaint as on demurrer, to see whether the action is maintainable.

Appeal from Special Term, New York County.

Action by Lloyd G. McCrum against the Lex Realty Company and

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another. From an order granting a motion to cancel a lis pendens, plaintiff appeals. Reversed, and motion denied.

Argued before O'BRIEN, P. J., and PATTERSON, INGRAHAM, LAUGHLIN, and CLARKE, JJ.

William P. Maloney, for appellant.
Richard T. Greene, for respondents.

CLARKE, J. This is an appeal by the plaintiff from an order canceling a lis pendens filed by him in an action brought for the specific performance of a contract for the conveyance of real property, upon condition that the defendant Frazier either deposit in court the sum of $25,000, or, at his election, file an undertaking in said sum for the payment of any amount which the plaintiff may recover in this action, and to pay the judgment sought to be enforced against the real property in the event that final judgment shall be rendered against said defendant Frazier.

Section 1670 of the Code of Civil Procedure provides that:

"In an action brought to recover a judgment affecting the title to, or the possession, use or enjoyment of real property * * * the plaintiff may, * * * file in the clerk's office * * * a notice of the pendency of the action."

Section 1671 of said Code, as amended by chapter 60, p. 71, of the Laws of 1905, provides that:

"In any action, other than an action to foreclose a mortgage or for the partition of real property, or for dower, in which a notice of the pendency thereof has been filed, and in which it shall appear to the court upon a motion made as hereinafter provided, that adequate relief can be secured to the plaintiff by a deposit of money, or in the discretion of the court by the giving of an undertaking, as hereinafter provided, when the cancellation of such notice is not otherwise expressly provided for or regulated, any defendant or any other person having an interest in the property affected by the action may apply for the cancellation of such notice * * *. If the court on the hearing of the motion shall decide that adequate relief can be secured to the plaintiff and that the case is one in which the judgment sought to be enforced against the real property * * * may be secured by the deposit of the amount claimed or by the giving of an undertaking, the court may make an order directing that the applicant make a deposit in court of a sum of money, or * * * give an undertaking * * * and that thereupon, * * * an order may be made canceling such notice of record. The sum required to be paid into court or the amount of the undertaking, shall be at least the amount claimed by the plaintiff of the value of the property affected by the action or the interest of the party filing such notice therein with interest and costs * * *."

In Bresel v. Browning, 109 App. Div. 588, 96 N. Y. Supp. 402, this court held that, where it manifestly appeared from the complaint that the plaintiff could never obtain a decree for specific performance, the court at Special Term should have permitted the cancellation of the lis pendens, upon complying with the provisions of section 1671 of the Code of Civil Procedure. The facts were that the actual dimensions of the premises were not as set forth in the terms of the sale, and the land was subject to a covenant to pave and repair the street in front thereof. We said that:

"The defendant cannot increase the dimensions of the land, and if there be a covenant running with it to pave and keep in repair the street in front, the defendant is quite powerless to rid the land of it. The most, therefore,

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that the plaintiff can expect is to recover his damages, if any, together with the deposit he has made."

Thereafter the construction of this section of the Code in an action for a specific performance was before us again in Tishman v. Acritelli (Sup.) 97 N. Y. Supp. 668, and in reversing an order canceling a lis pendens upon the giving of an undertaking, we said that:

"Where the relief demanded is not the payment of a sum of money, but invokes the right of the plaintiff to a conveyance of real property described, the lis pendens should not be canceled. * * * If the plaintiff, upon the facts alleged in the complaint or facts clearly established, is entitled to a specific performance of the contract, and a conveyance of the property contracted to be sold, it is evident that adequate relief cannot be secured to the plaintiff by the deposit of a sum of money."

In M. Lindheim & Co. v. Central National Realty & Construction Co. (Sup.) 97 N. Y. Supp. 619, we said, upon a review of the cases, that on a motion to cancel a lis pendens we are not authorized to look into the facts as upon a trial, nor to search the complaint as upon a demurrer; citing Mills v. Bliss, 55 N. Y. 139; Brainerd v. White, 12 Abb. N. C. 407; Brox v. Riker, 56 App. Div. 391, 67 N. Y. Supp. 772; and St. Regis Paper Co. v. Santa Clara Co., 62 App. Div. 538, 71 N. Y. Supp. 82.

The learned court at Special Term has examined the complaint as if upon demurrer, and, concluding that specific performance would not be decreed, has fixed upon an amount which in its opinion furnishes adequate security for any judgment that might be obtained. But we do not think such questions were properly before it, and, indeed, the appellant complains that the question decided was not made upon the oral argument, and, the point decided herein not having been made, the decision was arrived at without hearing plaintiff's counsel upon that question at all. As stated by the Court of Appeals in Mills v. Bliss, supra:

"Whether the action can be sustained is not a question to be passed upon on this appeal. The plaintiff may fail to prove the facts alleged, or the court may hold that the action is untenable upon the facts stated. * * * The questions of fact as well as of law must be disposed of upon the trial and hearing of the cause."

The order appealed from should be reversed, with $10 costs and disbursements to the appellant, and the motion denied, with $10 costs. All concur.

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## McGREEVY v. NEW YORK CITY RY. CO.

(Supreme Court, Appellate Division, First Department. May 11, 1906.)

STREET RAILROADS—INJURIES TO TRAVELER—CONTRIBUTORY NEGLIGENCE.

A passenger on alighting from a street car passed behind the car, and started to walk diagonally across an adjoining track, when he was struck by a car approaching from the opposite direction. Had he looked he could have seen the approaching car, which was a short distance from him, and approaching rapidly. His waiting for a moment until the car had passed would have avoided the accident. *Held*, that he was guilty of contributory negligence as a matter of law.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Street Railroads, §§ 207, 208.]

Houghton, J., dissenting.

Appeal from Trial Term, New York County.

Action by Dominick McGreevy, as administrator of Michael McGreevy, deceased, against the New York City Railway Company. From a judgment for plaintiff, and from an order denying a motion for a new trial, defendant appeals. Reversed, and new trial ordered.

Argued before O'BRIEN, P. J., and INGRAHAM, McLAUGHLIN, CLARKE, and HOUGHTON, JJ.

Charles F. Brown, for appellant.

Hugo Wintner, for respondent.

INGRAHAM, J. The only question presented upon this appeal is whether the finding by the jury that the deceased was free from contributory negligence can be sustained. One of the witnesses called by the plaintiff testified that he was a street sweeper; that on the 9th day of July, 1904, he was standing on Amsterdam avenue, between 180th and 181st streets, on the curb, at a distance of 60 feet below the southerly cross-walk of 181st street; that while standing there he saw a man get off a north-bound car, and start to cross the avenue to the west; that this man got off the car, came around behind it, looked up and down, and walked on towards the west, crossing the south-bound track; that when he started to cross a south-bound car was on the north side of 181st street, coming down; that it did not stop on the north side of 181st street, but continued down, and struck the deceased as he was upon the track; that as the witness saw this man about to cross the south-bound track he yelled; that the motorman commenced to stop the car, but it was then within 3 feet of the deceased; that when the witness saw the south-bound car at the north side of the northerly crossing of 181st street, the deceased was about in the center, between the two tracks; that there is a space of 7 or 8 feet wide there, and that the car was coming at a good rate of speed, estimated by the witness at about 20 miles an hour. Upon cross-examination the witness said that the deceased when he was struck was about 60 feet from the south corner of 181st street; that when he first saw the deceased he was in the neighborhood of 3 or 4 feet from the south-bound track; that when he saw him there he looked up, and saw the car coming south, and, as the deceased was approaching the

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witness, he knew from the speed at which the car was coming that it would strike him; that when the witness hallooed out the deceased looked up, and saw that the car was nearly on him, and the witness saw that he could not get out of the way in time; that the deceased was stepping over the first rail of the south-bound track when the witness shouted, and the car was then 3 feet away. A passenger upon the north-bound car, called for plaintiff, testified that he saw the deceased on the car; that the car stopped on the south side of the southerly cross-walk; that the deceased got off and started to cross to the west side of the avenue behind the north-bound car; that he started to cross before the north-bound car started; that as the deceased got off the car the witness said to him, "Be careful, now," to which the deceased said, "All right"; that he turned right around as he got off the car, and came around the back of the car; that he crossed towards the southwest diagonally, and as he got about midway the second track the south-bound car was about 10 feet from him; that the motorman rang the bell and hallooed, and the witness hallooed too at the same time; that the motorman applied the brake, and threw off his lever, but the deceased kept going, and got right near the end rail, and as he got near the end rail he got bewildered, and kind of turned around and run back again, and at that time the fender of the car struck him just above the ankle; and that the witness did not see the car coming south until the deceased stepped upon the track. This witness remembered particularly that the south-bound car rang a bell. It thus appealed from the plaintiff's evidence that the deceased alighted from the car upon which he was a passenger and walked behind it, when a car was on the north side of 181st street coming rapidly down town; that he started to walk diagonally across the downtown track towards the southwest, and when he got upon the first rail of the downtown track the car was but a short distance (from 3 to 10 feet) from him. There was nothing to obstruct his view or distract his attention, and no reason is given why he stepped in front of the car when an accident was inevitable. One of the plaintiff's witnesses says that when he saw the deceased step upon the track he hallooed because he knew that a collision was inevitable. There is no reason why the deceased should not have known that the collision was inevitable when he stepped upon this track as well as the witness. No fact is proved to excuse this act, and the accident was therefore the direct result of the deceased stepping in front of an approaching car.

The case is within the principle established in Reed v. Metropolitan St. R. Co., 180 N. Y. 315, 73 N. E. 41, and Axelrod v. N. Y. City Ry. Co. (decided at the last term of this court, but not yet officially reported) 95 N. Y. Supp. 1072. In the Reed Case the plaintiff stepped off the north-bound car at the corner of Eighth avenue and Eighty-First street, walked behind the car, and walked onto the south-bound track, when he was struck by a south-bound car. The court held that:

"The situation discloses the failure to exercise ordinary caution. A person passing behind the rear of a car, and stepping onto the track where a car may be approaching from the opposite direction, is bound to satisfy himself that the way is clear. It is apparent that the slightest caution on the part of this



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plaintiff would have advised him of the presence of the approaching car, and avoided this accident."

In the Axelrod Case we applied this same principle, and these cases are controlling. The deceased, crossing the avenue in a diagonal way, not upon a cross-walk, if he had looked could have seen this car approaching. He continued walking southwesterly on to the track when the car was a short distance from him, approaching rapidly, and was struck before he got off. Waiting for a moment until the car passed would have avoided the accident, and the accident happened, therefore, because of deceased's negligence.

It follows that the judgment and order appealed from must be reversed, and a new trial ordered, with costs to the appellant to abide the event. All concur.

HOUGHTON, J. I concur in the reversal of this judgment only on the ground that the verdict was against the weight of evidence as to the contributory negligence of the deceased. I do not think he was negligent as a matter of law.

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## ORR et al. v. SOUTH AMBOY TERRA COTTA CO.

(Supreme Court, Appellate Division, First Department. May 11, 1906.)

BILLS AND NOTES—BONA FIDE PURCHASERS—NOTICE—NOTES OF CORPORATIONS.

The fact that the payee of a note executed by a corporation, acting through its officers, is a director of the corporation, does not put a purchaser of the note upon inquiry as to whether its issuance was authorized.

[Ed. Note.—For cases in point, see vol. 7, Cent. Dig. Bills and Notes, § 845.]

Appeal from Appellate Term.

Action by George Orr and another against the South Amboy Terra Cotta Company. From a judgment of the Appellate Term (94 N. Y. Supp. 524), affirming a judgment for defendant, plaintiffs appeal. Reversed and remanded.

Argued before O'BRIEN, P. J., and PATTERSON, INGRAHAM, LAUGHLIN, and CLARKE, JJ.

Alexander S. Bacon, for appellants.

Grenville T. Emmet, for respondent.

LAUGHLIN, J. This is an action against the maker of a promissory note for $1,000. The note was duly authorized by a resolution of the board of directors of the defendant, but it was issued to one of the directors without consideration. The note was made in the name of the defendant, a business corporation, signed by its president and secretary, and made payable to the order of E. R. Poerschke. The payee was one of the directors. He was a mason and builder, and for many years had purchased material of the plaintiffs, who were dealers in granite. He owed them $1,027. They demanded payment, and he turned over to them this note before maturity, for which they gave

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him credit on the account. There was conflicting evidence on the question as to whether the plaintiffs had notice of any infirmity in the note, and the court submitted that issue to the jury. There was also evidence tending to show that the plaintiffs knew that the payee was a director of the maker of the note, but that was also controverted. The court in charging the jury drew their attention to that evidence, and instructed them that, if they found that plaintiffs at the time they took the note knew that the payee was a director of the maker, they might take that fact into consideration in determining whether they were put upon inquiry as to how he obtained possession of the note. Counsel for plaintiffs duly excepted to such instruction, and said to the court: "The plaintiffs maintain that the mere fact that a person is a director and not an officer of a company is not sufficient to throw discredit upon any commercial paper;" and requested that the jury be instructed that the mere fact that Mr. Poerschke was a director, and the fact, even if it were true, that one of the plaintiffs knew it, was "not sufficient to throw discredit on the note, or enough to put a bona fide holder upon inquiry." The court declined to so charge, and counsel for plaintiffs duly excepted.

This was error. The rule applicable to notes made by officers of a corporation to their own order, and used to pay their individual obligations, has no application to notes made by the duly authorized fficers, and payable to a director. It is not uncommon for directors to have business dealings with the corporation, and it is perfectly legitimate if they refrain from voting, and do not use their personal influence with their fellow directors for their own advantage at the expense of the corporation. But the officers of a corporation individually make the contracts in behalf of the corporation and issue its obligations. They may not lawfully contract with themselves, or use the credit of the corporation for their own benefit individually. There is reason, therefore, for the rule that one taking the negotiable paper of a corporation in payment of an individual obligation of an officer is chargeable with notice and is put upon inquiry as to whether the issuance of the paper was authorized (Wilson v. Met. El. R. R. Co., 120 N. Y. 150, 24 N. E. 384, 17 Am. St. Rep. 625; Hanover Nat. Bank v. Am. Dock & Trust Co., 148 N. Y. 612, 43 N. E. 72, 51 Am. St. Rep. 721; Cheever v. Ry. Co., 150 N. Y. 59, 44 N. E. 701, 34 L. R. A. 69, 55 Am. St. Rep. 646; Rochester & C. T. R. Co. v. Paviour, 164 N. Y. 281, 58 N. E. 114); but the reason does not exist in the case of a director, and therefore the rule is not applicable. The plaintiffs, therefore, were entitled to have the jury instructed, as matter of law, that the fact that the payee was a director of a corporation was not notice to the plaintiffs of any infirmity in the note, and did not put them upon any inquiry concerning the circumstances under which it was issued or came into the hands of the payee. Any other rule would seriously impair the negotiability of the corporate securities.

It follows, therefore, that the order of the Appellate Term and order and judgment of the City Court should be reversed, and a new trial granted, with costs to appellant to abide the event. All concur.

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## STERN v. MAYER.

(Supreme Court, Appellate Division, First Department. May 11, 1906.)

BANKRUPTCY—PREFERENTIAL TRANSFERS.

Under Bankr. Act, § 60 (Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]), providing that if, within four months before the filing of a petition in bankruptcy, the bankrupt shall have given a preference by transferring property to a creditor who has reasonable cause to believe that the transaction was intended to give such preference, the trustee in bankruptcy may recover the property, etc., property which a creditor of a bankrupt purchased from the bankrupt within four months before the petition was filed, and later against the wishes of the bankrupt refused to pay for, saying that he would keep it and apply it on his indebtedness, was not preferentially transferred, and could not be recovered by the trustee in bankruptcy.

Ingraham, J., dissenting.

Appeal from Trial Term, New York County.

Action by Simon T. Stern, as trustee in bankruptcy of the estate of Hyman Gattle, against David Mayer. From a judgment for plaintiff, and from an order denying a motion for a new trial, defendant appeals. Reversed and remanded.

See 91 N. Y. Supp. 292.

Argued before O'BRIEN, P. J., and McLAUGHLIN, INGRAHAM, CLARKE, and HOUGHTON, JJ.

A. S. Gilbert, for appellant.

Albert H. Gleason, for respondent.

HOUGHTON, J. The plaintiff as the duly appointed trustee of Hyman Gattle, a bankrupt, brings this action to recover the value of certain jewelry alleged to have been transferred by the bankrupt to the defendant as security for a claimed indebtedness.

The gist of the action is to recover the value of the security so unlawfully transferred by the bankrupt to the defendant, his creditor, on the ground that such transfer was in fraud of other creditors. The complaint alleges that on the 16th of June, 1903, a petition in involuntary bankruptcy was filed by certain creditors against Gattle, which resulted on the 20th of July following in adjudging him to be a bankrupt, and that in May preceding the defendant, claiming to be a creditor of Gattle in the sum of $1,600, received from him while he was insolvent, within the meaning and purview of the bankruptcy act and with knowledge thereof, the jewelry in question as security for such alleged indebtedness, and that such security was given intending to give the defendant a preference over the other creditors of Gattle, in order that he might receive a greater percentage of his alleged debt than the other creditors would obtain. Then follows an allegation of demand on the part of the plaintiff for the return of the security so delivered by the bankrupt or its value, and refusal on the part of the defendant to deliver and demand for a money judgment.

The action on appeal, from an intermediate order, was held by this court to be one at law, and was directed to be tried as such. 99 App. Div. 427, 91 N. Y. Supp. 292. The complaint is manifestly framed

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under section 60 of the bankruptcy act (Act July 1, 1898, c. 562 [U. S. Comp. St. 1901, p. 3445]). That section pro within four months before the filing of the petition in bar bankrupt shall have given a preference by transfer of p creditor who has reasonable cause to believe that the tra intended to give such preference, the transaction may b voidable by the subsequently appointed trustee of the ba may recover the property so transferred or its value. C tween the bankrupt and the creditor, and conspiring to gi creditor greater advantage than the other creditors shall re gravamen of an action under this section, and evidently garded by the plaintiff in framing his complaint.

On the trial the plaintiff proved that the defendant came rupt's place of business and pretended he wanted to buy in question for his wife; that a price was fixed, and the sa livered to him, with leave to return if unsatisfactory; th taining possession of it he refused to pay therefor and to re ing that the bankrupt owed him, and he would keep the security for his debt. The bankrupt himself says that he sent that the defendant take or keep the jewelry as securi it was kept against his protest and demand for return, threatened and actually brought replevin therefor. At the plaintiff's testimony the defendant moved to dismiss th on the ground that the plaintiff had wholly failed to prov of action set forth in the complaint, and at the close of the evidence, which related to value only, the motion was re in both instances denied, and we think improperly.

It is very plain that the plaintiff failed to show that hi transferred any property to the defendant as security fo intending thereby to create an unlawful preference in fa defendant as against his general creditors. On the co proved that the bankrupt did no such thing, and that, if was done, it was that the defendant by deceit obtained po the jewelry, and against the protest of the bankrupt insiste taining it because of the debt owing to him. If what t proved was true, title to the jewelry in question never passe bankrupt to the defendant, but it did pass to the trustee on l ment and qualification as such; and, if he had seen fit, he brought an action either in replevin or for the value of th against the defendant by virtue of section 70 of the banl (30 Stat. 565 [U. S. Comp. St. 1901, p. 3451]). Such an a ever, would be upon the theory that the claim to the prop value, or the property itself, had never been out of the bar came to the trustee by virtue of his appointment, and wou a different one than that set forth in the complaint.

The plaintiff made no request on the trial to be permitte his complaint to conform to the proofs, and the defendant m able and proper objection by his motions to dismiss. A pa chosen and plead the acts for which he seeks to hold his must abide by his allegations unless relieved by amendme v. Union Railway Company (Sup.) 98 N. Y. Supp. 278.

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plead one cause of action and recover upon another if seasonable objection is made and no amendment of the complaint is asked for or allowed. Davis v. Broadalbin Knitting Co., 90 App. Div. 567, 86 N. Y. Supp. 127.

The judgment and order should be reversed, and a new trial granted, with costs to the appellant to abide the event. All concur, except INGRAHAM, J., who dissents.

INGRAHAM, J. (dissenting). The defendant obtained these goods from the bankrupt upon a statement that he wished to show them to his wife for the purpose of making a purchase. After he had obtained them he refused to redeliver them to the bankrupt or to purchase them, stating that he intended to hold them as security for a debt of the bankrupt to him. It is clearly disclosed that the intent of the defendant was to obtain possession of the goods and then hold them as security for his indebtedness, which would give him an unlawful preference under section 60 of the bankrupt law (Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]). The evidence offered by the plaintiff was received without objection as evidence tending to sustain the plaintiff's cause of action. If the defendant, after obtaining the goods and when asked for payment, had told the bankrupt that his wife would purchase them and offset the amount that the bankrupt owed him, the purchase having been made with the intent of thus securing an unlawful preference, I assume that the trustee in bankruptcy could maintain an action in the form here pleaded. The defendant obtained the goods for his wife to purchase if she desired them, intending at the time to get them into his possession so as to hold them as security for the indebtedness; and, having thus obtained the goods and held them to secure the indebtedness, I do not think he can defend against an action to recover the value of the goods as having been obtained by him for the purpose of obtaining an unlawful preference by claiming that he was guilty of a fraud, and that the bankrupt or his trustee could repudiate the transaction and recover the goods or their value upon that ground. But, if he wished to take this objection, I think he was bound to take it when the evidence was introduced, and that he could not lie by and allow the plaintiff to prove his cause of action, and then, when a good cause of action was proved, object to the sufficiency of the evidence under the complaint. The nature of the defendant's possession of these goods was entirely changed when the bankrupt requested him either to purchase or to return the goods. He refused to do either, but held them as security for the bankrupt's indebtedness to him. His possession of the goods after that was as collateral security for the payment of the bankrupt's indebtedness, and he was not then in a position to claim that he held the goods under any other right. While the bankrupt attempted to repudiate this relation, the trustee in bankruptcy recognized it, but claimed to be entitled to recover the goods as being in violation of the sixtieth section of the bankrupt law. That, I think, he had a right to do, and that the defendant would not then be allowed to say that he obtained the goods by fraud and not for the purpose that he announced when the bankrupt demanded their return.

There was no error in the submission of the case to the jury, and I think the judgment and order should be affirmed, with costs.

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## HOYT v. J. E. DAVIS MFG. CO.

(Supreme Court, Appellate Division, Third Department. May 2, 1906.)

TRIAL—MISCONDUCT OF COUNSEL—EXAMINATION OF VENIREMAN.

In an action against a corporation for injuries, counsel for plaintiff asked a venireman whether he was interested as agent or stockholder in any corporation insuring corporations against liability for negligence, and on objection the court stated that the question might be asked that counsel might determine the advisability of peremptorily challenging the juror. *Held*, that such question and the court's remark was improper, as tending to lead the jury to believe that an insurance company was the real defendant.

Appeal from Trial Term.

Action by Frank P. Hoyt against the J. E. Davis Manufacturing Company. Judgment in favor of plaintiff, and defendant appeals from an order denying a motion for a new trial. Reversed, and new trial granted.

This is an appeal by the defendant from an order denying the defendant's motion for a new trial upon the minutes. The plaintiff, while working in the defendant's factory upon a buzz planer, was injured by his fingers coming in contact with its knives, and brings this action to recover, claiming that the injury was caused by the defendant's negligence. The plaintiff had been at work upon this machine for about a month, and upon other like machines longer, and knew its condition and operation, and he is the principal witness as to the defects in the machine, of which defects he claims to have had knowledge for some time.

The machine consists of two tables, standing near each other. Between them is a small cylinder, from which two knives project, which cylinder revolves very rapidly, and thus planes the surface of the lumber; the operator steadying and pressing down on the lumber as it passes over the knives. On one side of this revolving cylinder is a gauge to keep the lumber in place as it goes against the knives. The lumber to be planed varies in width, and many times does not cover the entire surface of the revolving knives, so that at times they are partly uncovered and might injure the operator if he allowed his hands to come in contact with them. To avoid this danger, and for a rest upon which to pull back the piece after it is planed, a guard is used. This is of wood somewhat resembling a canoe paddle, fastened at the smaller end to the table by a bolt, and with the broader end upon the table between the operator and the board to be planed, so that it covers the exposed surface of the knives. Plaintiff claims that during the time he worked on this machine there was no nut upon the bolt, so that the guard was too loose, and the vibration of the machine caused it to move at times and thus exposed a part of the surface of the revolving knives, and that he had called the attention of his superior to this defect at different times and was answered that there was no nut. He also claims that there was no knifegrinder for a period of two weeks before the accident, and that the knives during that time became dull and were thus liable to cause the lumber to kick back, and that he had asked the foreman to cause the knives to be sharpened, and that upon that morning he had promised that it would be done. He also claims the belt was not properly adjusted. The plaintiff swears that while putting through this planer a small piece of board about 10 or 12 inches long, in which there was a knot, he was compelled to bear down heavily upon the board to keep it upon the knives, the machine slackened, the board kicked back, and his hands in some way came in contact with the knives. The evidence of the defendant tended to show that the guard was secured in the usual and proper manner, that the knives were kept in proper order, that a knifegrinder was constantly employed, and that the belt was properly adjusted.

While examining the jurors as to their qualifications, plaintiff's counsel asked the following question: "Are you interested as agent or stockholder

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in any insurance company insuring corporations against liability for negligence,"—which was objected to by the defendant as not a proper form of examination of a juror, to which the court replied: "Counsel may ask the question for the purpose of determining whether he will peremptorily challenge the juror or not." The defendant excepted, and the juror was sworn.

Argued before PARKER, P. J., and SMITH, CHESTER, KELLOGG, and COCHRANE, JJ.

Davis & Lusk (Rowland L. Davis, of counsel), for appellant.
Dickenson & Duffy (Edwin Duffy, of counsel), for respondent.

JOHN M. KELLOGG, J. The plaintiff's case depends almost entirely upon the credit which he is given as a witness, and it is evident that his evidence is not always reliable. It is improbable that the foreman told him there was no nut for this bolt, for the evidence shows that nuts to fit this bolt, a kind in common use, were in great quantities in different places around the factory to the knowledge of the employés. The witness Tower swore that he had worked in the factory for two or three weeks prior to the accident, and that there was no knifegrinder there. The evidence is very conclusive that Tower did not begin work in the factory until March 1st; the accident occurring March 3d. The evidence is clear that the bolt upon the guard was properly secured by a nut, and that a knifegrinder was employed in the factory all the time. It is very clear that the knives were in proper condition, and that the machine was not defective in that respect. It is unnecessary to go through the evidence of the various witnesses. The plaintiff is contradicted upon every substantial point of his case by many disinterested witnesses, and by circumstances which seem to be significant. The evidence of many witnesses tends to show that the plaintiff persisted in wearing a glove upon his hand while operating the machine, against the caution of his superiors and his co-employés, he being told that it was liable to cause his fingers to be caught in the machine; and the glove was found upon the machine, with the back of the hand torn off, immediately after the accident. Plaintiff seeks to explain this by Tower swearing that the day before the accident the plaintiff requested him to cut off the fingers on the palm side of the glove so that the fingers would be free, saying that he was afraid he would get caught in the machine, and that afterwards the plaintiff put on the glove and used it. The plaintiff denies that his superiors cautioned him, and swears that the day before the accident he had Tower cut off the fingers on the palm side of the glove, for the reason that they had got worn out on the hand and were no use and had some fringe there. It is quite apparent that the plaintiff was using the glove at the time of the accident, and that he and everybody else in the factory believed that it was unsafe and was liable to cause just such an accident as did happen. A careful perusal of the evidence and a consideration of all the facts lead to the conclusion that the verdict is not sustained by the evidence. In a case where the evidence is so strongly to one side, a small circumstance may have influenced the jury, and in this case we look for the circumstance. It is held by the Court of Appeals in Cosselmon v. Dunfee, 172 N. Y. 507, 65 N. E. 494, that the mere asking a question of a witness in a negligence case whether there was an accident insurance in favor of the defendant

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is improper practice, and may fairly call for a reversal of the judgment when it probably influenced the result. If the plaintiff's counsel in this case had been really desirous to know whether the jury in this agricultural county, far removed from the large cities, were stockholders in a company insuring against accidents, he probably would have been satisfied by asking if any of the jurors were stockholders in any corporation. If any of the farmers, mechanics, or tradesmen who would naturally constitute such jury had answered they were, it would have been easy to find what kind of corporations they were interested in, and whether they were agents for such a corporation would naturally be answered by finding what the business of the various jurymen were. Many other questions easily suggest themselves which would naturally draw out the necessary information without an appeal to the prejudice of the jury. It is evident that the counsel was not desirous of knowing whether the jurors were interested in companies insuring against accident, but he limited the question to companies insuring corporations against accident, thus making it more suggestive to this case. It is quite evident that this question was asked for the sole purpose of suggesting to the jury that this company might be, or probably was, insured against accident, and that the plaintiff, if he recovered, would be paid practically by the insurance company which was paid for just such risks. The language of the court might have conveyed to the minds of the jurors the impression that the answer "Yes" to that question would have rendered the juror subject to challenge. It seems that the question of the counsel and the language of the court may have, and very probably did, suggest to this jury that this was a case where in reality an insurance company and not the defendant was upon trial.

The respondent's counsel calls attention to the fact that this question was taken verbatim from Grant v. National Railway Spring Co., 100 App. Div. 234, 91 N. Y. Supp. 1096, and assumes that it is justified by that decision. There, when such a question was asked, the trial court discharged the jury, imposed the costs of the term upon the plaintiff, and, upon appeal, the order was reversed; the court saying it could not inquire into the motive of counsel, and the asking of such a question did not warrant the order. Here the plaintiff has obtained a verdict in a case where the evidence was decidedly against him, and it is probable that some extraneous matter entered into the consideration of the jury, and it seems that the question and the ruling might well have prejudiced the jury, and it is more natural to explain the verdict in that way than in any other suggested. Every suitor is entitled to a fair and impartial trial, and to have the verdict of the jury rest upon the law and the facts of the case entirely unprejudiced by outside considerations. A defendant corporation on trial in a negligence case has enough to meet the case upon the merits, and ought not to be required to meet suggestions which are thrown out, the only effect of which are to prejudice the jury or to get into their minds something which ought not to be in the case. And when counsel ask such questions, overreaching the limit, with a hope to gain a benefit from them, it is but fair that he should take the risk, and in a close case the court may properly consider that such suggestion had the very effect which counsel intended it should have. It is

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unnecessary to decide that the asking of such a question is a legal error which calls for the reversal of a judgment, but it should be understood that such questions are dangerous, and, when asked without good reason, may be very unprofitable to the party who asks them. While in this case it is clear that the verdict is unsupported by the evidence, a new trial under the circumstances is not to be regretted.

The verdict is against the evidence, and is not fairly sustained by it, and the order should therefore be reversed, and a new trial ordered, with costs to the appellant to abide the event. It is therefore unnecessary to consider several rulings in the case which otherwise might require serious consideration.

CHESTER, J., concurs. SMITH and COCHRANE, JJ., concur in result. PARKER, P. J., not voting.

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## GARDNER v. SCHENECTADY RY. CO.

(Supreme Court, Appellate Division, Third Department. May 2, 1906.)

1. EVIDENCE—ADMISSIONS BY AGENT OR EMPLOYÉ—NEGLIGENCE.
   In an action against an electric company for death of its street lamp trimmer, killed by an electric shock while in the performance of his duty, testimony of a witness that a former superintendent of the company had condemned the hoods of the lamp, and that he heard him say that the hoods were no good, that they were not safe, is not admissible against the company.
   [Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 908.]
2. MASTER AND SERVANT—INJURIES TO SERVANT—SUFFICIENCY OF EVIDENCE.
   Evidence in an action against an employer for death of an employé, killed while trimming an electric lamp in the course of his duty, *held* insufficient to sustain a verdict against defendant.
   Chester, J., dissenting

Appeal from Trial Term.

Action by Bridget A. Gardner, administratrix of Joseph P. Gardner, deceased, against the Schenectady Railway Company. From an adverse judgment and from an order denying a motion for new trial, defendant appeals. Reversed, and new trial granted.

This is an appeal from a judgment in favor of the plaintiff, and from an order denying the defendant's motion for a new trial upon the minutes. The plaintiff's intestate was killed by a current of electricity passing through his body while he was employed as an electrical street lamp trimmer by the defendant. The duties of a trimmer were (1) to trim the lamps during the day when the current was off, and (2) to go around nightly and see if the lamps are burning, and, if not, try to make them burn while the current is on. The deceased was engaged in trimming a lamp about 7 o'clock p. m., October 20, 1904, while the current was on, and was killed by a current of electricity which apparently passed through a hole of the right-hand thumb of the rubber glove he was wearing at the time. The action is under the employers' liability act, and the grounds of negligence against the defendant are that the lamp and hood and appliances connecting therewith were of an old construction, defective, and not properly insulated, that the glove furnished was defective, and that the decedent was not given proper instructions.

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Argued before PARKER, P. J., and SMITH, CHESTER, KELLOGG, and COCHRANE, JJ.

Daniel Naylor, Jr., and Edward C. Whitmyer, for appellant.
William Dewey Loucks, for respondent.

PER CURIAM. The evidence is clear that the intestate was employed as a skilled workman, familiar with the kind of business, and that he should either have worn rubber boots, or rubbers, or used the insulated stool, all of which were present in his wagon with him at the time. He did not wear any rubbers, or rubber boots, and there is no claim that he had the insulated stool in use. A witness claims that he did not use the rubber boots or insulated stool when instructing the decedent, but admits that he told him that he ought to take the stool with him as that was what it was for. A witness, in trimming a lamp under like circumstances, where the new style of hood was used, suffered a shock because he forgot to turn off one of the switches. It does not appear here whether this injury was caused by the failure of the decedent to turn off one or both of the switches, or whether the wire leaked or what caused the injury. The ground under which the decedent was working was more or less damp at the time. There is not sufficient evidence of any negligence on the part of the defendant.

Some evidence tends to show that this glove may have been in use for two months previous, and that a glove was good for a week, several weeks, a month, two months, or six months, depending upon the circumstances and the manner of its use. There is no proof of any defect in the glove prior to the accident, and for many days previous to the accident it was in the custody and control of the decedent, and it is quite clear that in fact a new pair of gloves was furnished him when he began work a few weeks before the accident. There is no proof of any defects in the hood. No other defect is claimed so far as the line itself was concerned. The metallic tag could only cause connection from the hood to the lamp, and its presence was immaterial if the hood was a proper one and the switch in proper order. It is true it was an old style hood, but one in general use at the time. The only evidence tending to show any defect in the hood was the statement of one witness that a previous superintendent had condemned the hoods, and that at some time in 1900 he heard that superintendent making a statement that the hoods were no good, that they were not safe. This was not evidence against the defendant. It was received over the defendant's objection and exception.

Therefore, for the reason that the verdict is not fairly sustained by the evidence, and for the erroneous admission of the declarations of the former superintendent, the judgment and order should be reversed and a new trial granted, with costs to the appellant to abide the event.

COCHRANE, J., concurs in result. PARKER, P. J., not voting. CHESTER, J., dissenting.

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## CARLSON v. UNITED ENGINEERING & CONTRACTING CO.

(Supreme Court, Appellate Division, Second Department. May 4, 1906.)

1. MASTER AND SERVANT—SERVANT'S INJURIES—PERSONS ENGAGED IN SUPERINTENDENCE.

The mere fact that a master employed a general superintendent did not relieve him from responsibility, under the employers' liability act, for the negligence of a foreman who was at the time in charge of the work.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 427.]

2. SAME.

Where an engine had been stopped for some time for repairs and adjustment, under the charge of a foreman, his act in directing the engine to be started after the completion of the repairs was one of superintendence.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 177.]

3. SAME—SAFE PLACE—CARE REQUIRED.

It was the duty of a foreman who had been superintending repairs of an engine, before he directed it to be started, to exercise reasonable care to see that workmen engaged in the work of repair or adjustment were in places of safety.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 450.]

4. SAME—QUESTION FOR JURY.

In an action for injuries to a servant, *held* that the question of contributory negligence was one for the jury.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 1089-1132.]

Appeal from Trial Term, Queens County.

Action by Charles Carlson against the United Engineering & Contracting Company. From a judgment in favor of plaintiff, and from an order denying a motion for a new trial, defendant appeals. Affirmed.

Argued before HIRSCHBERG, P. J., and WOODWARD, JENKS, HOOKER, and MILLER, JJ.

John C. Robinson, for appellant.

Charles J. Carroll, for respondent.

JENKS, J. This action for negligence is brought under the employers' liability act. The defendant used a stationary engine for hoisting in construction work. It was stopped for adjustment of a wire rope running over the drums. The plaintiff, while engaged in that work, placed his foot in a place dangerous if the machinery were moving. When he was in such position, the engine was started, and his foot was severely injured. The theory of the plaintiff is that defendant was negligent because its employé Sapp gave the order to start the engine without warning, and before he saw that the plaintiff was in a place of safety. The evidence justified a finding that Sapp gave the order to start the engine when the plaintiff was about the repairs and without taking any precautions to see whether the plaintiff, then engaged in that work, was out of peril. It also justified the finding that Sapp was a superintendent within the purview of the said act. There is testimony

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that he was the foreman; that he employed the plaintiff; that there were several gangs of men with foreman, but that Sapp was the foreman of them all, and Sapp himself testifies that he was foreman, and as such his duties were "to rig the carpenter work and everything that was done around the work"; and that he took this particular work in hand. The engineer also testifies that the superintendent was not there taking charge of that particular work that day. He had Mr. Sapp do that. The mere fact that there was a general superintendent "did not relieve the defendant from responsibility" for the acts of Sapp. See McBride v. N. Y. Tunnel Co., 101 App. Div. 448, 450, 453, 92 N. Y. Supp. 282. I think that the act of Sapp in directing the engineer to start the engine was one of superintendence. As foreman he took personal charge of the repair and adjustment of this machinery, and gave orders and directions to that end. The direction to start the engine after the stop of two hours for the repairs and adjustment under his charge was not like unto a direction for that purpose given in the course of its ordinary intermittent working, a mere detail of the work, but rather a direction in the course of his superintendence of its adjustment and repair. It was his duty, in the course of such superintendence, before he directed that the engine should be started, to exercise reasonable care to see that the workmen engaged in the labor of repair or adjustment were in places of safety. McHugh v. Manhattan Ry. Co., 179 N. Y. 378, 72 N. E. 312; McBride v. N. Y. Tunnel Co., supra.

The question of contributory negligence was for the jury. There is testimony that, in order to do a part of the work ordered, the plaintiff was compelled to stand in the place where he was injured. There is no evidence that the place was dangerous when the engine was not running. And the engine had been stopped in order that this work of the plaintiff and others might be done in safety. I see no reason why the extra allowance should not be granted in this case.

I advise affirmance of the judgment and order, with costs. All concur; HIRSCHBERG, P. J., in result.

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## LUCAS v. SMITH.

(Supreme Court, Appellate Division, Second Department. May 4, 1906.)

1. BROKERS—COMPENSATION—WHEN EARNED.

An architect employed by an owner to find capitalists willing to construct a hotel on the owner's land in consideration of his appointment as architect for the construction of the building, procured capitalists willing and able to finance the undertaking. At a meeting between the capitalists and the owner, it was agreed that the architect should be employed as architect in the construction of the hotel. The scheme failed because of the refusal of the owner to carry out his part of the contract. *Held*, that the architect was entitled to the benefit of the contract; the owner having defeated his employment by refusing to comply with the terms of the agreement.

2. SAME—PLEADING—COMPLAINT—SUFFICIENCY.

The complaint in an action by an architect for compensation for procuring capitalists ready and willing to undertake the construction

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**of a hotel, alleged that his right to compensation depended on his procuring satisfactory arrangements for the erection of a hotel on the land then owned by defendant; that he procured the capital to construct the hotel on terms agreeable to defendant on such premises and on premises subsequently purchased by defendant and on land owned by other parties. *Held*, that the complaint alleged performance by the architect of his contract of employment and stated a cause of action.**

Appeal from Trial Term, Westchester County.

Action by Louis Herbert Lucas against Andrew H. Smith. From a judgment for plaintiff and from an order denying a motion for new trial on the minutes defendant appeals. Judgment and order affirmed.

Argued before HIRSCHBERG, P. J., and WOODWARD, JENKS, HOOKER, and MILLER, JJ.

H. B. Closson, for appellant.

Isaac N. Mills, for respondent.

WOODWARD, J. The facts in this case which are comparatively simple, and which have been found by the jury, have been discussed with impressive elaboration on the part of counsel, without showing any conclusive reason why the judgment in favor of the plaintiff should be disturbed. The plaintiff is an architect. He had been employed by the defendant and the defendant's son (who was an original party to this action, but who has since died, the action being continued against the defendant alone) in making some alterations in buildings located at Forty-Second street, near Madison avenue in the borough of Manhattan, and, while thus employed, had learned that the defendant had in mind the use of the premises as a site for a hotel. Knowing this fact the plaintiff entered into negotiation with the defendant to find capitalists who should be willing to construct the hotel upon the defendant's property, and it is not disputed that the defendant contracted with the plaintiff that if the latter would secure the capitalists who were ready, willing, and able to construct a hotel upon the premises in accord with the defendant's ideas, the plaintiff should be compensated by being employed as architect upon the building at the usual rate of 5 per cent. upon the cost of construction, although the defendant now contends that the contract was that he would use his influence to secure such employment of the company which was to be organized for the purpose of constructing the building, but this is entirely immaterial, for upon the facts which the jury must be deemed to have found, the plaintiff was actually employed for this purpose, and he brings this action to recover damages for a breach of this contract, due to the defendant withdrawing from the arrangement which was duly entered into after protracted negotiations.

It is conceded that it was the duty of the plaintiff, in order that he be entitled to compensation, that the agreement should be proved that he was to be given the employment as architect upon finding the capitalists who were ready, willing, and able to enter into the scheme upon terms to be agreed to by the defendant; that it was necessary to show that the plaintiff found such capitalists and brought them into relations with the defendant which resulted in a mutual agreement for the construction of the hotel, and that the enterprise failed of being carried

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out, not because the capitalists refused to go on, but because the defendant refused to go on, and to execute the written contract which would have bound him as against the capitalists. These various propositions were fully established by the evidence, under a charge which was certainly as favorable to the defendant as he was entitled to, and we are persuaded that the judgment and order appealed from should not be disturbed by this court.

It seems that the defendant and his son owned a certain piece of real estate on Forty-Second street, near Madison avenue, nearly opposite the Manhattan Hotel, and they had conceived the idea of constructing a new hotel of the same general class upon their premises, but lacked the necessary capital. The plaintiff, knowing these facts, upon a definite employment, undertook to find the capital, and it is not disputed that he did find capitalists who were ready, willing, and able to finance the undertaking upon terms which were satisfactory to the defendant; the final agreement being reached on the 25th day of June in the year 1901. This agreement which went into the details of the scheme, and which contemplated the purchase of certain other property adjacent to that of the defendant, is to be spelled out of certain correspondence between the various parties who were interested as capitalists, and as tenants of the proposed hotel, it being arranged that a company should be organized to conduct the same, and to have a lease of the property for a period of 21 years, with rentals ranging from $110,000 the first year to $130,000, and from the testimony of the parties as to what took place at the meeting of June 25, 1901, when all of the parties interested were present, and it cannot be doubted that there was, on this date, a full meeting of the minds of the parties upon a definite scheme for the construction of a hotel to cost $850,000. This plan was so well worked out at this meeting that directions were left for reducing the same to writing for the purpose of signature, and it was agreed that one Mr. Chesebrough should become the manager of the contracting parties, for the purpose of determining any matters of detail which might arise. Immediately after this meeting the defendant and his son telegraphed and wrote letters withdrawing from the scheme; but subsequently made demands for further concessions in relation to matters which were either not before the meeting of June 25th, or had been determined differently at such meeting. Some of these were acceded to, and the defendant evidenced great anxiety to have the contract, as thus modified at his request, put into force at once, but he seems to have had reactionary periods, and before any contract was actually signed, binding as between the parties, he repudiated the whole transaction and the enterprise failed. At the meeting of June 25, 1901, it was agreed among the contracting parties that the plaintiff should be employed as architect in the construction of the hotel, and the scheme having fallen because of the retirement of the defendant, the plaintiff claims the right to the value of his contract, and the jury has found the facts in his favor. It has been established by a long line of judicial decisions, clearly and concisely stated in Sibbald v. Bethlehem Iron Co., 83 N. Y. 378, 382, 38 Am. Rep. 441, that the "fundamental and correct doctrine is, that the duty assumed by the broker is to bring the minds of the buyer and seller to an agree-

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ment for a sale, and the price and terms on which it is to be made, and until that is done his right to commissions does not accrue." This is the rule to be applied in the present case, and the plaintiff has fully established by the evidence that he brought about an agreement between the defendant and certain capitalists, whose ability to perform is not questioned, by which the defendant was to have a certain fixed interest in the hotel property which was to be brought into existence under the terms and conditions of such agreement. Why then should there be any question as to his right to the benefits of his contract? The contract between the parties provided that he should be employed as architect, and the defendant has defeated that employment by refusing to comply with the terms of his agreement with the capitalists who were brought into the enterprise by the plaintiff, acting in behalf of the defendant.

The defendant urges on this appeal that the court should have dismissed the complaint at the opening of the case, because it is alleged that it does not state facts sufficient to constitute a cause of action. This contention is based on the proposition that the plaintiff alleges that his right to commissions depended upon his procuring satisfactory arrangements for "the erection of a hotel structure upon said land then owned by said defendants," and that it is not alleged that the plaintiff ever performed this undertaking. This is suggested because the plaintiff alleges that the hotel to be constructed was to be built in part "upon land of other parties." An examination of the pleadings, which are to be fairly and intelligently construed, shows that the plaintiff alleges the employment under the terms heretofore mentioned to procure the capital to construct a hotel upon the premises owned by the defendant, and that he alleges a performance of these conditions by procuring certain individuals and corporations who were ready, willing and able to construct such hotel upon terms agreeable to the defendant upon such premises, and upon premises subsequently purchased by the defendant, and upon lands owned by other parties; and this was fully established by the evidence. It is entirely plain that as the plan developed it became necessary to have other lands to meet the requirements of all the parties. The hotel was to be constructed upon the lands owned by the defendant, and on such other lands as should be acquired under the terms of the agreement, and when the plaintiff had brought about the agreement of the parties he had earned his commissions. We have examined the various points suggested by defendant, but none of them appears to us to justify a reversal of this judgment, which seems to be in harmony with the law as expressed in Sibbald v. Bethlehem Iron Co., 83 N. Y. 383, 384, 38 Am. Rep. 441, and authorities cited.

The judgment and order appealed from should be affirmed, with costs. All concur.

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## In re COZINE.

(Supreme Court, Appellate Division, Second Department. May 4, 1906.)

ADMINISTRATORS—ACCOUNTING—BURDEN OF PROOF.

Where an administrator has made payments on his personal and individual claims against the estate, the burden of proof is on him to show that the claims were proper.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 2170.]

On rehearing. Former opinion modified.

For former opinion, see 93 N. Y. Supp. 557.

Argued before HIRSCHBERG, P. J., and JENKS, HOOKER, and MILLER, JJ.

HIRSCHBERG, P. J. This appeal has been reargued by order of the court. On the original hearing, we modified the decree by striking out certain items which had been paid for taxes, and affirmed the decree as thus modified. See Matter of Cozine, 104 App. Div. 182, 93 N. Y. Supp. 557. The principal error then alleged by the appellant related to the reception of evidence given by the administrator involving personal transactions between himself and the intestate. We held that this evidence was chargeable to the scope and form of inquiries addressed by the appellant's counsel to the administrator, and that the learned surrogate did not err in refusing to strike it out after it had been thus elicited. We also held, however, that the burden of proof was on the appellant, as contestant, to show that certain payments made by the administrator were improper charges against the estate. In this we erred, because the alleged payments were of the administrator's personal or individual claims against the estate. This fact was not brought to our attention. In such case there is no presumption in favor of the claims, but, on the contrary, the rule of law applicable requires that the claims should be supported by clear and satisfactory evidence. Matter of Humfreville, 6 App. Div. 535, 39 N. Y. Supp. 550; Matter of Smith, 75 App. Div. 339, 341, 78 N. Y. Supp. 130.

The reargument has been had only on the question of the sufficiency of the proof to establish three disputed items claimed by the administrator to be proper charges in his favor against the estate, amounting respectively to the sums of $2,000, $1,300, and $1,450. The appellant, in moving for the reargument, distinctly disclaimed any desire to reopen the question of the competency of the evidence given by the administrator as to the personal transactions with the deceased.

In view of this fact, and accepting that evidence as competent, we are of the opinion that the $2,000 item was sufficiently proved. Indeed, the learned counsel for the respondent conceded, on the reargument, that the record contained evidence supporting that item. We think otherwise, however, as to the two other items; that is, the one of $1,300 charged by the administrator as his equity in the house, No. 803 Sterling Place, Borough of Brooklyn, and the one of $1,450 charged by the administrator for money loaned to the deceased to ap-



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ply upon the purchase price of the house, No. 1202 De Graw street in said borough. As to those two items, a referee should be appointed pursuant to section 2586 of the Code of Civil Procedure, to take further testimony; the burden of proof being on the administrator in the establishment of the validity of these claims, and the referee to report such testimony to this court with his opinion. All concur.

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## MEARS et al. v. NORTH AMERICAN BREWING CO.

(Supreme Court, Appellate Division, Second Department. May 4, 1906.)

COURTS—MUNICIPAL COURTS—APPEAL—RENDITION OF JUDGMENT AGAINST DEFENDANT NOT SERVED WITH PROCESS.

Under Code Civ. Proc. § 3057, providing for affidavits on appeal founded on error in fact not within the knowledge of the court, an appeal from a judgment of the Municipal Court of New York is the proper remedy, where defendant shows by affidavit that the summons was not served on it, and the affidavit of service fails to show a proper service.

Appeal from Municipal Court, Borough of Brooklyn, Third District.

Action by Camden Mears and others, copartners, doing business under the firm name of the Mears Rubber Company, against the North American Brewing Company. From a judgment for plaintiffs, defendant appeals. Reversed.

Argued before JENKS, HOOKER, GAYNOR, RICH, and MILLER, JJ.

Fernando Solinger, for appellant.

Henry Bonawitz, for respondents.

MILLER, J. The defendant appeals from a judgment of the Municipal Court, and shows by affidavit that personal service of the summons was not made upon it, and that it made no appearance in the action. The respondent does not dispute this, and the affidavit of service upon which the judgment was rendered fails to show service on the defendant. An appeal was the proper remedy. Section 3057, Code Civ. Proc.; Lazarus v. Boynton (Sup.) 86 N. Y. Supp. 104.

The judgment of the Municipal Court must be reversed, with costs. All concur.

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## In re EVANS' WILL.

(Supreme Court, Appellate Division, Second Department. May 9, 1906.)

WILLS—REVOCATION.

Under 2 Rev. St. (1st Ed.) pt. 2, c. 6, tit. 1, § 42, declaring that no will shall be revoked except by some other will in writing, or some writing of the testator declaring such revocation, or unless the will be burnt, torn, canceled, obliterated, or destroyed with the intent and for the purpose of revoking the same by the testator himself, or by another person in his presence by his direction and consent, a will which the testatrix directed the custodian thereof to destroy, and which he falsely stated he had destroyed, was not revoked.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 443.]

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Appeal from Surrogate's Court, Kings County.

Proceeding for the probate of the last will and testament of Anna Evans, deceased. From a judgment admitting the will to probate, Richard J. Evans appeals. Affirmed.

Argued before HIRSCHBERG, P. J., and WOODWARD, JENKS, RICH, and MILLER, JJ.

A. P. Bachman, for appellant.

James P. Judge, for respondent.

JENKS, J. The sole question is not whether Mrs. Evans made a valid will, but whether she left one. The learned surrogate found that in 1905, prior to her death, she directed her brother, who had a contingent interest under the will, and was the sole executor, to produce the will made in 1897 before her, and to destroy it; that she asked him if he had destroyed it, and that he answered that he had done so. If the will had been revoked, the brother would not have been benefited through her intestacy. The statute dealing with revocations is plain. 2 Rev. St. (1st Ed.) pt. 2, c. 6, tit. 1, § 42. It specifies the acts which may work revocation, and, in effect, declares that there is no other way. The authorities are clear and uniform that revocation can only be made pursuant thereto. Lovell v. Quitman, 88 N. Y. 377, 42 Am. Rep. 254; Burnham v. Comfort, 108 N. Y. 535, 541, 15 N. E. 710, 2 Am. St. Rep. 462; Matter of Davis' Will, 105 App. Div. 221, 228, 93 N. Y. Supp. 1004; Delafield v. Parish, 25 N. Y. 9. But the learned counsel for the contestants would bring this case within the statute in order that this specific wrong may be righted. His proposition is:

> "Equity is properly invoked in the application of a statute, if the circumstances of the matter are such as properly conform to the spirit of the statute, and could not reasonably have been in the mind of the legislators when enacting the statute."

And we are cited to the quotation from Bacon, made by Earl, J., in Riggs v. Palmer, 115 N. Y. 506, 22 N. E. 188, 5 L. R. A. 340, 12 Am. St. Rep. 819:

> "In order to form a right judgment whether or not a case be within the equity of a statute, it is a good way to suppose the lawmaker present, and that you have asked him this question, 'Did you intend to comprehend this case?' Then you must give yourself such answer as you imagine he, being an upright and reasonable man, would have given. If this be that he did mean to comprehend it, you may safely hold the case to be within the equity of the statute; for while you do no more than he would have done, you do not act contrary to the statute, but in conformity thereto."

Let us apply the test. Of course the question put would not be specific as to whether the statute was intended to right the wrong worked in this specific instance, but whether the statute "comprehended," i. e., a revocation in a case where the testator directed that an act sufficient under the statute to effect a revocation should be done, and it was not done, but the testator was told by the custodian that it had been done apart by the custodian. The legislator might well answer that the statute was drawn so as to require that such an act should actually be done;

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that the protection of testators and the objects of their bounty demanded that the undoing of an act so formal as the making of a last will and testament should be so formal and so thorough and so complete as to show not mere animus revocandi, but positive action upon it should be taken by the testator or in his presence. I know of no principle that justifies a court to apply a statute beyond its interpretation and construction, on the ground that its application would prevent injustice in a specific instance. Legislative limitations or omissions do not constitute a court as a curative Legislature.

The decree is affirmed, with costs. All concur.

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## RAMSTEDT v. BROOKER et al.

(Supreme Court, Appellate Division, Second Department. May 9, 1906.)

1. CONTRACTS—PERFORMANCE—SUBSTANTIAL PERFORMANCE—SUFFICIENCY.
   A building contract substantially performed, is sufficiently performed to authorize a recovery thereon.
   [Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, §§ 1353, 1362.]
2. SAME.
   The failure of a contractor to put three coats of plaster on the clothes closets' walls in a building in accordance with the contract, was not, as a matter of law, a nonperformance of the contract sufficient to defeat a recovery thereon.
   [Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, § 1353.]

Hirschberg, P. J., and Woodward, J., dissenting.

Appeal from Municipal Court, Borough of the Bronx, First District.

Action by Frank Ramstedt against Frederick W. Brooker and another. From a judgment for defendant, plaintiff appeals. Reversed.

Argued before HIRSCHBERG, P. J., and WOODWARD, JENKS, HOOKER, and GAYNOR, JJ.

Willoughby B. Dobbs, for appellant.

Douglas Mathewson, for respondents.

GAYNOR, J. The complaint is for the balance due on a building contract. Performance is alleged, and that was the issue tried. I do not see how the justice could direct a verdict for the defendants. A careful reading of the evidence shows that at best for the defendants the question whether the plaintiff had performed was one of fact for the jury. The law is that if the contract was substantially performed that was performance. The jury had to be so charged, and it was for them to say whether there had been a substantial performance. The omission of some small things is not enough to defeat a recovery on a complaint for performance. Such omissions in the case of building contracts may well be inadvertent or in good faith. Here the justice seems to have directed the verdict because some clothes closets did not have three coats of plaster. They were not to be classified with the walls of the house. The omission at

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all events cannot be said as matter of law to have been intentional and substantial; that was for the jury.

**Judgment of the Municipal Court reversed, and new trial ordered, costs to abide the event. All concur, except HIRSCHBERG, P. J., and WOODWARD, J., who dissent.**

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## PEOPLE'S TRUST CO. v. PABST.

**(Supreme Court, Appellate Division, Second Department. May 9, 1906.)**

**BANKS AND BANKING—LOANS TO OFFICERS WITHOUT APPROVAL OF DIRECTORS—VALIDITY OF NOTE GIVEN FOR LOAN.**

**Under Laws 1892, p. 1857, c. 689, § 25, subd. 4, as amended by Laws 1895, p. 749, c. 929, providing that no officer or agent of any bank shall borrow from it without the approval of a majority of the directors, and that one violating such provision shall forfeit twice the amount to the state, when considered in connection with subdivision 1, absolutely prohibiting certain loans, a note executed by the teller of a bank for a loan made by it to him without the approval of the directors is not void.**

**[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Banks and Banking, §§ 660, 664, 665.]**

Appeal from Trial Term.

Action by the People's Trust Company against William R. Pabst. From a judgment for plaintiff, defendant appeals. Affirmed.

Argued before HIRSCHBERG, P. J., and WOODWARD, JENKS, GAYNOR, and RICH, JJ.

Francis A. McCloskey, for appellant.

John D. Fearhake, for respondent.

JENKS, J. The action is upon a promissory note and against an indorser. The note is for a renewal of $2,500 of a note for $3,000. Cross-examination of a witness for the plaintiff elicited that the maker of the note was a teller in the employ of the predecessor of the plaintiff when the original note was made, and that the consideration was a loan of $3,000 made to him by that bank. Thereupon the witness on redirect testified that the loan was approved by the directors or a majority thereof, under objection and exception that his answer was a conclusion. On recross it was developed that this bit of testimony was hearsay, and a motion was made to strike it out. The court reversed its decision, but never made it. The defendant made no other motion or request, save that at the close of the plaintiff's case he moved for a dismissal on the grounds of failure of proof, that the note was void, and the plaintiff was not the holder in due course. The court reserved its decision on the motion, and finally filed its decision for the plaintiff. If the trial had been before a jury, the remedy of the defendant as to the incompetent testimony received was to ask the court to instruct the jury to disregard it. Holmes v. Moffat, 120 N. Y. at 163, 24 N. E. 275. But, as in this case the jury was waived and the court in its decision wholly disregards the question now presented, I will discuss it on the theory that there was no evidence that the loan was authorized by the directors.

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The contention is that the note was void for failure of proof that there was compliance with subdivision 4, § 25, c. 689, p. 1857, Laws 1892, as amended by chapter 929, p. 749, Laws 1895, which provides as follows:

"No officer, director, clerk or agent of any bank shall borrow from the bank with which he is officially connected any sum of money without the consent and approval of a majority of the board of directors thereof. Every person violating this provision shall, for each offense, forfeit to the people of the state twice the amount which he shall have borrowed."

The contract is but malum prohibitum. The general rule is stated in Pratt v. Short, 79 N. Y. 445, 35 Am. Rep. 531, as follows:

"So, also, a prohibitory statute may itself point out the consequences of its violation, and if, on a consideration of the whole statute, it appears that the Legislature intended to define such consequences, and to exclude any other penalty or forfeiture than such as is declared in the statute itself, no other will be enforced, and if an action can be maintained on the transaction of which the prohibited transaction was a part, without sanctioning the illegality, such action will be entertained."

See, too, McBroom v. Scottish Investment Co., 153 U. S. 323, 14 Sup. Ct. 852, 38 L. Ed. 729; Harris v. Runnels, 12 How. (U. S.) 79–84, 13 L. Ed. 901. The subdivision quoted, supra, does not prohibit such transaction or declare it void, and it does provide an express penalty which is imposed on the borrower alone. If the Legislature had intended to impose any forfeiture or other penalty, I think that it would have so declared in express terms. The provision quoted, supra, is subdivision 4 of section 25, entitled "Restrictions." By subdivision 1 of that section the Legislature absolutely prohibits certain loans and discounts. If the Legislature intended to prohibit or declare void the loans within the purview of subdivision 4, it is but reasonable to infer that it would have made a declaration similar to that made in subdivision 1 of the same section with reference to certain other loans or discounts.

None of the other questions raised require comment.

I advise affirmance of the judgment, with costs. All concur.

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## FARRELL v. BOARD OF EDUCATION OF CITY OF NEW YORK.

(Supreme Court, Appellate Division, Second Department. May 9, 1906.)

1. SCHOOLS AND SCHOOL DISTRICTS—DISTRICT PROPERTY—JANITORS—COMPENSATION.

The Labor Law, Laws 1897, p. 463, c. 415, § 3, as amended by Laws 1899, p. 1172, c. 567, and Laws 1900, p. 638, c. 298, providing that the wages to be paid for a legal day's work to laborers or mechanics on public works, or on any material to be used in connection therewith, shall not be less than the prevailing rate for a day's work in the same trade or occupation in the locality within the state where the work is performed, does not apply to a janitor appointed by the board of education under Greater New York Charter, Laws 1897, p. 384, c. 378, giving the board exclusive power to regulate janitors' salaries.

2. SAME.

The present Greater New York Charter, Laws 1901, p. 32, c. 466, § 56, relating to compensation of employés of the board of education, by ex-

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**cluding "day laborers and teachers, examiners and members of the supervising staff," includes janitors employed by the board, though limited to "compensation paid out of the city treasury."**

Appeal from Special Term.

Action by Joseph Farrell against the board of education of the city of New York. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Argued before HIRSCHBERG, P. J., and WOODWARD, JENKS, and RICH, JJ.

L. Laflin Kellogg (Alfred C. Pette, on the brief), for appellant.

William Hughes (James D. Bell, on the brief), for respondent.

JENKS, J. This action is to recover for janitor's services in a public school in the borough of Brooklyn. The plaintiff complains that he has earned, at the prevailing rate of wages paid to janitors in the borough of Manhattan for like services, $4,000 in excess of the salary received by him. He was appointed a janitor by the school board in Brooklyn in 1892, and his compensation was fixed, pursuant to authority, at $1,000 a year. After consolidation, the Brooklyn Borough board increased that sum to $1,360 a year, and on May 1, 1902, it was, pursuant to section 56 of the charter (Laws 1901, p. 32, c. 466), further increased to $1,699.20 per annum. The plaintiff relies upon that part of section 3 of chapter 415, p. 463, of the Laws of 1897, as amended by chapter 567, p. 1172, of the Laws of 1899, and by chapter 298, p. 638, of the Laws of 1900, which provides:

**"The wages to be paid for a legal day's work as hereinbefore defined to all classes of such laborers, workmen or mechanics upon all such public works or upon any material to be used upon or in connection therewith shall not be less than the prevailing rate for a day's work in the same trade or occupation in the locality within the state where such public work on, about or in connection with such labor is performed in its final or completed form is to be situated, erected or used."**

The plaintiff is "a person employed to take charge of rooms or buildings, to see that they are kept clean and in order, to lock and unlock them, and generally to care for them." Fagan v. Mayor, 84 N. Y., at page 352. Of course, as in discharge of such duties he labors and works and employs mechanical skill, he may be said as the doer to be, in the broad sense of the terms, a laborer, a workman, or a mechanic, for the first two words are generic and sometimes, all other signs failing, have been regarded even as marking those who toil from those who are idle. But the language of the paragraph indicates that it refers to those who are paid daily wages for labor upon public works, and that its purpose is to require that such wages shall equal the prevailing rate paid to other laborers, workmen, or mechanics not engaged upon public work.

On the other hand, this plaintiff is a subordinate specifically recognized by the charter, appointed by the board of education, and removable by it. Sections 1067, 1074, Greater New York Charter. By section 1069 of the original charter (chapter 378, p. 384, Laws 1897), the board of education had the exclusive power to regulate

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his salary. Section 1101 of the charter, as amended, provided for his continuance with the compensation as was there provided, or as thereafter provided by the lawful authority. The power over salaries committed to the local authorities by section 56 of the present charter extends to the compensation of the plaintiff. This is specifically shown by the exclusion "other than day laborers and teachers, examiners and members of the supervising staff of the department of education," for the exclusion of some of the employés of the department indicates the inclusion of the others. There is no force in the point that, as section 56 is limited to "compensation paid out of the city treasury," it does not apply to the salary of this plaintiff. There is no such precise thing as "the city treasury," but this term is used to describe the money that is raised, received, and expended by the municipal corporation. That the public school moneys are thus properly described is evident from the provisions of sections 1059, 1060, 1055, and 1064 of the charter.

The revised charter was passed subsequent to the labor law and its amendments. My conclusion is, as the Legislature intended to prescribe and to provide for the salaries of janitors and the regulation thereof by the charter of the city of New York, that in any event the part of the labor law cited does not apply. In State ex rel. v. Martindale, 47 Kan. 147, 27 Pac. 852, a somewhat similar statute was under review, and the court held that a like expression did not embrace any officer or employé for whom an annual salary had been specifically named and appropriated by the Legislature. I think the principle is the same, notwithstanding the action in this case is by the local authorities, inasmuch as it is pursuant to the express sanction of the Legislature.

The judgment is affirmed, with costs. All concur.

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## PEOPLE v. DUNDON et al.

(Supreme Court, Appellate Division, Third Department. May 18, 1906.)

1. DEPOSITIONS—CRIMINAL PROSECUTION—USE BEFORE GRAND JURY.
   Under Code Cr. Proc. § 8, subd. 3, and section 255, authorizing the reading of a deposition before a grand jury on its being satisfactorily shown to the court that the witness cannot with due diligence be found in the state, proof of this fact before the grand jury, and not before the justice, is sufficient to authorize the reading of the deposition before the grand jury.

2. CRIMINAL LAW—APPEAL BY PEOPLE—DISMISSAL OF INDICTMENT.
   Under Code Cr. Proc. § 518, providing that an appeal to the Appellate Division of the Supreme Court may be taken by the people only on a judgment sustaining a demurrer to the indictment, and on an order of the court arresting the judgment, the Appellate Division has no jurisdiction of an appeal by the people from an order dismissing the indictment, though the defendants waived the question as to the right of the people to appeal.

Appeal from Trial Term, Broome County.

Indictment against James Dundon and others. From an order dismissing the indictment, the people appeal. Appeal dismissed.

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Argued before SMITH, CHESTER, KELLOGG, and COCHRANE, JJ.

Roger P. Clark, Dist. Atty., for the People.
Frank S. O'Neil, for respondents.

COCHRANE, J. The defendants were indicted for the crime of grand larceny in the second degree. In the investigation of the charge resulting in sucn indictment the grand jury received the depositions of two witnesses who were at the time absent from the state. These depositions had been properly taken as required by subdivision 3 of section 8 of the Code of Criminal Procedure. And upon satisfactory proof to the court as required by said last-mentioned provision that the witnesses could not with due diligence be found in the state their depositions became proper evidence before the grand jury. Code Cr. Proc. § 255. Sufficient proof of the absence from the state of such witnesses was made before the grand jury. The trial court however dismissed the indictment because such proof should have been made to the justice holding the term rather than to the grand jury.

"An appeal to the Appellate Division of the Supreme Court may be taken by the people in the following cases and no other: (1) Upon a judgment for the defendant on a demurrer to the indictment; (2) upon an order of the court arresting the judgment." Code Cr. Proc. § 518. The right of appeal in criminal cases is statutory only. The People v. Carroll, 105 App. Div. 147, 93 N. Y. Supp. 926. It follows that the order in question is not appealable. It is stipulated tnat the respondents waive any question as to the right of the people to appeal from this order. But consent cannot give jurisdiction to an Appellate Court. McMahon v. Rauhr, 47 N. Y. 67, 72; Wilmore v. Flack, 96 N. Y. 519.

We think the order in question is erroneous, but for the reasons above stated, we are not at liberty to entertain the appeal therefrom.

Appeal dismissed. All concur.

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## HAHLO et al. v. COLE.

(Supreme Court, Appellate Division, First Department. April 20, 1906.)

1. ABATEMENT AND REVIVAL—BANKRUPTCY OF PARTY.

An action by a bankrupt in a state court does not abate upon the adjudication in bankruptcy or appointment of a trustee, and, in the absence of an application by the trustee for substitution, it may be prosecuted by the bankrupt.

2. BANKRUPTCY—ACTIONS BY BANKRUPT—SUBSTITUTION OF TRUSTEE—CONSENT OF COURT.

Under Bankr. Act July 1, 1898, c. 541, § 11, 30 Stat. 549 [U. S. Comp. St. 1901, p. 3426], declaring that a trustee may, with the approval of the court, prosecute any suit commenced by the bankrupt prior to the adjudication etc., it is improper for a trustee to be substituted as plaintiff in a suit in a state court by a bankrupt without first obtaining the consent of the federal court to such substitution.

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Appeal from Special Term.

Action by Henry C. Hahlo and others against John B. Cole. From an order substituting Ernest P. Burritt as trustee in bankruptcy of the original plaintiffs as party plaintiff, defendant appeals. Reversed, with leave to renew the motion for substitution.

Argued before O'BRIEN, P. J., and PATTERSON, INGRAHAM, LAUGHLIN, and CLARKE, JJ.

David T. Davis, for appellant.

Frank H. Curry, for respondent Ernest P. Burritt.

Henry M. Wise, for respondents Henry C. Hahlo and others.

LAUGHLIN, J. The former plaintiffs in this action were copartners, and they instituted the action upon a firm account for stock sold and delivered to the defendant. Subsequent to the commencement of the action, the plaintiffs were duly adjudged bankrupts by decree of the United States District Court for the Southern District of New York, and the respondent Burritt was duly appointed trustee in bankruptcy. The motion for substitution was opposed upon the ground that the trustee failed to show that he had been authorized by the federal court to intervene in the action. The objection was overruled, evidently upon the ground that the interest of the former plaintiffs had been transferred to the trustee, and that the court was therefore authorized by section 756 of the Code of Civil Procedure to direct that the trustee be substituted in their place.

Undoubtedly, the claim in litigation passed to the trustee in bankruptcy, and he had a duty to perform with respect to the collection thereof. Sections 70a, 21e, 21g, c. 541, Act July 1, 1898, 30 Stat. 565, 552 [U. S. Comp. St. 1901, pp. 3451, 3430] and section 11 and section 23, subd. "b," 30 Stat. 549, 552 [U. S. Comp. St. 1901, pp. 3426, 3431]. The trustee, however, in the performance of his duties, is subject to the order and direction of the federal court. Section 24, subd. "b," Bankr. Act.

Section 11 of the bankruptcy act provides as follows:

"A trustee may, with the approval of the court, be permitted to prosecute as trustee any suit commenced by the bankrupt prior to the adjudication, with like force and effect as though it had been commenced by him."

The question arises as to whether this statutory provision has reference to the court in which the suit is pending or to the federal court. It was evidently the view of the Supreme Judicial Court of Massachusetts that it refers to the federal court and requires the consent of that court before an action in a state court by or against the bankrupt can be prosecuted or defended by the trustee, for in Callahan v. Israel, 186 Mass. 383, 71 N. E. 812, where a demurrer had been interposed to a complaint in an action brought by a trustee in bankruptcy, upon the theory that it was essential, even in an original action by him, to allege, as a condition precedent to his right to maintain the same, the consent of the federal court, the court, in overruling this objection, said:

"The title to the estate is vested in the trustee. Act July 1, 1898, c. 541, 70a, 21e, 21g, 30 Stat. 565, 552 [U. S. Comp. St. 1901, pp. 3451, 3430].

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**There is no reason to hold that he has not the right of an owner to bring suit to collect his property save as it is clearly limited by the act. The only limitations are found in section 11, and relate to suits brought by or against the bankrupt before the proceedings in bankruptcy and pending after the appointment of the trustee."**

A like view was taken by the Supreme Court of Georgia. Trades Ins. Co. of Chicago v. Mann, 11 Am. Bankr. R. 269–272, 45 S. E. 426. The Circuit Court in this district has construed this statute as requiring the consent of the federal court, and has adopted the practice of granting such consent in the form of an order authorizing the trustee to apply to the state court for substitution. In re Price (D. C.) 92 Fed. 987.

It is manifest that it may not be for the best interests of the estate of a bankrupt to have the trustee intervene to prosecute and defend all actions pending in favor of or against the bankrupt, and this was doubtless the theory upon which the statutory provision was enacted. See Collier on Bankruptcy (5th Ed.) p. 141; In re Price, supra. It is, at least, doubtful whether the trustee has authority to prosecute or defend an action pending at the time of his appointment without the consent of the federal court. An action by or against the bankrupt in the state court does not abate upon the adjudication in bankruptcy or appointment of a trustee, and, in the absence of an application by the trustee for substitution, it may be prosecuted or defended by the bankrupt.

There is no force in the suggestion that the trustee is not disqualified from obtaining the order for substitution because section 11 of the bankruptcy act only requires authority of the federal court to permit him to prosecute or defend the action, and that the prosecution or defense of the action cannot be commenced until after he has been substituted as a party. Since the federal court can control the prosecution of the action by the trustee, there is no propriety in allowing the substitution until it is determined that it is to be effective. See Baer v. McCullough, 176 N. Y. 97–103, 68 N. E. 129. Therefore, without deciding that the substitution is unauthorized, unless the consent of the federal court thereto is first obtained and affirmatively shown, we are of opinion that it is improper, and that the better practice is to require the trustee to show on all sucn applications that he has obtained the consent of the federal court.

It follows therefore that the order should be reversed, with $10 costs and disbursements, and the motion denied with $10 costs, but with leave to renew on proof of authority from the bankruptcy court. All concur.

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## YOUNG v. HYDE et al.

(Supreme Court, Appellate Division, Third Department. May 2, 1906.)

1. INSURANCE—DIRECTORS—MISMANAGEMENT—ACTION BY STOCKHOLDER AND POLICY HOLDER.
In an action against a corporate insurance society by a stockholder and policy holder for the benefit of the corporation against directors for mismanagement and loss of the society's funds, it was no objection that she sued both in her capacity as a stockholder and policy holder.

2. SAME—STATUTES—ACCOUNTING.
An action by a stockholder and policy holder of a corporate insurance society against directors for loss of the society's funds through mismanagement, brought for the benefit of the society, was not within Insurance Law, Laws 1892, p. 1958, c. 690, § 56, providing that no judgment for an accounting or restraining or interfering with the prosecution of the business of such an insurance company, or appointing a temporary receiver, should be made otherwise than on the application of the Attorney General.

3. SAME—DEMAND ON THE SOCIETY TO SUE.
Where, in an action by a stockholder and policy holder of an insurance society for its benefit to recover for losses against directors for alleged mismanagement, it appeared that the very men to be sued constituted all the directors of the society, and that it would be useless or dangerous to ask them to sue themselves, plaintiff was not required to make a demand on the society to bring the action as a condition precedent to her right to do so.

4. SAME—COMPLAINT—CAUSE OF ACTION—JOINDER.
Where an action was brought against all the defendants as directors of a corporate insurance society for their alleged wrongful neglect and waste of the society's funds, and the complaint showed that each defendant who took money wrongfully from the society, not only was liable for the money taken by him, but was also liable for that which he permitted others to take, the fact that the complaint alleged nine instances in which individual directors took the funds of the society or took advantage of the society for their personal benefit did not render the complaint objectionable as improperly uniting several causes of action against different defendants.

Appeal from Special Term.

Action by Mary S. Young, a stockholder and policy holder of the Equitable Life Assurance Society, against James H. Hyde and others. From an interlocutory judgment overruling the demurrer of defendant Hyde to the complaint, defendants appeal. Affirmed.

The plaintiff, a stockholder and policy holder of the Equitable Life Assurance Society of the United States, brings this action against the directors of said society, all of whom have been serving during the last three years, and against said society, seeking to recover from the directors and for the society various sums of money which it is claimed have been lost to the society during that time by reason of the negligent manner in which said directors have performed their duties. The grounds of the demurrer will appear so far as necessary in the opinion.

Argued before PARKER, P. J., and SMITH, CHESTER, KELLOGG, and COCHRANE, JJ.

Guggenheimer, Untermyer & Marshall (Louis Marshall, of counsel), for appellants.

Edgar T. Brackett, for respondent.

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JOHN M. KELLOGG, J. The point raised by the demurrer that the plaintiff is asserting one cause of action as a stockholder and another as a policy holder is not well taken. The cause of action belongs to the society, and not to her, but because the society cannot or will not assert its rights, she as an interested party appeals to the court in its behalf. In order to maintain the action, she is required to show an interest which is suffering or is imperiled by the wasteful acts of the defendant directors, and she may show all her interest and is not required to divide it and assert but one-half of it. Her actual interest is that of a stockholder and policy holder, and the rights of both define the quality of her interest, and show that she is entitled to be a plaintiff here. The fact that her interest is combined from two other interests does not make two causes of action upon the facts alleged. It is immaterial what are the relative interests or rights of a stockholder and a policy holder in this society, for the plaintiff's interest represents both, and it is immaterial from which source she derives the greater interest.

It is further contended by the demurrer that the plaintiff, as a private suitor, has not the capacity to sue, and her complaint does not, therefore, state facts sufficient to constitute a cause of action under section 56 of the insurance law (chapter 690, p. 1958, Laws 1892), which provides that no judgment providing for an accounting or restraining or interfering with the prosecution of the business of such an insurance company, or appointing a temporary receiver, shall be made otherwise than upon the application of the Attorney General. The cause of action here is one belonging to the society, and the action is brought for its benefit, and judgment is asked in its favor against the unfaithful directors that they be required to account and pay to the society the moneys it has lost through their unfaithfulness. The society is joined as a defendant, because the unfaithful directors will not make it a plaintiff against themselves, but it is here only to receive such benefits as the judgment of the court gives it. No action upon its part is required or expected. The plaintiff in its place has assumed the burden of the prosecution. No accounting or other act by the society is required or would be proper in this action. The sole question is, did the defendant directors mismanage the affairs of the society in the respects alleged, and, if so, how much has it lost by reason of such mismanagement. It is clear that if the society were named as plaintiff against these same defendants upon this complaint asking the same relief, it would not be thought for a moment that the unfaithful directors could hide behind section 56, which was intended for the protection of the society, and not as a shield for its unfaithful officers against whom it has just claims. It plainly appears from the complaint that this action is not brought for any of the purposes mentioned in said section 56, and the demurrer in that respect is not well taken.

The demurrer, so far as it raises the question that no demand has been made upon the society to bring this action, is not well taken. The absence of such demand is excused, as it appears that the very men to be sued constitute all of the directors of the society, and that it would be useless or dangerous to ask them to sue themselves. "If

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the complaint alleged that the directors of the corporation at the time of the commencement of the suit were the same as those who had committed the wrongs for which the suit is brought, it would relieve the plaintiff from making any demand on the corporation, for it may be assumed that such directors would not prosecute, or at least not prosecute in good faith, an action based upon their own misconduct." O'Connor v. Virginia Passenger & Power Co., 184 N. Y. 46–52, 76 N. E. 1082.

The demurrer raises the question that several causes of action against different defendants are improperly united. If the directors of the society wrongfully and negligently left its funds unguarded, so that strangers could help themselves, and thereby the society lost large amounts of money, it would be expected that a complaint against such directors, in addition to alleging their wrongs and neglects, would give particulars as to each separate transaction by which the society had lost, specifying the person who had taken the moneys, the circumstances under which they were taken and would show that the taker had no right to them, and it would appear that the society had a cause of action against each taker. These particulars would be added to such a complaint to make it definite and certain, and to show the extent and the manner of the losses. Here the defendant directors, instead of allowing strangers to take the money allowed some of their number to take it, but that does not require a change in the form of pleading, nor dispense with the propriety of a statement of the particulars of each loss. All of the allegations of the complaint show that it is an action brought against all of the defendants for their wrongful neglect and the waste of the society's moneys. It shows that each defendant who took money wrongfully, not only is liable for the money he took, but is liable also for the money which he permitted others to take. The fact, therefore, that this complaint alleges nine instances in which individual directors took the funds of the society, or took advantage of the society for his own benefit, and in that respect contains allegations which should go far towards establishing a cause of action against each, when taken in connection with the various allegations as to the gross neglect and mismanagement of all the directors, that they made no proper rules, that they disregarded the interests of the society and its funds and thus made possible, and brought about these wrongs by the different directors, makes it apparent that the plaintiff is pursuing, not each individual for the active wrong which he committed in helping himself, but is pursuing all the directors for the waste of the society's funds, seeking a judgment against each for all the damages which his wrongs and his neglect have caused. This cannot be viewed as an aggregation of different causes of action against different defendants without disregarding the principal allegations of the complaint, which could have no proper place in such a complaint, and which could only be used in asserting a liability against all. We cannot gather the object of the action from a single allegation in the complaint, but the complaint as a whole constitutes the cause of action. Referring to the circumstance that nine different defendants are named as receiving the funds without consideration and wrongfully, the com-

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plaint shows that the society suffered those losses by the active wrong of each taker and the gross negligence and wrong of all the other 51 directors who permitted and made the wrong possible by their neglect of duty. So that each injury arose from the wrongful act of some director and the gross neglect of all the others. The active or passive wrong of each of the 52 directors caused the entire loss and each item thereof.

The complaint alleges but one cause of action against all the individual defendants. The interlocutory judgment should therefore be affirmed, with costs, with the usual leave to the defendants upon the payment of the costs below, and in this court to answer within 20 days.

All concur, except PARKER, P. J., not voting.

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(47 Misc. Rep. 693.)

## CENTRAL TRUST CO. OF NEW YORK v. EGLESTON et al.

(Supreme Court, Special Term, New York County. June, 1905.)

1. WILLS—CONSTRUCTION—CONTRIBUTIONS BY LEGATEES.

By testator's will, the income from the entire estate was to be divided into three equal shares, the trustee under the will to pay from these incomes the annuity to the widow first from the incomes derived from the property, being $2,000 for the first year and one-half after testator's decease, and thereafter $4,000 a year during her life; the balance of the income to be accumulated in three separate funds, and the trustee to pay from such income $2,000 to each son, less 100 pounds to be equally contributed. One-third of such 100 pounds was to be taken from each $2,000, as a charge thereon, and paid over by the trustee, as a legacy, to the widow during the period of one year and one-half from testator's death "to maintain the home," and thereafter, and until each son attained majority, to pay to each son from his separate share of the income accumulated $3,000 per year for education and expenses, 200 pounds to be paid to the widow and the same being made up in the same way as the 100 pounds and for the same purpose; the sons, in case such contribution of 200 pounds was not made from their shares, to receive each only $2,000, but to be relieved of any contribution. *Held*, that the contributions of 100 pounds and 200 pounds "to maintain the home" were to be made by each son, and not by them collectively.

2. SAME—PRECATORY WORDS.

A will provided that testator's wife was to have for the first year and one-half, "while the estate is provided for, $2,000 per annum, and when the estate is settled after the above time $4,000 each year for life." After such settlement, each of the testator's three sons was to have $3,000, instead of $2,000, a year, so that the sum of $5,000, in additional income, was added to the income of the beneficiaries after settlement of the estate. The will further provided that, for the first year and one-half after testator's death, "I desire that the Central Trust Company (trustee under the will) advance to my wife in the ratio of my previous expenditure from five thousand dollars to about nine thousand dollars, so as to give time to adjust family affairs, this to be for the benefit of my wife and sons, not one but all, but if all of the children are of age (21) then for one year, not one year and one-half ($5,000 to $9,000)." The children referred to were under age. *Held* that, in view of the general scheme of the will, the precatory words were meant as a direction to the trustee, and that the amount of $5,000 to $9,000 was to be paid out in the same way as testator himself previously made the expenditure for the family; the "ratio" or proportions of the sum, and at what particular time to be paid, being left to the discretion of the trustee.

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3. SAME—ADVANCES.

Such advance of from $5,000 to $9,000 was in addition to the separate provisions made for the wife and sons during the settlement of the estate; it not being stated from what funds the advance was to be made, and the advances not being expressly or by fair implication charged against the annuity for the wife or against the annuity or accumulations for the sons.

4. SAME—OUT OF WHAT FUND PAYABLE.

In the absence of express designation, and it not appearing from the will as a whole that there was any other intention, the advances were not to be charged against any specific beneficial interest elsewhere provided: the word "advance" being equivalent to the word "pay," and such payment was to be made from the funds in the trustee's hands.

On examination of questions presented on settlement of the decree. Judgment ordered submitted.

For former opinion, see 95 N. Y. Supp. 945, 47 Misc. Rep. 475.

CLARKE, J. Upon examination of the questions presented upon settlement of the decree, I am of opinion that the contributions of £100 and £200 "to maintain the home" are to be made by each son, and not by them collectively. A construction is also sought of the following clause:

"For the first year and one-half after my death (if any child is under age) I desire that the Central Trust Company advance to my wife in the ratio of my previous expenditure from five thousand dollars to about nine thousand dollars, so as to give time to adjust family affairs—this to be for the benefit of my wife and sons, not one, but all— but if all of the children are of age (twenty-one) then for one year, not one year and one-half ($5,000 to $9,000).

The children are under age, so the provision is for 1½ years. The testator has used precatory words directed to the trustee.

In Phillips v. Phillips, 112 N. Y. 197, 205, 19 N. E. 411, 413, 8 Am. St. Rep. 737, Judge Finch says:

"The primary question in every case is the intention of the testator, and whether in the use of precatory words he meant merely to advise or influence the discretion of the devisee or himself to control or direct the disposition intended. In such a case, we must look at the whole will, so far as it bears upon the inquiry, and the use of the words 'I wish' or 'I desire' is by no means conclusive. They serve to raise the question, but not necessarily to decide it."

In view of the general scheme of the will, the precatory words are meant as a direction to the trustee. The amount from $5,000 to $9,000 is to be paid out in the same way as testator himself previously made expenditure for the family, and the "ratio" or proportions of the sum and at what particular time to be paid is left to the discretion of the trustee, but payments between $5,000 and $9,000 are to be made. Such construction is in accord with the general scheme. The wife is to have for the first year and one-half, "while the estate is provided for, two thousand dollars per annum, and when the estate is settled after the above time four thousand dollars each year for life." After the settlement of the estate each of the three sons is to have $3,000, instead of $2,000, a year, so that the sum of $5,000 in additional income is added to the incomes of the beneficiaries after settlement of the estate. I therefore conclude that the advance of from $5,000 to $9,000 is in addition to the separate provisions made for the wife and sons during the settlement of

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the estate. The testator intended that during such settlement the family should have funds wherewith to continue in the same circumstances as his previous expenditures had provided. The trustee is "to advance from five thousand dollars to about nine thousand dollars." It is not stated from what funds the advance is to be made. The sums to be advanced are not expressly or by fair implication charged against the annuity for the wife nor against the annuities or accumulations for the sons. In the absence of express designation, and it not appearing from the will as a whole that there was any other intention, the advances are not to be charged against any of the specific beneficial interests elsewhere provided, but the word "advance" is equivalent to the word "pay," and the payment must be made from the funds in the trustee's hands. The provision is for "my wife and sons, not one, but all." During the first year and one-half allowed by testator for settlement of the estate the trustee is to pay from $5,000 to $9,000 out of the principal in its hands as a legacy to the widow, who is charged with the duty of applying the same for the benefit of herself and the three sons.

Decisions signed. Submit judgment on July 31st.

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## EMERSON et al. v. SHEFFER.

(Supreme Court, Appellate Division, Third Department. May 2, 1906.)

1. BILLS AND NOTES—CONSIDERATION—FORBEARANCE.

A bankrupt firm being indebted to plaintiffs on a draft, one of the members represented that he could not pay the draft or secure the indebtedness unless he could get a note from his wife or son, to which one of the plaintiffs replied that he would take such a note, and that he was not particular about an immediate settlement, if the debt could be secured, whereupon the note was secured, signed by the son, indorsed by the wife, and delivered to plaintiffs. *Held* that, though the note was accepted as security for the draft only, there was an agreement to forbear immediate action to collect the draft, which was a sufficient consideration for the note.

2. SAME—BURDEN OF PROOF.

Where a note sued on was given as security for the debt of a bankrupt firm in consideration of the creditor's forbearance to sue, and it was thereafter alleged that such forbearance was no consideration, because action on the claim was stayed by Bankr. Act July 1, 1898, c. 541, § 11, 30 Stat. 549 [U. S. Comp. St. 1901, p. 3426], for 12 months after the date of the adjudication in bankruptcy, or until the question of his discharge was determined, it was incumbent on the defendant to show affirmatively the existence of facts bringing the creditor within the prohibition of the statute.

Appeal from Trial Term, Warren County.

Action by Louis W. Emerson and another against George A. Sheffer. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

This is an action on a promissory note executed December 6, 1901, by the defendant, George A. Sheffer, to the order of and indorsed by Henrietta Sheffer, since deceased, payable one year from the date thereof, and now owned by the plaintiffs. The cause was submitted to the learned trial justice on an agreed statement of facts, from which it appears that said note was given to the plaintiffs as security for an overdue draft held by them against the firm of Wilson, Sheffer & Coonley. That on or about the date of said



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note James A. Emerson, one of the plaintiffs, had a conversation with James H. Sheffer, one of the members of said firm of Wilson, Sheffer & Coonley, in which conversation said Emerson inquired of said Sheffer what his firm was going to do about said draft. Sheffer said that he did not have any money to pay, as the said firm of Wilson, Sheffer & Coonley were in bankruptcy at that time, and that all his assets had been turned over to the bankruptcy court. Emerson replied that he was not particular about an immediate settlement, if Sheffer would secure the debt. Sheffer said he had nothing to secure the indebtedness with, unless he could get a note from his wife or son. Emerson replied that he would take such a note. Sheffer afterwards procured the note in question, signed by his son and indorsed by his wife, and delivered said note to Emerson. Such note was signed and indorsed by the maker and indorser, respectively, for the accommodation of said firm of Wilson, Sheffer & Coonley, said maker and indorser not owing anything to the plaintiffs at the time such note was given. The draft was not surrendered by the plaintiffs to Wilson, Sheffer & Coonley. From such agreed statement the trial court found as a fact that the plaintiffs agreed to grant the firm of Wilson, Sheffer & Coonley time to pay their indebtedness on their draft if they would secure the same, and that the note in question was accepted by the plaintiffs as such security.

Argued before PARKER, P. J., and SMITH, CHESTER, and COCHRANE, JJ.

George Lawyer, for appellant.
S. M. West, for respondents.

COCHRANE, J. The defense urged against this note is that it lacks consideration, in that the original indebtedness represented by the draft of Wilson, Sheffer & Coonley held by the plaintiffs was not extinguished or paid by said note, and that there was no agreement to extend the time of payment of said draft. The note was concededly given, not in payment of the draft, but as security therefor, and if the defendant is right in his contention that the time of payment of said draft was not extended no recovery can be had on this note. Plaintiffs certainly did not agree to extend the time of payment of the original indebtedness for one year, the time which had to elapse before the maturity of the note, and no presumption of such agreement can be inferred merely from the fact of the acceptance of said note as security for the preexisting indebtedness. But the plaintiffs, as an inducement to the firm of Wilson, Sheffer & Coonley to secure their indebtedness, told them that they were "not particular about an immediate settlement," and on the strength of this statement the note in question was delivered. I think this amounted to a promise on the part of the plaintiffs that they would forbear action on the draft, and justifies the finding of the trial court that an agreement of forbearance was made by them in consideration of the note in question. By such promise the plaintiffs placed it out of their power to proceed immediately on the draft. No specific time of forbearance was mentioned, but it became the duty of the plaintiffs to wait a reasonable time before seeking enforcement of the original indebtedness. Any time, however short, was a sufficient consideration for the note. Milius v. Kaufmann, 104 App. Div. 442, 93 N. Y. Supp. 669; Cary v. White, 52 N. Y. 142. In the case last cited it was said:

"If there was an extension of time for a single day by a valid agreement as a consideration of the mortgage, there was a valuable consideration, within the rule."

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It is further urged by the defendant that, even if the plaintiffs agreed to grant forbearance on their original claim against the firm of Wilson, Sheffer & Coonley, such agreement was useless and of no value, because said firm was in bankruptcy, and that plaintiffs' right to proceed on such claim was stayed under section 11 of the bankruptcy act of July 1, 1898 (chapter 541, 30 Stat. 549 [U. S. Comp. St. 1901, p. 3426]), which provides that action on such a claim may be stayed for 12 months after the date of the adjudication in bankruptcy, or if within that time the bankrupt applies for a discharge, then until the question of such discharge is determined. No facts appear in this record which show that the plaintiffs were within the prohibition of that statute. It does not appear when Wilson, Sheffer & Coonley were adjudicated bankrupts. If such adjudication had been made more than 12 months before the execution of the note in question, and said bankrupts had not within that time applied for their discharge, or if, having applied for the same, such discharge had been refused, the prohibitory provision of the federal statute above referred to would not affect the plaintiffs. It was incumbent on the defendant to show affirmatively the existence of such facts as would preclude the plaintiffs from enforcing their obligation against the bankrupt firm.

The judgment should be affirmed, with costs.

CHESTER, J., concurs. SMITH, J., concurs in result. PARKER, P. J., not voting.

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## STANTON v. BOARD OF SUP'RS OF ESSEX COUNTY.

(Supreme Court, Appellate Division, Third Department. May 2, 1906.)

COUNTIES—SUPERVISORS—RESOLUTIONS—STATUTES—APPLICATION.

County Law, Laws 1892, p. 1748, c. 686, § 17, requires that every act or resolution of a board of supervisors in the exercise of its legislative powers shall have a title prefixed concisely expressing its contents, followed by a reference to the law or laws conferring the authority to pass the act or resolution, the number of votes both for and against its passage, and provides for the publication thereof. *Held*, that such section applies to resolutions which have already become final and complete solely by the action of the board, and had no application to a resolution changing the site of county buildings, which was not final; the proposition being required to originate with, and be ratified by, the people after action by the board.

Appeal from Trial Term, Essex County.

Action by Merritt C. Stanton against the board of supervisors of Essex county. From a judgment dismissing the complaint (96 N. Y. Supp. 840), plaintiff appeals. Affirmed.

Argued before PARKER, P. J., and SMITH, CHESTER, KELLOGG, and COCHRANE, JJ.

Richard L. Hand and Francis A. Smith, for appellant.

Edward T. Stokes and R. Corbin, for respondent.

COCHRANE, J. By this action the plaintiff, a taxpayer of the county of Essex, seeks to restrain the board of supervisors of that county from changing the site of the county buildings from Elizabethtown to

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Westport. Proceedings with a view to making such change have been had, under sections 31, 32, and 33 of the county law (Laws 1892, p. 1753, c. 686). The proposed location of said buildings exceeds one mile from their present location, and is beyond the boundaries of the incorporated village where they are now situated. The proposed change has received a majority of the votes of the board of supervisors, and also a majority of the votes of the electors of the county. If the proceedings have been in compliance with the statute, and such statute is not unconstitutional, it only remains for the supervisors to effectuate the sentiment of the electors of the county as expressed by their ballots, and change accordingly the site of the county buildings.

This action is sought to be maintained on the ground that the sections of the county law under consideration are unconstitutional, in that they provide for a surrender or delegation of legislative power, and an attempt to confer that power upon the electors of a county; and the plaintiff also alleges numerous irregularities and failures to comply with the statute in question, which he claims render nugatory the proceedings which have been taken. The constitutional question thus raised, as well as most of the other questions, have been disposed of in a well-considered opinion by Mr. Justice Spencer, before whom the action was tried (48 Misc. Rep. 415, 96 N. Y. Supp. 840), and we are content to rest the judgment herein on his opinion, merely adding our views in reference to one question, which seems worthy of consideration, and which was not discussed by him, perhaps for the reason that it was not urged at the trial.

The question thus referred to is as to the application of section 17 of the county law (Laws 1892, p. 1748, c. 686) to the proceedings in question. That section requires that every act or resolution of a board of supervisors "in the exercise of its legislative powers shall have a title prefixed concisely expressing its contents followed by a reference to the law or laws conferring the authority to pass the act or resolution, the number of votes both for and against its passage," and also provides, among other things, that such acts or resolutions shall within six weeks after the close of the session be published in the newspapers in the county appointed to publish the session laws of the Legislature. It is claimed by the plaintiff that the resolution for the removal of the site of the county buildings as adopted by the board of supervisors had no title, and did not comply with the requirements of this section. Assuming, as did the learned trial justice, that the resolution in question was an exercise of legislative power by the board of supervisors, it is not such a resolution as is contemplated by section 17 of the county law. The purpose of that section is to furnish a convenient and efficacious method of acquainting the public with the provisions of an act or resolution which has already become effective, in the same way that it is the policy of the law to publish and make known the contents of acts of the Legislature. Resolutions of boards of supervisors under the section in question are to be published in the same newspapers in which session laws of the Legislature are to be published, and for the same purpose. A title and the other requirements of the section facilitate this purpose, for reasons which are obvious. The section applies to resolutions which have already become final and complete solely by action of the board, and

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require no other action to make them effective; or, in other words, to such resolutions as in and of themselves have the force of law, and not to such resolutions as are but steps in the accomplishment of some incomplete purpose. The resolution in question was not a final or dominating act of the board of supervisors. It was inchoate and incomplete; one step in the accomplishment of a purpose not yet accomplished. The proposition to change the site of the county buildings neither originated with the board, nor was it consummated by the action of the board. It had to originate with the people, and after adoption by the board was not complete until it was ratified by the people. By section 32 of the county law (Laws 1892, p. 1753, c. 686) a different provision is made for its publication than is made by section 17. It is quite clear that section 17 deals with resolutions already binding on the public, and does not apply to the resolution in question. The reasons for the provision of that section do not apply to a resolution like that now under consideration.

We have examined the other questions raised, but find none fatal to the removal of the county seat. For the most part such questions are discussed in the opinion of the learned trial justice. Such as are not discussed by him we have considered, and find to be without merit.

The judgment should be affirmed, with costs. All concur, except PARKER, P. J., not voting.

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## OSTRANDER v. STATE.

**(Supreme Court, Appellate Division, Third Department. May 2, 1906.)**

APPEAL—MODIFICATION OF JUDGMENT—INCREASING RECOVERY.

On appeal from a judgment of the court of claims in favor of claimant and against the state, the Supreme Court cannot increase the judgment, where, although there are findings by the court of claims, there is no finding as to the extent of the damages as claimed by claimant.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 4506.]

Appeal by Charles Ostrander from a judgment of the court of claims in his favor and against the state, granting insufficient relief. Reversed, and new trial granted.

Argued before PARKER, P. J., and SMITH, CHESTER, KELLOGG, and COCHRANE, JJ.

George F. Thompson, for appellant.

Julius M. Mayer, Atty. Gen., and Willis H. Tennant, for respondent.

COCHRANE, J. The judgment in this case establishes the liability of the state because of an overflow of water on the land of the claimant in Genesee county, in the year 1901, from a feeder constructed and maintained by the state in connection with the Erie Canal. This appeal is because of the alleged insufficiency of the damages awarded.

The court of claims found as facts that farm products of the claimant "were damaged by the combined waters of the feeder and the heavy rain, and the damage to said products and the property of claimant from

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said joint waters was in excess of the award herein made," and "that all the damage suffered by claimant was not caused by the waters of said feeder, but that some of it was caused by the heavy rain which occurred at the time of said overflow, and which accumulated on claimant's premises independently of the water which came from the feeder," and concluded that the state "is not liable for the damages caused to claimant by the accumulation of waters due to heavy rains, which damage would have been caused without the presence of the feeder, and without any intervention on the part of the state."

It is unnecessary to consider whether this conclusion of the court is legally deducible from the said facts as found, for the reason that such facts have no support in the evidence. It is absolutely unestablished that, independently of the feeder, there was any accumulation of rain on the premises of the claimant, or that the rain would have caused him any damage whatever. In fact the court expressly found that the rains "were not the greatest known in that region, or greater than several storms before that time."

The learned Attorney General strenuously insists that some of the water in question came from a stream known as "Oak Orchard Creek," and which formed a part of the feeder system, or that coming from an easterly direction it flowed across the feeder. There is no satisfactory evidence, however, to that effect. Moreover, the court expressly found that "the waters of Oak Orchard Creek did not run upon the lands of the claimant," and "that the lands of the claimant are so situated that the water that did run across the same in the spring of 1901 must have come from Whitney creek and Tonawanda creek, having been conducted thereon by running first into the feeder, thence running north, and spilling over the feeder," and also "that no water came down from the east in the spring of 1901, and flowed across the feeder onto claimant's land, except the waters running north in said feeder, having been accumulated in said feeder from Whitney creek or Tonawanda creek watershed through said gate."

From the undisputed testimony and also from the findings of the court the judgment herein is inadequate. We are asked to modify the judgment by increasing the same. We are unable to do this, because, although there are findings by the court of claims, there is no finding as to the extent of the damages as claimed by claimant. See Crowley v. The State of New York (decided at this term of the court) 98 N. Y. Supp. 1094.

The judgment must be reversed, with costs, and a new trial granted. All concur, except PARKER, P. J., not voting.

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## In re WATER FRONT OF CITY OF NEW YORK.

### Appeal of AMERICAN ICE CO.

(Supreme Court, Appellate Division, First Department. May 11, 1906.)

1. EMINENT DOMAIN — CONDEMNATION OF LAND — PROPERTY INTERESTS AFFECTED.

The petition in proceedings to condemn land by the city of New York, as authorized by Laws 1882, p. 1, c. 410, and amendments, for the purpose of improving the water front of a river, as authorized by Laws 1870, p. 366, c. 137, as amended by Laws 1871, p. 1231, c. 574, and the amendments thereto, referred to all wharfage rights and easements to the lands sought to be taken; and the order appointing the commissioners required them to make an estimate and assessment of the loss to the respective owners and persons respectively entitled to or interested in the wharfage rights, easements, or privileges connected with the property. *Held*, that it was the duty of the commissioners to determine on the merits whether or not a grantee under a grant of a right of wharfage was entitled to damages in consequence of the taking of the property sought to be acquired.

2. NAVIGABLE WATERS—RIPARIAN RIGHTS—EASEMENTS.

The grant of a right of wharfage at a wharf adjoining land under water belonging to the grantor carries with it, as a necessary incident and appurtenance, a right of way to the wharf for vessels over the grantor's adjacent land under water.

3. EMINENT DOMAIN — PROCEEDINGS TO CONDEMN LAND — ASSESSMENT OF DAMAGES.

Where in proceedings by a city to condemn land a person was awarded full damages, irrespective of the right of a third person to claim easements therein, a judgment confirming the award must be set aside, for if the award should be affirmed and the third person subsequently establish a claim, the city would be required to pay damages twice.

4. JUDGMENT—RES JUDICATA.

Where in proceedings to condemn land the only question involved was whether a third person had any easement in the land sought to be taken for which he should be compensated, a judgment against him in an action in which he claimed to be the owner of the fee did not constitute a bar.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, § 1246.]

Appeal from Special Term, New York County.

Proceedings by the city of New York to acquire wharf property and lands under water necessary for the improvement of the water front of the city on the North river, between Forty-Second and Forty-Third streets. From an order confirming the report of commissioners of estimate and assessment, the American Ice Company appeals. Reversed and remanded.

Argued before O'BRIEN, P. J., and PATTERSON, McLAUGHLIN, LAUGHLIN, and HOUGHTON, JJ.

Albert Stickney, for appellant.

James A. Deering, for respondent Forty-Second St. & Grand St. Ferry R. Co.

Theodore Connoly, for respondent City of New York.

HOUGHTON, J. In furtherance of the plan to improve the water front of the city of New York, as authorized by chapter 137, p. 366, of the Laws of 1870, as amended by chapter 574, p. 1231, of the Laws of

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1871, and the amendatory acts thereof, the mayor, aldermen, and commonalty of that city, acting by the department of docks, on the 31st of December, 1894, instituted condemnation proceedings, under chapter 410, p. 1, of the Laws of 1882, and the acts amending the same, to acquire the lands under water and wharf property on the North river, situated between West Forty-Second and West Forty-Third streets, bounded northerly and southerly by the respective sides of those streets, together with all wharfage rights, incorporeal hereditaments, and easements appurtenant thereto. The petition alleged that the respondent, the Forty-Second Street & Grand Street Ferry Railroad Company, was the owner of all the property and rights involved, and the commissioners of estimate and assessment, appointed to appraise the damage, so found, and reported and awarded the sum of $215,000 to the railroad company as damages for all the land under water between the lines of Forty-Second and Forty-Third streets, and the wharfage rights connected therewith. On the hearing before the commissioners, the appellant the American Ice Company appeared, and claimed to be entitled to an award of damages for certain wharfing privileges and easements along the southerly side of Forty-Third street, arising out of an alleged right to maintain a pier at the extension of Forty-Third street, to which right the adjacent lands of the railroad company were claimed to be subservient. This claim was not recognized by the commissioners, and from an order of the Special Term confirming their report the ice company appeals.

Had the commissioners passed upon the merits of the appellant's claim, and concluded to award it nothing, quite different questions would have been presented to us than those which we feel called upon to determine upon this appeal. From the report of the commissioners it appears that they determined to make no award to the ice company, and, in effect, refused to pass upon its rights, because they thought it for the best interests of the city and its present policy to acquire bulkhead rights owned by private parties on Manhattan Island first, and separately, instead of attempting in the same proceeding to acquire the rights of private pier owners, and as they interpreted the petition for the appointment of commissioners, it did not refer to the condemnation of any pier or pier rights, and hence concluded it to be unnecessary to determine whether or not the ice company had any rights for which compensation should be made. The petition did refer to all wharfage rights and easements to the lands lying between the two lines of Forty-Second and Forty-Third streets. The order appointing the commissioners required them to make an estimate and assessment of the loss and damage "to the respective owners," and "persons respectively entitled unto or interested in the wharfage rights, wharf property, terms, easements, or privileges" connected with the property proposed to be taken.

The appellant received whatever title it has from the Knickerbocker Ice Company, which before grant to appellant, and prior to December 29, 1902, brought an action to restrain the respondents, the Forty-Second Street & Grand Street Ferry Railroad Company and the city of New York and all others, from constructing a bulkhead at the foot of Forty-Third street and the North river, or across the water lot lying

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between Forty-Second and Forty-Third streets, in accordance with the plan adopted by the department of docks, claiming to be the owner in fee of a dock at the foot of Forty-Third street. It was defeated in that action, on the ground that it had no fee estate, and that judgment was affirmed by this court (85 App. Div. 530, 83 N. Y. Supp. 469), and by the Court of Appeals (176 N. Y. 408, 68 N. E. 864). In both courts the facts respecting the title of appellant's grantor to a pier at the foot of Forty-Third street, or to its right to maintain one at that point, are fully stated, and it is unnecessary to repeat them here.

While it was held that the Knickerbocker Ice Company had no title to the land upon which the pier was erected, or might be erected, the Court of Appeals, in an opinion in which the entire court concurred, says:

"These things are not only inconsistent with the idea that the grant of 1852, under which appellant claims, conveyed an absolute fee, but they speak with most persuasive force of the real purpose and effect of the grant, which was to convey to the grantee the right to maintain a pier, and to collect wharfage, etc., at the foot of Forty-Third street in the Hudson river, wherever that point should be located by lawful authority. It was the incorporeal hereditament attached to the fee, and not the fee itself, that was conveyed. Under this construction of the grant, the rights of all concerned are recognized and preserved. The city holds the title, which it never had the right to alienate. The plaintiff, as the grantee's successor in title, has the right to follow the lawful extension of Forty-Third street for the purpose of maintaining a pier and collecting its revenues."

The respondents insist that this expression of opinion was unnecessary to the decision of the case, and therefore is not controlling upon us. In a sense this is true, but unless the deed of 1852 was absolutely void, it operated to convey something, and it was a very natural and pertinent observation in determining that it did not convey a fee to point out what in fact it did convey. We do not feel at liberty, if so inclined, to ignore this language of the Court of Appeals or its consequent holding. A grant of the right of wharfage is a grant of property, and carries with it, as a necessary incident and appurtenance as part of the grant, a right of way or access to the wharf for vessels over the lands under water. Langdon v. Mayor, etc., of the City of New York, 93 N. Y. 129, 151.

Whether the deed of 1852, which is the source of appellant's title, was invalid because the two branches of the common council did not properly pass the resolution authorizing a sale by the city of the pier right, or, if the resolution was properly passed, whether there was such an intent to pass title to the land upon which the pier was to be erected that no valid easement or wharfage right can be deemed to have been conveyed, or whether the appellant's grantor or the appellant itself has forfeited all or any of the rights which it may have had, or whether the appellant has any rights at all which the city should be compelled to compensate it for, we do not now determine, because those questions were not passed upon by the commissioners. We think they misconstrued the scope of their inquiry, and that they should have determined these questions, and have concluded upon the merits whether or not the appellant had any existing right to maintain a pier at the foot of Forty-Third street, and, if so, what damage resulted from the taking away of that right to the south side of that street or pier at the end thereof, and that

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they should not have ignored those rights in making their award to the railroad company.

It is urged that the award to the railroad company should be affirmed because the city does not complain, and that whatever rights the appellant may have can be preserved by a rehearing as to it. The difficulty with that position is that, if the appellant has in fact rights for which it should be compensated, the title of the railroad company to the lands under water between Forty-Second and Forty-Third streets is subservient to such rights. The railroad company has been awarded damages for the full rights and title to lands under water up to the south bounds of Forty-Third street. The ice company and the railroad company received title from a common owner. Whatever pier right existed at Forty-Third street, as well as the water and land rights between Forty-Third and Forty-Second streets, were owned by John LaFarge. The pier right was conveyed by his widow and devisees to the appellant's grantor in 1860. The land and water rights between Forty-Second and Forty-Third streets were conveyed to the respondent railroad company's grantors in 1863 by the same persons. The grant of the right of wharfage at a wharf adjoining land under water belonging to the grantor carries with it, as a necessary incident and appurtenance, and, in legal effect, as part of the grant, a right of way or access to the wharf for vessels over the grantor's adjacent land under water. Langdon v. Mayor, etc., of City of New York, supra. The conveyance to appellant's grantors of the wharf or pier, having been made by the persons then owning the lands adjacent under water, if valid and now existing, gave appellant a right of access to the wharf over the lands under water subsequently conveyed to the grantors of the respondent railroad company. This prior deed was recorded before the subsequent deed was given. The railroad company has been awarded full damages, irrespective of that right. Even if the ice company could compel the city to reimburse it for its rights, the city ought not to be compelled to pay again for rights which it has already paid for in full. If the award to the railroad company shall be affirmed, and the ice company subsequently establish liability on the part of the city, such would be the result.

It is further urged that the judgment against the Knickerbocker Ice Company, appellant's grantor, is a bar to the claim of any right on appellant's part. We do not concur in this view. In that action the plaintiff, claiming to be the owner of the fee of the pier, sought to restrain interference with its property. It was determined that the plaintiff did not have a fee, and the relief asked was denied. Here the only question involved is whether or not the appellant has any easements or incorporeal rights for which it should be compensated.

Without, therefore, determining whether the appellant has any rights for the taking of which it should be compensated, and because the commissioners proceeded upon a wrong theory in ignoring such rights, and in not passing upon the question whether or not any rights existed, and in making a full award to the railroad company irrespective of such rights, we think the order must be reversed, and a rehearing had, with costs to the appellant against the city of New York to abide the event. All concur.

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PEOPLE ex rel. SAMPSON v. DUNNING, Justice of the Peace, et al.

(Supreme Court, Appellate Division, Second Department. May 4, 1906.)

1. CRIMINAL LAW—PRELIMINARY PROCEEDINGS—INQUISITION BEFORE MAGISTRATE—INFORMATION.

Code Civ. Proc. § 451, provides that, where the name of a necessary party cannot be ascertained, the moving party may designate such party by a fictitious name, or by as much of his name as is known, adding a description identifying the person intended, and Code Cr. Proc. § 152, while not calling for a description under such circumstances, provides that the warrant must "specify" the name of the defendant, or, if it be known to the magistrate, the defendant may be "designated" therein by any name. *Held* that, where an information on which an inquisition before a magistrate was based related to the crime of conspiracy, and clearly disclosed that the deponent knew who the parties were who made the alleged threats and requests complained of, it was insufficient to refer to them by the fictitious names of John Doe and Richard Roe, without any other designation or description.

2. SAME—DESIGNATION OF CRIME.

Code Cr. Proc. § 148, provides that an information is the foundation of the jurisdiction of a magistrate in preliminary proceedings, and an information is defined by section 145 as being "the allegation made to a magistrate that a person has been guilty of some designated crime." Section 148 declares that, when an information is laid before a magistrate of the commission of a crime, he must examine the informant or prosecutor, and any witnesses he may produce, on oath, and take their depositions. *Held*, that an information charging that John Doe and Richard Roe willfully, etc., conspiring to interfere with and injure the property and business of a certain railroad company and construction company, did solicit and urge deponent not to work for D. or for the contracting company or the railroad company, stating that they would injure deponent's credit as a contractor if he proceeded with such work, and that they would pay deponent to quit said work, was fatally defective for failure to designate the commission of any crime, and was therefore insufficient to confer jurisdiction on the magistrate.

3. PROHIBITION—JUSTICES OF THE PEACE—JURISDICTION—PERSONS ENTITLED TO RELIEF.

Where an information filed with a justice of the peace was insufficient to confer jurisdiction on the justice to conduct an inquisition, a person subpœnaed to appear before the justice and answer questions was entitled to a writ of prohibition to restrain further proceedings.

Appeal from Special Term.

Application for a writ of prohibition by the people, on relation of Samuel J. Sampson, against E. C. Dunning, Jr., a justice of the peace, and the people of the state of New York, the alleged plaintiff, in a criminal action pending before such justice. From an order denying the application, relator appeals. Reversed.

Argued before HIRSCHBERG, P. J., and WOODWARD, JENKS, HOOKER, and MILLER, JJ.

Herbert R. Limburger, for appellant.

Francis T. Osborne, Otto T. Hess, and Henry R. Barrett, for respondents.

WOODWARD, J. The relator, Samuel J. Sampson, has been subpœnaed as a witness in what is popularly known as a "John Doe proceeding" before a justice of the peace for the county of Westchester,

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and he has been denied an absolute writ of prohibition restraining the said justice of the peace from continuing the investigation, and compelling the relator to appear and answer questions. He appeals from the order denying such writ. It is well settled that a writ of prohibition lies only where there is a want of jurisdiction, or where a court or judge or other tribunal is proceeding in excess of the jurisdiction conferred. People ex rel. Hummel v. Davy, 105 App. Div. 598, 602, 94 N. Y. Supp. 1037, and authority there cited. We apprehend, however, that jurisdiction, in a measure, at least, depends upon that element of good faith which should be at the foundation of all judicial proceedings, and in applying technical rules it may not be out of place to call attention to the abuses which are likely to arise if the courts are lax in insisting that all proceedings of a criminal nature shall be carried on within the letter and the spirit of the law. That the ends of justice may not be defeated, the law wisely provides, both in civil and criminal cases, that where the name of a necessary party cannot be ascertained—where it is in good faith unknown—the moving party may designate the defendant in the summons, and in any other process or proceeding in the action, by a fictitious name, or by as much of his name as is known, adding a description indentifying the person intended. See section 451, Code Civ. Proc.; section 152, Code Civ. Proc. While in the latter Code there does not appear to be any provision calling for a description in those words, it is provided that in the warrant it must "specify the name of the defendant, or if it be unknown to the magistrate, the defendant may be designated therein by any name," and to designate is to "point out by distinguishing from others"; to "indicate by description, or by something known and determinate" (14 Cyc. 229); so that it would appear that the policy of the law is not satisfied merely by declaring that John Doe or Richard Roe, or both of them (these names being generally recognized as being fictitious), have been guilty of a crime. Good faith and the spirit of the law alike demand that the parties who are accused of crime, or who are necessary defendants in a civil proceeding, should be pointed out in the papers, if not by their own proper names, then by such descriptions as will enable the parties and the court or magistrate or other officials who may have to do with them to know who is intended; and this is peculiarly true when the facts and circumstances are such that the accusing party in a criminal proceeding must, of necessity, know the party or parties. It could never have been the intention of the Legislature that any individual might, by merely alleging that a fictitious person had committed a crime, begin a general investigation into the affairs of the community. All of our criminal law proceeds upon the theory that every man is presumed innocent until the contrary is shown, and it is all administered, or intended to be administered, with a view to protecting the innocent against the designs of irresponsible and vicious persons. The grand jury is the great bulwark of the innocent; it is designed to prevent criminal proceedings in cases where there is lack of probable cause, and this is to be determined in secret by responsible men chosen from the community at large, acting upon their oath and upon sworn testimony, and it is hardly to be supposed that the Legislature has intended to open the doors to irre-

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sponsible inquisitors, who merely allege generally that fictitious persons have been guilty of crime.

In the matter now before us the information on which the justice of the peace has assumed to act relates to the crime of conspiracy, if to any crime at all, and it is alleged that:

"That the said John Doe and Richard Roe, willfully, maliciously, wrongfully, and fraudulently conspiring to interfere with and injure the property and business of the said New York, Westchester & Boston Railroad Company and the property and business of the said City & County Contracting Company, did thereupon solicit and urge deponent not to work for the said James P. McDonald, or for the said City & County Contracting Company, or for the said New York, Westchester & Boston Railroad Company, stating that they would injure deponent's credit as a contractor if he proceeded with such work, and that they would pay deponent to quit said work."

Clearly, the deponent knew who the parties were who made these alleged threats and requests. They appear from the language used to have been made directly to the deponent, and yet there is not the slightest effort to give the real names of the parties, or to designate them in any manner, except as John Doe and Richard Roe; these names being conceded to be fictitious. The deponent does not, apparently, dare to allege that any known individual has done any of the acts which he sets forth, although if the statements are true they were made to him directly, and he might at least have designated them by some kind of a description. It appears from the papers that he knew the relator, Mr. Sampson, and that it was the latter, who was one of the parties, who had the conversation with the deponent, and that Mr. Sampson was requested to make an affidavit in support of the deponent's allegations, under a threat that he would be called as a witness in a John Doe proceeding, and yet the deponent, knowing all of these facts, and being in a position to know the parties, contents himself with a general allegation against John Doe and Richard Roe, thus dodging the responsibility which it is the policy of the law to demand on the part of those who would make use of its criminal processes. We do not intend to hold that there might not be a case in which a mere allegation that John Doe had committed a particular crime would not be sufficient to give jurisdiction, but where it appears from the moving papers that the deponent must have known the true names, or at least must have been in a position to have described or indicated the particular individuals, it seems clear to us that it is a perversion of the law to attempt to carry on an investigation under such an information; that it is lacking in that good faith and that sense of individual responsibility which should be manifest in such a proceeding.

We come now to consider the information, and to determine whether the justice of the peace acquired jurisdiction. The information is the foundation for the jurisdiction of the magistrate (McKelvey v. Marsh, 63 App. Div. 396, 398, 71 N. Y. Supp. 541; Code Cr. Proc. § 148), and an information is defined by section 145 of the Code of Criminal Procedure as being "the allegation made to a magistrate, that a person has been guilty of some designated crime." This would seem to require, where the real defendant was known, a designation of the person sufficiently clear, so that there would be no justification for attempting

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to make him a witness against himself, and at the same time a designation of the crime which it was alleged such person had committed, not by an argumentative blanket allegation of facts and conclusions, but by a plain and concise statement that some known crime—such as murder, arson, burglary, grand larceny, conspiracy, or assault—had been committed. This is evident, not alone from the language of the section quoted, but from that of succeeding sections.

Section 148 provides that:

"When an information is laid before a magistrate, of the commission of a crime, he must examine on oath the informant or prosecutor, and any witnesses he may produce, and take their depositions in writing, and cause them to be subscribed by the parties making them."

Section 149 provides that:

"The depositions must set forth the facts stated by the prosecutor and his witnesses, tending to establish the commission of the crime and the guilt of the defendant."

It is "the crime" designated in the information that is to be supported by the depositions of the prosecutor and his witnesses, and not the general allegations of fact from which an inference of a crime might or might not be drawn, according as the pleader has been accurate or inaccurate in his statement of facts. Words having a precise and well-settled meaning in the jurisprudence of a country are to be understood in the same sense when used in its statutes, unless a different meaning is unmistakably intended (Perkins v. Smith, 116 N. Y. 441, 448, 449, 23 N. E. 21, and authority there cited); and when the Code of Criminal Procedure undertook to define an information, and to require that it should allege "that a person had been guilty of some designated crime," it used the word designated in its well-settled legal sense, which is "to call by a distinctive title; to point out by distinguishing from others; to express or declare; to indicate by description, or something known and determinate; to point out or mark by some particular token; to show; to point out; to specify." 14 Cyc. 229, and authorities cited in notes; 9 Am. & Eng. Ency. of Law, 405, and authorities cited in notes, particularly note 2. Tried by this test, it is very plain that the information before the justice, upon which it is sought to compel the relator to testify, does not charge that any person has been "guilty of some designated crime," and this is a jurisdictional defect, which may not be overlooked.

Speaking of the far-reaching possibilities of dispensing with this requirement, a learned jurist in People ex rel. Fleming v. Maver, 41 Misc. Rep. 289, 84 N. Y. Supp. 71, says:

"A mere form of words, charging nothing, and subjecting no person to responsibility for the utterance, could be made the basis of a general inquiry by or before a magistrate, into any and every question arising between members of the community which might be deemed to have a bearing upon some half-suspected crime, and all persons would be bound to attend, if directed, and to testify to any matter which the person conducting the inquiry might deem of moment. The policy of our law is to confine the general power of inquiry to the grand jury, a body periodically chosen from the whole body of citizens of the community itself, whose exercise of that power, with due regard to the rights of the citizens, is safeguarded by the number of its members."

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See, also, People v. Hiley, 33 Misc. Rep. 168, 68 N. Y. Supp. 361; People ex rel. Sandman v. Tuthill, 79 App. Div. 24, 79 N. Y. Supp. 905. In that case this court declared that:

"The statute contemplates that the information shall set forth that a definite crime has been committed, not with all of the particularity of an indictment, but with sufficient definiteness, so that the magistrate may know that some particular offense against the law is charged."

The information failing to designate any crime, there is a jurisdictional defect, and it ought not to be necessary for the relator to be compelled to submit to the examination, or to be compelled to refuse to answer questions before he can be relieved. The justice of the peace can have no jurisdiction except upon the filing of an information which charges some person with "some designated crime," and, in the absence of such an information, it is clearly within the province of this court to issue its mandate directing the proceeding to be terminated.

The order appealed from should be reversed, and the absolute writ of prohibition should issue.

**Order reversed, with $10 costs and disbursements, and motion for writ of prohibition granted. All concur.**

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## WIGHTMAN v. CATLIN.

**(Supreme Court, Appellate Division, Second Department. May 4, 1906.)**

1. CHAMPERTY AND MAINTENANCE—DISABILITIES OF ATTORNEY—PURCHASING DEMANDS FOR ACTION.

Code Civ. Proc. § 73, provides that no attorney shall directly or indirectly buy or be in any manner interested in buying anything in action, etc., with the intent and for the purpose of bringing an action thereon. *Held* that, where one against whom there was a valid claim was given ample notification that an action would be brought thereon, but he failed to pay it, the subsequent purchase of the claim by an attorney was not violative of the statute, as the statute only applies to the purchase of claims where the primary purpose is to enable the bringing of an action.

2. APPEAL—REVIEW—RULINGS ON EVIDENCE.

Where evidence is excluded on a general objection, the ruling is not error, if there is any valid objection to the question, though the reasons given for the ruling are wrong.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Appeal and Error, § 3413.]

3. CHAMPERTY AND MAINTENANCE—EVIDENCE.

Where the defense was that the claim had been purchased by an attorney, in violation of Code Civ. Proc. § 73, forbidding the purchase of any chose in action, etc., by an attorney for the purpose of bringing an action thereon, a question to plaintiff, as to what conversation he had with the original claimant prior to the assignment, was objectionable as too general.

4. SAME—PLEADING—ISSUES.

Where the defense was that plaintiff's attorney was interested in the claim sued on, in violation of Code Civ. Proc. § 73, providing that no attorney shall be in any manner interested in buying any chose in action for the purpose of bringing an action thereon, and it appeared that plaintiff, to whom the claim had been assigned by the original claimant, was a friend of the attorney, evidence tending to show that the attorney advised the original claimant to assign the claim to plaintiff, though for the purpose of facilitating collection, was inadmissible as not material under the defense.

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5. APPEAL—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

Any error in the exclusion of evidence is harmless, where the same matters are brought out by other evidence.

Appeal from Municipal Court of New York.

Action by Merle J. Wightman against Warren Wesley Catlin. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Argued before WOODWARD, JENKS, HOOKER, and RICH, JJ.

Adelma H. Burd, for appellant.

A. J. Moore, for respondent.

WOODWARD, J. Ervin C. Gollner is the owner of certain premises in the city of New York, which said premises were leased to the defendant by the month at the rate of $35 per month in advance. This action is brought by the plaintiff, as assignor of the claim, to recover the rent for the month of March, 1905. The defendant alleges that he had been renting the premises for some time prior to the month of March, 1905, and that prior to the commencement of that term he had complained to his landlord of the condition of the bathroom, or the manner in which it was being used by other tenants, and that the landlord had agreed to cause the same to be corrected, and that under these conditions he had entered upon the tenancy for the month of March; but that, the difficulty continuing, he renewed his complaint, and, upon the landlord telling him to leave the premises, he moved out, surrendering the premises to the landlord, and it is claimed that this amounted to an eviction, justifying the defendant in refusing to pay for the full month's rent.

Sully v. Schmitt, 147 N. Y. 248, 41 N. E. 514, 49 Am. St. Rep. 659, cited in support of the theory of eviction, does not sustain the defendant's position, and we are persuaded that there is no doubt of the fact that the defendant owed Gollner the sum of $35 at the time the latter assigned the claim to the plaintiff, and that the judgment which has been found in favor of the latter is justified under the facts disclosed by the evidence, unless there is merit in the further contention of the defendant that the assignment of the claim in suit is in violation of section 73 of the Code of Civil Procedure. The section cited provides:

"An attorney or counselor shall not, directly or indirectly, buy, or be in any manner interested in buying, a bond, promissory note, bill of exchange, book-debt, or other thing in action, with the intent and for the purpose of bringing an action thereon."

There is no suggestion that the plaintiff in this action is an attorney or counselor at law, but the defendant has introduced evidence to show that the plaintiff's attorney in the present action was originally employed by the landlord to collect the claim for rent against the defendant. That on the 31st day of March, 1905, the said attorney wrote to the defendant that:

"There has been left in my hands for collection a claim against you for rent of premises No. 245 East 137th street amounting to $35. If the same is not paid on or before the 6th day of April, 1905, action for its collection will be commenced."

That on the following day, April 1st, the landlord assigned this claim to the plaintiff. That the plaintiff was a neighbor of the said attorney

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on Staten Island, and that they had offices together in the city of New York, and that the assignment was drawn by the said attorney and executed and delivered in his office. That the assignment was turned over to the said attorney, and that he subsequently brought this action on the 7th day of April, 1905, in the Municipal Court.

We fail to find any evidence that Mr. Moore, the attorney, has any interest in this claim, directly or indirectly. So far as the assignment shows anything it shows a valid assignment of a valid claim to the plaintiff. It shows the assignment of a claim which the landlord had, through his attorney, threatened to sue if it was not paid within a given time, and the undisputed evidence shows that the claim was not sued until several days after the time limited. The defendant had all of the time from the 31st day of March to the 4th day of April to pay this just claim. He was actually given until the 7th day of April before suit was commenced, and he could have prevented the action by paying the claim at any time before suit was brought, and it seems to us entirely clear that the defendant has entirely failed to show that there has been any violation of the provisions of section 73 of the Code of Civil Procedure. It cannot be said from the evidence produced upon the trial that the plaintiff's attorney had any interest in this claim, or that it was purchased by him, directly or indirectly, "with the intent and for the purpose of bringing an action thereon." Indeed, the evidence shows an assignment from the landlord to the plaintiff, who is not an attorney, and the mere fact that the plaintiff employed the same attorney to collect this just demand, who had previously been employed by the landlord, does not bring the case within the letter or the spirit of the statute, if, indeed, it was ever intended to apply to courts not of record. See Goodell v. People, 5 Parker, Cr. R. 206.

The Court of Appeals, in Moses v. McDivitt, 88 N. Y. 62, 64, in commenting upon the language of this section, say:

"This language is significant and indicates that a mere intent to bring a suit on a claim purchased does not constitute the offense. The purchase must be made for the very purpose of bringing such suit, and this implies an exclusion of any other purpose. As the law now stands, an attorney is not prohibited from discounting or purchasing bonds and mortgages and notes, or other choses in action, either for investment or for profit, or for the protection of other interests, and such purchase is not made illegal by the existence of the intent on his part at the time of the purchase, which must always exist in the case of such purchases, to bring suit upon them if necessary for their collection. To constitute the offense the primary purpose of the purchase must be to enable him to bring a suit, and the intent to bring a suit must not be merely incidental and contingent. The object of the statute, as stated by Chancellor Walworth in Baldwin v. Latson, 2 Barb. Ch. 306, was to prevent attorneys, etc., from purchasing things in action for the purpose of obtaining costs by the prosecution thereof, and it was not intended to prevent a purchase for the purpose of protecting some other right of the assignee."

This case has never been overruled or criticised, so far as we have been able to discover, and it undoubtedly correctly states the objects and limitations of the statute, so that, if the plaintiff's attorney in the present case was actually interested in the claim, the evidence would fail to establish the necessary facts to bring him within the prohibition of the statute, for it clearly does not show that his object was the bringing of the action for the purpose of costs, or for any other purpose, except



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the collection of this legitimate claim after the defendant had neglected to pay the same within the time limited in the original notification. If plaintiff's attorney had, in fact, bought this claim for the purpose of making a profit upon it—if he had bought it for $10, with the intention of suing the same if it was not paid on or before the fourth day of April—he would not be within the language of the statute, and the case shows that the action was not commenced until the 7th day of April, so that the defendant had warning that the claim would be pressed. He was given several days in which to adjust the same, but he neglected to do so, and it is no defense that the claim may have been assigned to the plaintiff's attorney, although the evidence does not justify such a conclusion. On the other hand, the court has found the assignment of the claim to have been made to the plaintiff, and there is nothing in the evidence, so far as it is pointed out by the appellant, to show that there was any agency on the part of the plaintiff for his attorney, or that any other object was sought than the collection of this claim. It may be, as suggested by the appellant, that the assignment of the claim was made to the plaintiff by the defendant for the purpose of forcing the latter to defend, if at all, on Staten Island rather than in the borough of Manhattan, but this practice is not condemned by the statute. It is only when an attorney buys a claim "with the intent and for the purpose of bringing an action thereon" that the law denies him the aid of the courts. It does not seek to prevent an attorney doing a legitimate business in buying claims for the purpose of gain. What it condemns is the purchase of claims with the "intent and for the purpose of bringing an action" that he may involve parties in costs and annoyance, where such claims would not be prosecuted if not stirred up by the attorney in his effort to secure costs. "Reason is the soul of law, and, when the reason of any particular law ceases, so does the law itself" (Co. Litt. 70, b.), and, as the costs in the Municipal Court could hardly form an important consideration in this transaction, and it clearly appears that the defendant had an abundance of time in which to make the payment before suit was brought, and that the claim was one which the landlord had already threatened to sue if it was not paid, it is clear that, in the view most favorable to the appellant, he has not brought the case within the letter or the spirit of the statute.

The conclusion which we have reached disposes of the alleged errors in the admission and rejection of evidence, for, if all of the matters had been established which it may be assumed would have been established by the evidence as the defendant desired it, there would still be the fact that, even if the plaintiff's attorney was the real party in interest, he would have a right to buy the claim and to sue it in the event of the defendant failing to pay the same. The evil against which the statute was directed was the purchase of claims for the sole purpose of making costs and annoying persons who would not be sued under other circumstances, and the fact that the defendant was given notice by the original claimant that he would be sued if it was not paid within a time specified, and that the claim was not in fact sued until several days later than the date mentioned, takes this case out of the mischief to be remedied, even if the action were brought in a court of record, and it is plain that it was not within the intent of the Legislature to say

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that an attorney should be outlawed, and deprived of the privileges which were accorded other men in the purchase of claims, bonds, notes, etc. It was only the abuse of purchasing with the intent and for the purpose of bringing the action that the attorney might be benefited by the costs which his own action had produced, which the Legislature prohibited (Moses v. McDivitt, 88 N. Y. 62, 65), and, the defendant's case not being within the reason of the act, assuming the evidence to establish that the plaintiff's attorney is the real party in interest, the statute cannot be invoked to relieve him of the payment of a just debt. See Riggs v. Palmer, 115 N. Y. 506, 509, 510, 22 N. E. 188, 5 L. R. A. 340, 12 Am. St. Rep. 819.

The appellant insists, however, that the rulings of the court present error. The plaintiff, called as a witness by the defendant, had testified to his residence, his office rooms, and the assignment, and was then asked: "What conversation had you with Mr. Gollner, the landlord, prior to his giving you this assignment?" This was objected to generally, and the court sustained the objection, stating that it was on the ground that some part of the conversation would relate to the instrument, which was of itself the best evidence. The reason which the court gives for a ruling upon a general objection may be wrong, and yet the ruling be right, if there is any valid objection to the question, and in this case the question did not confine the witness to any particular conversation, or to any conversation in reference to this assignment. The witness might have had a conversation in reference to the Russo-Japanese War, or upon any other subject, and a general question of this character is not material to any issue presented in the case. But, assuming that there was error in the exclusion of this question, the same witness was subsequently asked: "Had Mr. Gollner, before the assignment was handed to you, any conversation with you upon the subject of the assignment?" The witness answered, "Yes, he had," and the court then permitted the witness to answer all the material questions in reference to such conversation, so that the defendant had all of the advantage of the evidence which he assumes was excluded under his more general question, and the alleged error could not have been harmful to him.

Mr. Gollner, the landlord, called as a witness for the defendant, was asked: "Before the assignment was delivered by you to Mr. Wightman, had Mr. Moore advised you to make it to Wightman?" This was objected to, and the objection sustained. There was no issue in this case of the motive of Mr. Gollner, or upon what advice he may have acted. The defense interposed was that the plaintiff's attorney was interested in this claim, in violation of the provisions of section 73 of the Code of Civil Procedure, and the fact that Mr. Moore might have advised his client to assign the claim to Mr. Wightman, even for the purpose of facilitating the collection of the claim, would not tend to establish the defense, and the ruling was justified because the answer sought was not material to the issue. The same reasoning applies to the ruling in reference to Mr. Moore when he was asked if the assignment was made to Mr. Wightman at his request. At most there would seem to have been concerted action on the part of Gollner, Wightman, and Moore to collect a valid claim after giving notice that it would be sued if not paid within

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a specified time, and we are convinced that this is not a violation of the provisions of section 73 of the Code of Civil Procedure, and that is the only defense in this case, aside from the alleged eviction, which is without merit.

The judgment appealed from should be affirmed, with costs. All concur.

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## WYNKOOP v. LUDLOW VALVE MFG. CO.

(Supreme Court, Appellate Division, Third Department. May 2, 1906.)

MASTER AND SERVANT—NEGLIGENCE—INJURIES TO SERVANT—EMPLOYER'S LIABILITY ACT—ASSUMPTION OF RISK—INSTRUCTIONS—QUESTIONS FOR JURY.

Under the employer's liability act, enumerating as necessary risks only those inherent in the nature of an employer's business remaining after the exercise by him of due care in providing for his employés, and which the statute declares are the only risks which the employé "is presumed to have assented to," where plaintiff had worked in defendant's machine shop for seven months and knew as much about the situation and dangers arising therefrom as defendant did, it was error, in an action for injuries received by plaintiff through having his hand run over by a traveling crane passing from one end of the shop to the other, owing to the tracks on which such crane moved not being guarded, to instruct that as a matter of law such necessary risks were the only risks which the plaintiff assumed, thereby taking from the jury the question of the assumption by plaintiff of all risks, except those specified in the charge.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 1068–1088.]

Smith, J., dissenting.

Appeal from Trial Term, Rensselaer County.

Action by William Wynkoop against the Ludlow Valve Manufacturing Company. From a judgment for plaintiff, and from an order denying defendant's motion for a new trial, it appeals. Reversed.

This is an action for negligence under the employer's liability act. Defendant operates in the city of Troy a machine shop about 150 feet long and 100 feet wide. A gallery 25 or 30 feet in width extends around the interior of the building except one end thereof, and about 18 feet from the floor. In the gallery at the time of the accident there were different kinds of machinery at which about 30 men and boys including the plaintiff were employed. Through the center of the building from one end to the other moved a large crane operated by electricity, and used for carrying material and delivering it from one place to another on the floor beneath. This crane reached across the building between the interior sides of the gallery. It moved on wheels two on each side, the wheels on each side being 10 or 15 feet apart. The wheels on either side of the crane ran on tracks erected along the interior edges of the gallery on each side of the building. The tracks lay on large timbers on the edges of the gallery and 2½ or 3 feet above the gallery floor.

On December 31, 1903, plaintiff was proceeding to drill some valves with a drill press in the gallery. In the performance of this work it was necessary to use wooden boxes with which to hold the valves in position while being drilled. Near at hand was a lathe about three feet from the track on which the crane moved backward and forward. In this space between the lathe and the track and on the gallery floor were the boxes in question of different sizes. Plaintiff went into this space in search of a box about a foot square which would fit the valve he was about to drill. He tried one after another in an effort to find one of proper size. In his effort to find a suitable one he proceeded for a distance of about 12 feet along the passage-

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way between the lathe and the track picking up one box after another and not finding any which would fit the valve he carried in his hand throwing down the boxes and trying others. In this way he proceeded to the end of the passageway and was returning engaged in the same search for a suitable box. After picking up about 100 boxes without finding one which was suitable, plaintiff tripped or stumbled over one of the boxes, and, to save himself from falling, involuntarily threw out his left hand upon the adjoining track just as the crane was passing, and the wheel ran over and crushed his hand.

Argued before PARKER, P. J., and SMITH, CHESTER, KELLOGG, and COCHRANE, JJ.

J. Murray Downs, for appellant.
J. W. Atkinson, for respondent.

COCHRANE, J. The theory of the plaintiff is that the defendant was negligent in not properly guarding the tracks on which the crane moved. Plaintiff had been employed in this shop for seven months and was fully conversant with the operations of the crane and the manner and purpose of its use, and with the conditions which there existed. The learned trial justice at the request of plaintiff's counsel charged the jury that:

"The risks which the plaintiff assumed were those risks and those only inherent in the nature of the business of the defendant which remained after the defendant had exercised due care in providing for its employés, and had complied with the laws affecting or regulating the business for the greater safety of defendant's employés."

This was error. The risks referred to in the foregoing proposition are those which are described in the employer's liability act as "necessary risks" and the statute declares that those are the only risks which the employé is "presumed to have assented to." But the court told the jury as a matter of law that those were the only risks which the plaintiff assumed; thereby taking from the jury the question of the assumption by the plaintiff of all risks except those specified in the proposition which was charged. Nowhere else in charging the jury did the learned trial justice explain to them or make any allusion to the question of the assumption of risk by the plaintiff, except to state to them the defendant's claim in reference thereto. The effect of this charge was practically to eliminate from the case the very important question of the assumption of the risk by the plaintiff in conjunction with the negligence of the defendant. Whatever danger existed was apparent and obvious to the plaintiff. He had worked there for seven months. He knew as much about the situation and dangers arising therefrom as did the defendant. Assuming without deciding that the defendant was negligent in not properly guarding the tracks on which the crane was propelled there was nevertheless the important question whether the plaintiff with full knowledge of the situation had not assumed the risk of the accident which befell him; and it is difficult to see how any jury with a full and correct understanding of the law could draw any other inference than that the plaintiff assumed such risk. But this question under the charge of the court was not passed on by the jury. In fact the court in

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effect told the jury as a matter of law that the plaintiff assumed no such risk.

The judgment and order must be reversed, and a new trial granted, with costs to the appellant to abide the event. All concur, except SMITH, J., who dissents.

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## ZEISER v. COHN.

(Supreme Court, Appellate Division, Third Department. May 2, 1906.)

1. ACTION—JOINDER OF CAUSES—SINGLE OR ENTIRE CAUSE.

Where, after return of execution unsatisfied, a judgment creditor brought action to set aside conveyances by the judgment debtor as fraudulent, alleging that the grantee in such conveyance had agreed to pay to plaintiff the judgment debtor's indebtedness, plaintiff praying that the proceeds of a sale of certain real estate conveyed by the debtor, and sold by the grantee be applied to plaintiff's judgment, and further praying a receiver, the only cause of action alleged was one to set aside the fraudulent conveyances.

2. DISMISSAL—RESERVATION OF DECISION—EFFECT.

Where, under the express authority of Code Civ. Proc. § 1187, a decision on a motion to dismiss a complaint was reserved until after the verdict of the jury, which verdict was favorable to plaintiff, and thereafter the court dismissed the complaint on the ground that it had erred in permitting plaintiff to prosecute the action as one upon contract instead of an action in the nature of a creditor's bill to set aside conveyances alleged to have been fraudulent as to creditors, plaintiff was not precluded from proving the cause of action which the court finally determined was the only one that he had alleged, by reason of the fact that the decision of the question was deferred until after verdict, although the ruling requiring plaintiff to elect on which cause he would proceed was made with reference to plaintiff's attitude that his complaint was twofold, in view of the fact that the question as to the character of the complaint was under consideration early in the trial, and if then decided plaintiff would have been at liberty to prove the cause of action which it was determined he had alleged.

Appeal from Special Term, Albany County.

Action by John Zeiser against Mark Cohn, individually, and as executor, etc. From a judgment (90 N. Y. Supp. 66, 44 Misc. Rep. 462) dismissing the complaint, plaintiff appeals. Reversed.

Argued before PARKER, P. J., and SMITH, CHESTER, KELLOGG, and COCHRANE, JJ.

J. Newton Fiero and Fletcher W. Battershall, for appellant.

James J. Farren and Mark Cohn, for respondent.

COCHRANE, J. On the trial it was claimed by plaintiff that he had alleged in his complaint two causes of action, viz., a cause of action to set aside a deed and bill of sale executed by Jacob Cohn to Theresa Cohn as fraudulent and void as to the creditors of Jacob Cohn including the plaintiff, and also a cause of action to recover on a collateral or accompanying contract alleged to have been executed by Theresa Cohn as a part of the consideration of the said deed and bill of sale, by which contract she agreed to pay certain creditors of Jacob Cohn including the plaintiff. The court ruled that if the complaint contained those two causes of action the plaintiff must

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elect on which he would proceed. Thereupon the plaintiff under protest elected to proceed on the collateral contract whereby it was claimed that Theresa Cohn had promised to pay his claim against Jacob Cohn.

At the close of the evidence defendant moved for a dismissal of the complaint on the ground among others that the only cause of action alleged in the complaint was to set aside the deed and bill of sale as fraudulent and that the evidence was insufficient to sustain such cause of action. Decision on this motion was reserved under section 1187 of the Code of Civil Procedure until after the verdict of the jury. This verdict was favorable to the plaintiff. Thereafter the court dismissed the complaint holding that an error had been committed in permitting the plaintiff to prosecute the action as one upon contract instead of an action in the nature of a creditor's bill to set aside conveyances alleged to have been executed to defraud creditors and that the evidence was insufficient to sustain the latter cause of action. The trial justice properly reached the conclusion that the complaint contained but one cause of action, and that such cause of action was to set aside the transfers of Jacob Cohn to Theresa Cohn on the ground that they were fraudulent as to the creditors of Jacob Cohn, and with his reasons for reaching such conclusion we are in accord. See 44 Misc. Rep. 462, 90 N. Y. Supp. 66, for the opinion of the trial justice which also contains a full analysis of the complaint.

We think, however, that after a definite decision had been reached as to the correct theory of the complaint the plaintiff should then have had an opportunity to try his case on such theory. It is true that the court did not at any time decide that the complaint contained two causes of action. The ruling that plaintiff must elect on which cause of action he would proceed was made with reference to the attitude of the plaintiff, that his complaint was twofold, and this attitude of the plaintiff may be said to be responsible for the fact that his case has not been tried on the proper theory. But at the same time the question as to the character of the complaint was under consideration quite early in the trial, and if the decision as to this question had then been made, plaintiff would have been at liberty to prove the cause of action which the court finally determined was the only one that he had alleged; and it is only fair to the plaintiff that he should not be precluded from this opportunity by reason of the fact that a decision of this question was deferred until after the verdict of the jury.

The cause of action alleged in the complaint has not been tried, and in order that the plaintiff may have an opportunity to establish the same, the judgment should be reversed, and a new trial granted, with costs to abide the event. All concur, except PARKER, P. J., not voting. SMITH, J., concurs in result.

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**PEOPLE ex rel. LOW v. WILSON et al., Assessors.**

(Supreme Court, Appellate Division, Third Department. May 2, 1906.)

TAXATION—REAL PROPERTY—WHERE ASSESSABLE—"FARM OR LOT."

**A tract of land containing 32,000 acres, 18,000 acres of which are in one town and 14,000 in another, the entire tract being mountainous, woody, covered with lakes, containing a number of buildings, some of which were in each town and used for residences, hunting lodges, servants' residences, and in the manufacture on a large scale of maple sugar and lumber, is not a farm or lot within Tax Law, Laws 1896, p. 801, c. 908, § 10, as amended by Laws 1902, p. 504, c. 200, providing that, if a farm or lot is divided by a line between two tax districts, and the owner resides thereon, it shall be assessed to him in the district in which he lives.**

Appeal from Special Term, St. Lawrence County.

Certiorari by the people, on relation of Abbot Augustus Low, against George B. Wilson and others, as assessors in the town of Colton in the county of St. Lawrence, to review proceedings of the respondents in assessing real estate of the relator. From a judgment for respondents, relator appeals. Affirmed.

Argued before PARKER, P. J., and SMITH, CHESTER, and COCHRANE, JJ.

William Allaire Shortt, for relator.

C. S. Ferris and A. X. Parker, for respondents.

COCHRANE, J. In the year 1902 the relator was the owner of over 32,000 acres of land, of which over 18,000 acres were in the town of Colton, and 14,000 acres in the adjoining town of Piercefield; both of said towns being in the county of St. Lawrence. This land constituted a solid and contiguous tract nearly rectangular in shape, and that portion thereof which is within the town of Colton is about 6 miles in one direction and 4½ miles in the other direction. Ponds, lakes, streams, mountains, and valleys intersperse the entire tract. The relator's residence was on that portion of the land situated in the town of Piercefield at a place called Horseshoe on the western shore of Horseshoe Lake. From this latter place the relator had constructed three narrow gauge railroads extending to various points of his large domain. At this place also he had buildings of various kinds, including a house for his employés, a blacksmith shop, where a blacksmith and helper were constantly engaged, a plant for generating electricity, a stable where horses and cows were kept, an engine house for the locomotives used by him on his narrow gauge roads, storehouses, and buildings used in the manufacture of maple sugar, and boathouses. At the eastern end of Horseshoe Lake in Piercefield was an extensive plant for reducing maple sap to syrup, and in close proximity thereto was a maple wood where about 15,000 trees were tapped annually. On another lake in Piercefield, known as "Big Trout Lake," was a hunting camp where a man lived constantly. About five miles from the relator's residence, and connected therewith by a good turnpike road, was Camp Marian, situated on a lake of the same name in about the center of the Colton tract. Here was a house occupied by the employés of the relator, a stable and barn like other farm

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buildings in the town, about 15 small buildings used by the relator, his family, and guests, in summer, a large office or administration building, a large two-story structure used for dances and other social functions, and a boathouse. At different places on the tract in Colton were two other large structures provided with apparatus for evaporating maple sap, a process in the manufacture of sugar, and about each structure was a maple wood each covering an area of about 1½ miles, and each containing about 15,000 trees which were cultivated in such a way as to yield the maximum of productiveness. Lumber operations had also been engaged in by the relator, and plants and buildings for such purpose and dwelling houses for the men engaged therein had been constructed at various places. The entire tract is located in what is known as the "Adirondack Wilderness," and is wild and uncultivated, except a very small portion thereof not exceeding 25 acres, and the land as a whole is not fit for agricultural purposes as generally understood.

The respondents, assessors of the town of Colton, in 1902, assessed that part of said land consisting of over 18,000 acres situated in said town of Colton as nonresident lands, and it is such action on their part which constitutes the grievance of the relator; he claiming that all of the 32,000 acres should be assessed in the town of Piercefield, where he resides. This contention of the relator involves a construction of sections 9 and 10 of the tax law (Laws 1896, p. 801, c. 908) as amended in 1902 (Laws 1902, p. 457, c. 171, and page 504, c. 200). It is unnecessary to review at length the history of the legislation affecting this subject. Such history was tersely and aptly summarized by Mr. Justice Follett, in Casterton v. Town of Vienna, 17 App. Div. 98, 44 N. Y. Supp. 870, as follows:

> "Permitting lands situated in one town to be assessed in another town is and always has been an exception to the general statutes regulating the assessment of realty."

The general scheme of taxation, as expressed in sections 9 and 10 of the tax law, as amended, is that real property shall be assessed in the tax district in which it is situated. But section 10 contains an exception to this rule, as follows, viz.:

> "If a farm or lot is divided by a line between two or more tax districts and the owner resides thereon it shall be assessed to him in the district in which he resides."

The reason for this exception is obvious. A "farm or lot," in the ordinary sense of the term, is not susceptible of easy division, and it would be unnatural and frequently difficult or embarrassing to make such division. As a matter of convenience, both for the taxpayer and the municipality, it is desirable that a farm or lot be taxed as one body, and ordinarily no substantial injustice can result from such a method. The relator claims that he is within this exception, and that his tract of over 32,000 acres of land is a "farm or lot," within the meaning of the statute under consideration. A mere statement of the facts as above set forth refutes such contention. It is true that certain industries are to a certain extent conducted by the relator on the land in question. But in no sense can such land properly be character-

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ized as farm land. The reasons for the exception in the statute which permits a farm or lot divided by a line between tax districts to be assessed in the district where the owner resides do not exist in this case. No one will be much inconvenienced by assessing each portion within the town where it is located. The appropriate division and adjustment of assessment can be made with very little difficulty, and it would be most unjust to the town of Colton to be deprived of the taxes which would naturally flow from this large tract of land within its borders. The terms "farm" and "lot," as used in section 10 of the tax law, are to be understood in their ordinary and popular sense, and are not to be construed as including a large area of the character and extent here presented. That part of the relator's land which is within the town of Colton was properly assessed by the assessors of that town.

The judgment should be affirmed, with costs. All concur.

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## ASSOCIATE PRESBYTERIAN CONGREGATION OF HEBRON v. HANNA.

(Supreme Court, Appellate Division, Third Department. May 2, 1906.)

1. APPEAL—HARMLESS ERROR—ERROR IN SELECTING JURY.
   Where no question of fact for the determination of the jury arose on a trial, objections to the formation of the jury will not be considered.
   [Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 4124.]

2. CORPORATIONS—ACTION BY—PARTIES—MISNOMER—WAIVER OF DEFECT.
   An answer in an action by a corporation for the recovery of real estate, which alleges that the correct name of the corporation is the name given in a deed by which land, including the land in question, was conveyed to it, does not raise the question of misnomer within Code Civ. Proc. § 1777, providing that, in an action by a corporation, defendant is deemed to have waived a mistake in the statement of the corporate name, unless the misnomer is pleaded in the answer.

3. RELIGIOUS SOCIETIES—PROPERTY—CONVEYANCE—LEAVE OF COURT.
   Code Civ. Proc. §§ 3391, 3393, providing that in a proceeding by a corporation required by law to make application to the court for leave to sell its real estate, the petition shall set forth that the interests of the corporation will be promoted by a sale together with a statement of the reasons therefor, and if it shall appear to the satisfaction of the court that the interests of the corporation will be promoted thereby an order may be granted authorizing the sale, only authorizes the sale of the real estate of a religious corporation prohibited by the religious corporations law (Laws 1895, p. 277, c. 723, § 11, as amended by Laws 1896, p. 277, c. 336, Laws 1901, p. 527, c. 222) from selling its real estate without obtaining leave of court therefor, pursuant to the provisions of the Code, when the interests of the corporation will be promoted by a sale.

4. SAME—RECOVERY OF PROPERTY.
   A religious corporation conveyed its real estate without obtaining leave of court as required by the religious corporations law (Laws 1895, p. 483, c. 723, § 11, as amended by Laws 1896, p. 277, c. 336; Laws 1901, p. 527, c. 222). The purchaser paid the purchase price, and took possession of the premises. *Held*, that the court was authorized to adjudge that the conveyance was invalid.

5. SAME—JUDGMENT—FORM.
   A religious corporation, conveying its real estate without obtaining leave of court as required by the religious corporations law (Laws 1895,

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**p. 483, c. 723, § 11, as amended by Laws 1896, p. 277, c. 336; Laws 1901, p. 527, c. 222), brought an action for the recovery of the premises and for the cancellation of the record of the deed. *Held*, that a provision in the judgment adjudging the deed void, and directing the cancellation of the record thereof, was not prejudicial to defendant, especially where the court directed that the consideration of the deed be restored to defendant by offsetting the same against the costs of the action, which consideration the trustees of the religious corporation had improperly received from defendant.**

Appeal from Trial Term, Washington County.

Action by the Associate Presbyterian Congregation of Hebron against Charles S. Hanna. From a judgment for plaintiff, and from an order denying a motion to set aside the verdict, and for a new trial, defendant appeals. Affirmed.

Argued before PARKER, P. J., and SMITH, CHESTER, KELLOGG, and COCHRANE, JJ.

D. M. Westfall, for appellant.

Frank C. Brown, for respondent.

COCHRANE, J. On the 28th day of February 1903, the trustees of a religious corporation incorporated under the name of "The Trustees of the Associate Presbyterian Congregation of Hebron," executed to the defendant a deed purporting to convey to him real estate of said corporation. The consideration for such conveyance was paid by the defendant to the said trustees and by them applied to the purposes of said corporation, and the defendant went into possession of the property described in said deed. It is alleged in the complaint, and not denied, that such consideration had been offered to be restored to the defendant. "A religious corporation shall not sell or mortgage any of its real property without applying for and obtaining leave of the court therefor pursuant to the provisions of the Code of Civil Procedure." Section 11, Religious Corporations Law, Laws 1895, p. 483, c. 723, as amended by Laws 1896, p. 277, c. 336; Laws 1900, p. 1220, c. 521; Laws 1901, p. 527, c. 222. This statutory provision was not complied with in this case. Said corporation brings this action under the name of "The Associate Presbyterian Congregation of Hebron." In its complaint it demands judgment both for the recovery of the possession of the premises described in said deed, and also for the cancellation of the record of said deed. Facts are alleged in the complaint consistent with both forms of relief demanded. At the trial defendant claimed that the action was for ejectment, and that he was entitled to a jury trial, and the court so held. But, at the conclusion of the evidence, no question of fact had developed and the court directed a verdict in favor of the plaintiff. The defendant indulges in some criticism as to the formation of the jury. But as no question arose for determination by the jury, such criticism is academic, and need not be considered.

The action was not instituted in the correct corporate name of the plaintiff. But it is provided by section 1777 of the Code of Civil Procedure that "the defendant is deemed to have waived any mistake in the statement of the corporate name unless the misnomer is pleaded in the answer." The answer in this case alleges on information and

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belief that the plaintiff is not a corporation, and then alleges the correct corporate name of the plaintiff as being the true and correct name of the grantee to which the grantors of the corporation conveyed certain premises, of which the premises in question are a portion. The plaintiff proved its incorporation, and, in doing so, established the misnomer. But the question of such misnomer was not properly raised by the said allegation in the answer. This defense is technical, and if a defendant wishes to avail himself thereof he must raise the question by such an unequivocal allegation in his answer as will clearly apprise the plaintiff of the point raised so that the plaintiff may make the proper correction by amendment or otherwise. The answer fails to do this. This objection not having been properly raised, the defendant is deemed to have waived it.

The defendant insists that he has alleged certain facts in his answer as a counterclaim, and that as no reply was interposed such facts are admitted, and that they are of such a nature as to entitle him to equitable relief; that the court should now confirm or ratify the conveyance which the parties intended to make; or, in other words, should now grant its permission that the sale be made as it would have done had an application been made therefor as required by the religious corporation law, as above set forth; and thus carry out the intent of the parties, and do equity to the defendant, who is in possession of the property under the deed in question, and who has paid the consideration thereof. The difficulty with this argument is that assuming as true all the facts contained in the answer they fall far short of being sufficient to authorize the court to grant leave for the sale of the property in a proceeding instituted directly for such purpose as required by the statute; and a fortiori such facts are insufficient to authorize the court in this action to grant the desired relief. Sections 3391 and 3393 of the Code of Civil Procedure provide that in such a proceeding by a corporation for leave to sell its real estate a petition shall be presented setting forth among other things that the interests of the corporation will be promoted by such sale, and setting forth a concise statement of the reasons therefor, and a statement as to the financial condition of the corporation, and that if it shall then appear to the satisfaction of the court that the interests of the corporation will be promoted thereby an order may be granted authorizing the sale for such sum as the court may prescribe, and that the court shall make direction as to the disposition of the proceeds of such sale. It is only when the interests of a corporation will be thereby promoted that a sale of its real estate can be made; and there is no allegation or evidence in this case that this proposed sale would be beneficial to the corporation.

But it is further urged that as the defendant is in possession of the property under the deed in question, and that as the plaintiff is in possession of the purchase price thereof, that the plaintiff should be estopped from maintaining this action. The logic of this argument would in all cases nullify the statute requiring permission of the court to make such sale. All that the parties would have to do in any case would be to ignore the court and consummate the sale as between themselves, and then each party would be estopped from claiming

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as against the other that the sale was invalid. Even if the plaintiff is estopped, the court is not estopped; and the court should not abdicate its right, and cannot disregard its duty to see that the real property of a religious corporation is not alienated unless the interests of such corporation will be thereby promoted.

The defendant also complains because the judgment contains equitable relief adjudging the deed null and void and directing the cancellation of the record thereof. Perhaps those provisions in the judgment are unnecessary. But they are in conformity with the allegations of the complaint, and the demand therein for judgment. And the defendant is in no way prejudiced thereby. The effect as to him would be precisely the same if they had been omitted from the judgment. Moreover, in connection with this equitable relief, the court directed that the consideration of the deed be restored to the defendant by offsetting the same against the costs of the action which consideration the trustees of the plaintiff had improperly received from the defendant.

No inference can be drawn in this action that the plaintiff is seeking to repudiate a contract which its officers had any power or authority to make or to which the court could give its approval. The objections of the defendant are unmeritorious. There is no error in the case prejudicial to the defendant or available to him.

The judgment and order should be affirmed, with costs. All concur.

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## FULLER BUGGY CO. v. RAMSEY et al.

**(Supreme Court, Appellate Division, Third Department. May 18, 1906.)**

1. JUDGMENT—DEFAULT—SETTING ASIDE.

   That an amended complaint was served on one defendant three days prior to the severance of the action, and not on the other defendant, is no ground for setting aside a default judgment against the latter on the original complaint.

2. SAME—CONDITIONS—PAYMENT OF COSTS.

   Where a default judgment against a defendant was set aside, though he had no legal right to have it set aside, he cannot complain of the condition imposed that he pay the costs entered in the judgment against him and $10 costs of the motion.

   [Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, § 328.]

Appeal from Special Term, Warren County.

Action by the Fuller Buggy Company against Joseph Ramsey and others. From an order imposing costs on defendant Joseph Ramsey, as a condition to setting aside a default judgment against him, he appeals. Affirmed.

James H. Bain, for appellant.
N. B. Spalding, for respondent.

SMITH, J. The defendant Ramsey was served with a summons and complaint. He made default in appearing. The action was severed, so that the action against him and the defendant Cudney proceed-

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ed separately from the action against defendant Waldron. Judgment was rendered by default against him. This judgment he now seeks to open. The ground of his motion to open the judgment is that three days prior to the severance of the action, and after his default, the plaintiff served upon defendant Waldron an amended complaint. The judgment, however, taken against the defendant Ramsey by default, was upon the original complaint, which stated a good cause of action against him. If the plaintiff had waited three days longer before serving his amended complaint upon the defendant Waldron, the action would have been severed and there could then have been no claim that the judgment was not in all respects regular as against the defendant Ramsey. We cannot see that the rights of the defendant Ramsey have been in any way prejudiced by the service of this amended complaint upon the defendant Waldron three days prior to the severance of the action. If the amendment had been necessary for the statement of a complete cause of action against the defendant Ramsey, it is undoubtedly true that the amended complaint must have been served upon the defendant Ramsey. Inasmuch, however, as a good cause of action was stated against the defendant Ramsey in the original complaint, the allegations of which were admitted by Ramsey's default, we can see no object in serving the amended complaint upon him, or what right he can claim to be served therewith. The defendant Ramsey therefore was not entitled to have this judgment opened, upon the ground that the amended complaint had not been served upon him.

The plaintiff, however, has not appealed from the opening of the judgment upon the payment by the defendant Ramsey of the costs entered in the judgment and of $10 costs of the motion with which he has been charged. Nor does the plaintiff question by appeal the part of the order requiring the service upon the defendant Ramsey of the amended complaint. Without the legal right to have the judgment opened, the order opening the same is simply a favor to which might lawfully be attached such terms as the requirement to pay costs.

The order should therefore be affirmed, with $10 costs and disbursements. All concur.

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## STARKWEATHER v. SUNDSTROM et al.

(Supreme Court, Appellate Division, Third Department. May 18, 1906.)

COSTS—STENOGRAPHER'S MINUTES.

A respondent is entitled to costs for procuring stenographer's minutes to enable him to propose amendments to appellant's proposed case, though he had not requested the loan of the minutes from appellant and been refused.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Costs, § 974.]

Appeal from Special Term, Broome County.

Action by Horace P. Starkweather against Charles Sundstrom and another. From an order denying defendants' motion to retax costs, defendants appeal. Affirmed.

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Argued before SMITH, CHESTER, KELLOGG, and COCHRANE, JJ.

Thomas Watts and Abram F. Servin, for appellants.
Wales & Riley, for respondent.

SMITH, J. The costs were taxed upon a judgment of the Appellate Division affirming a judgment of the court below. Among the items of costs was $78 for procuring stenographer's minutes to enable the plaintiff to propose amendments to the defendant's proposed case. This item was objected to before the taxing officer, "on the ground that said item is illegal and improper and cannot be properly retaxed or taxed as a disbursement, because the defendants were never requested to lend their copies to the plaintiff nor to prepare amendments." By reason of the requirement of rule 32 of the Supreme Court Rules, a respondent preparing amendments to a proposed case must refer to the stenographer's minutes. That the cost of procuring such minutes is a necessary disbursement, which may be charged by the respondent, has been settled at least in two departments in Ridabock v. Metropolitan Elevated R. Co., 8 App. Div. 309, 40 N. Y. Supp. 938, and in Park v. N. Y. C. R. R., 57 App. Div. 569, 68 N. Y. Supp. 460, 1145. In the Park's Case the respondent had sought to procure the stenographer's minutes from the appellant for the purpose of preparing his amendments to the proposed case, but the appellant had refused to loan them to the respondent. That fact was mentioned as one of the facts which gave point to the necessity of the disbursement. It was not held in that case, however, that the failure of the respondent to request the loan of the stenographer's minutes from the appellant would render the disbursement for such minutes an unnecessary disbursement, nor has any case gone to this extent. That such minutes are necessary to enable the defendant to prepare amendments to the appellant's proposed case, the appellant knew as well as the respondent. In fact, just what those amendments should be could only be ascertained by reference to the stenographer's minutes. If the appellant would have saved himself from liability for such a disbursement, he could have tendered them to the respondent for the purpose of preparing his amendments just as easily as the respondent could have asked him for it. It is the appellant who is relieved from liability if the minutes are loaned to respondent to prepare the amendments to the proposed case. To hold that the disbursement is not a necessary one until the respondent has requested the loan of the minutes from the appellant, and been refused, would be to require the respondent to take more care to protect the appellant than would the appellant to protect himself. The order should therefore be affirmed.

**Order affirmed, with $10 costs and disbursements. All concur.**

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## STONY WOLD SANATORIUM v. KEESE et al.

(Supreme Court, Appellate Division, Third Department. May 2, 1906.)

TAXATION—REMEDIES OF TAXPAYERS—RECOVERY OF TAXES PAID—ACTION—QUESTION FOR JURY.

In an action by a corporation, incorporated for hospital purposes, to recover taxes paid, on the ground that they were paid on real estate exempt from taxation, under the Tax Law, Laws 1896, p. 797, c. 908, § 4, subd. 7, exempting real estate held by such a corporation, and on which it is in good faith contemplated to make improvements, *held*, a question for the jury whether the land involved was in good faith contemplated to be used for hospital purposes.

Cochrane, J., dissenting.

Appeal from Trial Term, Franklin County.

Action by the Stony Wold Sanatorium against Daniel Keese and others. From a judgment in favor of plaintiff, and from an order denying a motion for a new trial, defendants appeal. Reversed and new trial granted.

The defendants are assessors of the town of Franklin, in the county of Franklin. In 1903 they assessed real property of the plaintiff for the sum of $26,540. Thereafter property was sold in payment of the tax levied through such assessment, of the stipulated value of $1,148.29. This action is brought to recover this amount from the assessors, on the ground that the property assessed was exempt property. Upon the trial the verdict of the jury was directed by the court for the plaintiff for the amount claimed. From the judgment entered upon this verdict, and from an order denying a motion for a new trial, this appeal is taken.

Argued before PARKER, P. J., and SMITH, CHESTER, KELLOGG, and COCHRANE, JJ.

Benjamin L. Wells, for appellants.

J. P. Badger, for respondent.

SMITH, J. By subdivision 7 of section 4 of the Tax Law (chapter 908, p. 797, Laws 1896), the real property of a corporation or association organized exclusively for hospital purposes and used exclusively for carrying out thereon one or more such purposes, and the personal property of any such corporation, shall be exempt. The section further provides:

"The real property of any such corporation or association entitled to such exemption held by it exclusively for one or more of such purposes and from which no rents, profits or income are derived, shall be so exempt, though not in actual use therefor by reason of the absence of suitable buildings or improvements thereon, if the construction of such buildings or improvements is in progress, or is in good faith contemplated by such corporation or association."

It is still further provided that the real property of any such corporation not used exclusively for carrying out thereon one or more of such purposes, but leased or otherwise used for other purposes, shall not be exempt; but, if a portion only of any lot or building of any corporation is used exclusively for carrying out thereupon one or more of such purposes of any corporations, then such lot or building shall be so exempt only to the extent of the value of the part so used and the remaining part shall be subject to taxation. The plaintiff is a

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corporation incorporated for the purpose of maintaining a hospital for the cure of consumptives. Exemption is claimed for 1,742.7 acres, consisting of about 1,300 acres of land and 450 acres of water, upon which land the plaintiff had erected some buildings. The cost price of this property was $122,600. This land is divided into nine lots of about 200 acres per lot, situated about and including Lake Kushaqua. The main buildings are all situated in a group upon lot 296 occupying a space of approximately 200 feet square. There are four or five cottages strung along the shore of the lake from the main building. There was a piggery there at the time of the trial, which was not in existence in 1903 when the assessment was made. There are sewage disposal plants occupying about one-quarter acre. The farthest building north is only about one-half mile from the farthest building south. There were in 1903, and are now, no buildings whatever upon five of these lots. At the time of the assessment in 1903 plaintiff had only three acres out of this vast tract of 1,742.7 acres under cultivation. These three acres were upon lot 307. It has now only about eight acres under cultivation upon said lot, and five acres upon lots 265 and 266. This land is mountainous, marshy, of light sandy loam, and not well adapted to farming purposes. The tract is all wild and wooded and is situated in the Adirondack Mountain forest. One witness swears:

"It is woods for a number of miles to the west, 10 miles unbroken forest; to the east for 8 miles; to the north unbroken for miles, forest almost unbroken; and to the south the same thing; with the exception of fire-slashes for 30 or 40 miles in a direct course."

It will thus be seen that in 1903, when this assessment was made, a very small part of this property was in actual use for hospital purposes, and the exemption of the balance of the land upon which no improvements were then in progress can only be claimed on the ground that such improvements "were in good faith contemplated" by the plaintiff corporation. If we assume from the argument that the defendants were without jurisdiction to assess that part of the premises which are claimed to be exempt, by reason of the fact that their use was contemplated in good faith for hospital purposes, nevertheless a fair question seems to be presented for the jury as to the contemplated use in good faith of this vast amount of wild forest land by the plaintiff. The learned judge at the trial term has held as matter of law that none of this assessment was authorized, and that the entire property was exempt. It will be hardly profitable to discuss in detail in this opinion the evidence as to the necessity or contemplated use of the part of this property that was lying at a distance from the plaintiff's buildings. It can hardly be said as matter of law that all of this property is necessary that the air may be kept pure, or that it is all necessary to prevent noises and dust, when the plaintiff has located its sanitorium between two railroads and within about 200 feet of one of them, or that it is all necessary as a wind brake when they have located their sanitorium upon a high eminence, and a very small part only of this forest could in any event operate as such wind brake. Dr. Pryor, an enthusiastic witness sworn for the plaintiff, testified that all of this land will be needed "if you intend to have a



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farm colony. If you intend to take up the question which you will absolutely be obliged to take up, because that is the problem of the day, keeping these people there and letting them work until you are sure you have a recovery—if you intend to do all that, yes. If you do not intend to do that, no." The only patients admissible to this institution under the charter are consumptive women and children, male children only under 12 years of age. At the most the jury should say whether this forest land which must first be cleared was held in good faith for farms for these women and children. Whether all of this land were in good faith contemplated to be used for hospital purposes is in our judgment a question of fact, and not a question of law, and this fact can only be resolved as against these assessors by the verdict of a jury.

The assessment was not made upon the tract as a whole, but upon the nine lots separately. All but $1,540 of the aggregate assessment of $26,540 was upon lot 298 on which the main and several of the smaller buildings, besides the waterworks, are situated. While a comparatively small part of the area of the entire tract only was included in this lot, the greater part of the assessable value and of the assessment was there. There is no conflict in the evidence that this lot upon which plaintiff had been assessed for $25,000 was used exclusively for hospital purposes. It was therefore exempt as a matter of law, and the defendants were without jurisdiction to assess it. This is true also as to several of the other nearby lots; the proof being undisputed that they were occupied or used in one way or another solely for the plaintiff's purposes at the time of the assessment. The defendants therefore had no right to assess such lots and were trespassers in so doing. There was a question of fact to submit to the jury, however, as to whether the plaintiff in good faith contemplated using the four or five outlying lots assessed at a valuation of from $150 to $220 each for hospital purposes, and a new trial must be granted to the end that the defendants' liability for the assessment of those lots may be determined.

It follows that the judgment and order should be reversed and a new trial granted, with costs to appellants to abide event. All concur, except PARKER, P. J., not voting and COCHRANE, J., dissenting.

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## FITCH v. HAY et al.

(Supreme Court, Appellate Division, Third Department. May 2, 1906.)

1. APPEAL—RIGHT TO APPEAL—INTEREST IN LITIGATION—COSTS.

In an action to enjoin a board of county supervisors from paying a claim, the board has no interest in the matter entitling it to appeal on the merits, but where judgment for costs is rendered against it, it is entitled to appeal on the question of costs.

2. COSTS—SEPARATE ISSUES.

Where, in an action to restrain a board of county supervisors from paying a claim, plaintiff alleged that defendants acted fraudulently, and in collusion with the claimants, and the court found that the allowance of the claims was illegal, but that here was no fraud or collusion, defendant board should not have been charged with costs.

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3. COSTS—MODIFICATION OF JUDGMENT ON APPEAL.

Plaintiff, in an action to enjoin county supervisors from paying certain claims, charged that the board acted fraudulently. The court found that there was no collusion but that the claims were illegally allowed, and rendered judgment enjoining their payment, but improperly taxed costs against the board. The board appealed from the whole judgment. Plaintiff in the action was a supervisor of a town, and had warned the board of the illegality of some of the claims allowed. *Held* that, on modification of the judgment by striking out the erroneous provision as to costs, neither party was entitled to the costs of the appeal.

Appeal from Trial Term, Clinton County.

Action by Wilmer H. Fitch against Wellington Hay and others. From a judgment for plaintiff, defendants appeal. Modified and affirmed.

These defendants with James H. O'Neil, Owen O'Neil, Nelson Duval, Harvey S. Haff, George Gray, and the board of supervisors of the county of Clinton were made defendants in an action by the plaintiff to restrain the payment of certain claims audited by the appellants against the town of Mooers in the said county of Clinton. James H. O'Neil, Owen W. O'Neil, Nelson Duval, Harvey S. Haff, and George Gray were the claimants whose bills were audited; the audit of which is made the basis of this action. George Gray was overseer of the poor of said town. J. H. and Owen W. O'Neil were physicians who claimed compensation for services. Nelson Duval was the town clerk. Harvey S. Haff was an attorney who claimed compensation for services. The action was brought under chapter 301, p. 620, of the laws of 1892, to enjoin the payment of said claims upon the ground of their illegality. In the complaint it was charged that the appellants the town board colluded with the several claimants to secure to them payment of their claims which were illegal. Issue was joined by the service of answers by the appellants as the town board, by Gray the superintendent of the poor and by J. H. and Owen W. O'Neil. Upon the trial part of the claims so audited were held to have been lawfully audited, and part were held to have been illegally audited and their payment was enjoined. The defendant appellants and George Gray were charged with costs of the action amounting to upwards of $250. From the judgment thus entered the town board alone has appealed.

Argued before PARKER, P. J., and SMITH, CHESTER, KELLOGG, and COCHRANE, JJ.

D. H. Agnew, for appellants.

W. H. Dunn, for respondent.

SMITH, J. In People ex rel. Steward v. Railroad Commissioners, 160 N. Y. 212, 54 N. E. 697, Chief Judge Parker, writing for the Court of Appeals, says:

"It is the general rule that a court or board exercising judicial functions by permission of some statute, has no interest in maintaining its determination, and, therefore, can neither appeal from an order of the court reversing the proceedings, nor be heard on the appeal."

Within this rule of practice it is difficult to see what interest these appellants have in reversing this judgment upon the merits. They are not affected whether the judgment stands or falls. The parties aggrieved by the judgment are the claimants whose bills have been found illegal and and their payment enjoined.

By the judgment, however, these appellants are charged with upwards of $250 of costs. To review the equity of that charge they have a standing in court upon this appeal.

If this question could have been raised by a writ of certiorari, issued

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at the instance of the plaintiff, under the authority cited these appellants would not be interested in contesting the issues upon that writ. If the charge had been made that the audits were illegal, simply, the appellants could well have been charged with costs for making a contest at the trial term. They were charged, however, by plaintiff's complaint as having acted fraudulently and in collusion with these claimants. After having made this charge in his complaint, it does not lie with the plaintiff to say that the defendants improperly took issue with the charge made. On this issue, the only one in which they were in fact interested in any way in the trial court, these appellants succeeded. The referee has found that their acts were all in good faith, and without fraud. Under these circumstances, we are of opinion that they should not have been charged with the costs of this action. The judgment should therefore be modified by striking out the provision charging them the costs of the action, and, as so modified, affirmed. We are of opinion that neither party should have costs of this appeal. This plaintiff acted not for himself so much as in behalf of the people whose representative he was. He was the supervisor of the town. He warned the town board of the illegality of some, at least, of these claims, and had substantial ground for his action. The appeal of the town board was from the whole judgment, so that upon this appeal he is required to defend the judgment in each and every particular. The modification of the judgment, therefore, indicates only partial success for the appellants, which as we have stated, should not, in our judgment, carry costs of the appeal.

This affirmance of the judgment, as modified, should be without costs to either party.

**Judgment modified by striking therefrom the provision charging defendants with costs, and, as thus modified, affirmed, without costs to either party. All concur, except PARKER, P. J., not voting.**

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## WICKHAM et al. v. ROBERTS et al.

(Supreme Court, Appellate Division, Third Department. May 2, 1906.)

1. ASSIGNMENTS—PROPERTY ASSIGNABLE—RIGHTS OF ACTION.

**Under Code Civ. Proc. § 1910, providing that any claim or demand may be transferred, and 2 Rev. St. (1st Ed.) p. 447, pt. 3, c. 8, tit. 3, § 1, providing that, for wrongs done to the property rights or interests of another for which an action might be maintained against the wrongdoer, the same may be brought after the death of the person injured by his executor or administrator, a right of action for false representations, made by defendant on a sale of property to decedent, was assignable by decedent's administrator.**

2. FRAUD—FALSE REPRESENTATIONS.

**Where a seller of bonds represented to the purchaser that they were good, and also that they were a first lien upon the corporate property, and the last representation was false, as the seller knew, the purchaser might maintain an action for damages, though the bonds were considered good at the time of the sale.**

**[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Fraud, §§ 3-5.]**

Appeal from Special Term, Delaware County.

Action by Sarah Stewart Wickham and others against John M. Roberts and others. From an order setting aside a direction dismissing

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the plaintiffs' complaint and granting a new trial, defendants appeal. Affirmed.

Argued before PARKER, P. J., and SMITH, CHESTER, KELLOGG, and COCHRANE, JJ.

Julien Scott, for appellants.

James R. Baumes, for respondents.

SMITH, J. These plaintiffs are two of the next of kin of Samuel Stewart, deceased. They derive their right to bring this action through assignment from the administrator of the estate of Samuel Stewart. In April, 1895, Samuel Stewart purchased of the defendant four bonds of the Bainbridge Waterworks Company. They were represented by defendant Roberts to be a first lien upon the waterworks and a good investment, and that the interest would be paid and the bonds, when due, would either be paid or refunded. It turned out, however, that there was another mortgage lien for about the sum of $10,000, prior to the lien of the mortgage which secured these bonds. After the death of Samuel Stewart, this other mortgage lien was foreclosed, and upon the sale of the property there was nothing left to apply upon the bonds held by the estate of Samuel Stewart. The administrator, in distribution of the estate, assigned this claim to these plaintiffs, who have brought this action to recover damages for the false representations of the defendant, which they claim induced the purchase of the bonds. At the trial upon the close of the plaintiffs' evidence the complaint was dismissed. From the opinion of the trial judge upon granting the order appealed from, the complaint was apparently dismissed, upon the ground that there was no proof that Samuel Stewart relied upon the representations of Roberts in making the purchase. Thereafter, upon a motion for a new trial, the trial judge set aside the order dismissing the complaint, and held that there was enough in the case to present to the jury upon the question whether Samuel Stewart did in fact rely upon the representations of the defendant in purchasing the bonds.

The opinion of the learned trial judge convinces us that, upon the question as to whether Samuel Stewart relied upon these representations, the plaintiffs had the right to the verdict of the jury. There are one or two other questions raised by the appellant, however, which are not discussed in that opinion, to which it may be well to refer. In 2 Rev. St. (1st Ed.) p. 447, pt. 3, c. 8, tit. 3, § 1, it is provided,

> "For wrongs done to the property, rights or interests of another, for which an action might be maintained against the wrongdoer, such action may be brought by the person injured, or after his death, by his executors of administrators, against such wrongdoer, and after his death against his executors and administrators, in the same manner and with the like effect in all respects, as actions founded upon contracts."

The defendant contends that, while by this section a right of action was given to the executor or administrator, it was given to him alone and not to his assignee. He claims that in principle it is analogous to a right of action given to an executor or administrator for negligence causing the death of a party, in which class of cases he claims that it has been held that that action belongs to the administrator alone. See Mundt v. Glokner, 24 App. Div. 110, 48 N. Y. Supp. 940. The

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cases, however, are not analogous. The right of action for negligence causing death is one given for the benefit of the next of kin, alone, and not for the estate, and the executor or administrator is made by the statute the special trustee of that cause of action. The cause of action here sued upon belongs to the estate, and would seem to me to be assignable within section 1910 of the Code of Civil Procedure.

It is further contended that no cause of action lies against the defendant, because it appears in the evidence that at the time of the sale of the bonds they were considered as perfectly good. That the bonds were good, however, was not the only representation made. An additional representation was made to the effect that they were the first lien upon the waterworks. This representation was false, and known to be false by the defendant when he made it, and for a credit extended upon the faith thereof the defendant would clearly be liable in damages.

The order should therefore be affirmed, with costs. All concur.

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## CROWLEY v. STATE.

**(Supreme Court, Appellate Division, Third Department. May 2, 1906.)**

**APPEAL—MODIFICATION—INCREASE OF RECOVERY.**

**Where, on appeal from a judgment against the state in the court of claims, no finding by that court appears as to the extent of the damage to claimant owing to defendant's negligence, the Supreme Court has no authority to make a new finding, and in accordance therewith, to modify the judgment by increasing the recovery.**

**[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 4506.]**

Appeal from Special Term.

Appeal by Patrick Crowley from a judgment in his favor against the state in the court of claims granting insufficient relief. Reversed.

See 90 N. Y. Supp. 496.

Argued before PARKER, P. J., and SMITH, CHESTER, KELLOGG, and COCHRANE, JJ.

Brodie G. Higley, for appellant.

Julius M. Mayer, Atty. Gen. (Willis H. Tennant, of counsel), for the State.

SMITH, J. This appeal is taken on the ground of the insufficiency of the damages. Claimant's land was injured by an overflow from the canal caused by the negligence of the employés of the state. These facts are established for the purposes of this action by the judgment against the defendant for the sum of $300. Claimant rented 16 acres of land adjoining the Champlain canal. One acre was kept as grass land, upon one acre he planted corn, and upon 14 acres he planted a special variety of potatoes which was used for seed potatoes in Cuba, and for which he got 83½ cents per bushel that year. The ordinary crop of potatoes in that land was 150 bushels to the acre. This overflow occurred July 24, 1902. After the overflow the ground yielded only 70 bushels of potatoes to the acre, and practically no

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corn, so that the claimant's damages proven without contradiction amounted to about $900. The only justification which the Attorney General makes of this reduction of the damages proven from $900 to $300, the amount of the award, is that the court took into consideration that the injury to the potato crop was due in part only to the overflow of the canal, and in part to the hard rain. He asks us to hold as matter of law where the injury to crops is attributable to two causes for one of which the state is liable, and for one of which the state is not liable, that the damage which the state must pay is only proportionate to the injury by waters flowing over land through the negligence of the state. The difficulty with his proposition is that the facts proven in this case do not make applicable the rule. Hard rains do not harm a crop of potatoes as far as any evidence shows, unless they cause the flooding of the land. There is not one particle of evidence that this land was ever flooded except through the overflow of the canal. The record does not present a clear picture of the territory surrounding the land. The only stream which could overflow the land, apart from the canal, would seem to be Wood creek, which is situated about a quarter of a mile east. There is no evidence that that creek has ever risen so high as to flood this land. Between this land and the creek was the railroad. The evidence is wholly to the effect that this creek never overflowed upon this land. The record presents no evidence of any other cause of injury to the claimant's crops than the overflow of the canal. Claimant's evidence as to the extent of damage is corroborated by other witnesses and wholly uncontradicted in the evidence. The verity of claimant's evidence is not attempted to be shaken by cross-examination even. The court of claims has apparently arbitrarily divided the claimant's proven damage by three and given him only one-third thereof.

We are asked instead of granting a new trial to ourselves modify the judgment and give claimant judgment for the sum which the undisputed evidence shows to have been his damage. We are of the opinion that we are without power to grant this request. The power given us by the statute is to affirm, reverse or modify the judgment of the court of claims. The same power is given to this court in review of a judgment of the Supreme Court. Under well-settled authority we would not have this power if this appeal were from a judgment of the Supreme Court for insufficiency of damage. We know of no different rule of interpretation which would give us a greater power on an appeal from a judgment of the court of claims.

In Sayre v. State, 123 N. Y. 291, 25 N. E. 163, which has been often cited to us in support of a similar request, the judgment as finally given by the court was in accordance with the findings of the board of claims, whose award was under review. Without a finding by the court of claims as to the extent of the damage, as claimed by claimant to have been caused by defendant's negligence, we are not authorized to make a new finding in accordance with which we may modify this judgment.

The judgment should therefore be reversed, with costs, and a new trial granted. All concur.

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# MEMORANDUM DECISIONS.

ABRAMOWITZ et al., Appellants, v. GRAY, Respondent. (Supreme Court, Appellate Term. April 24, 1906.) Appeal from Municipal Court, Borough of Manhattan, Fourth District. Action by Rachmiel Abramowitz and another against Robert J. Gray. From a judgment for defendant, plaintiffs appeal. Affirmed. Charles Tolleris, for appellants. George T. Hogg, for respondent.

SCOTT, P. J. The facts in this case bear no resemblance whatever to those in Weinberg v. Greenberger, 47 Misc. Rep. 117, 93 N.Y. Supp. 530. In that case the money was paid as a deposit on account of a lease to be thereafter made, and it was left quite obscure for what purpose the deposit was given, unless it was as security that the depositor would make the lease in due time. In this aspect it could be considered merely as security for any damage which might accrue from the depositor's failure to execute a lease, and no such damages were proven. As was pointed out in that case, the deposit could not under the terms of the receipt be considered as having been given on account of or as security for the rent which was to constitute the consideration for the lease. In the present case the money paid to defendant and now sued for is recited as having been paid on account of the purchase money for two lots, and the whole evidence shows that the payment was so made, and not merely as security for the making of some future contract. Thus considered, it is clear that the judgment is right, and should be affirmed, with costs. Judgment affirmed, with costs. All concur.

In re ABRAMS. (Supreme Court, Appellate Division, Second Department. April 27, 1906.) In the matter of the application of David Abrams Jr., for the appointment of a committee of the person and property of David Abrams, Sr., an alleged incompetent person. No opinion. Order affirmed, with $10 costs and disbursements.

AHRONS, Respondent, v. CUNEO TRADING CO., Appellant. (Supreme Court, Appellate Division, First Department. April 6, 1906.) Action by Percy Ahrons against the Guneo Trading Company. D. Flannagan, for appellant. W. E. Cooke, for respondent. No opinion. Judgment affirmed, with costs, with leave to defendant to withdraw demurrer and to answer, on payment of costs in this court and in the court below. Order filed.

ALLEN, Respondent, v. UNION RY. CO. OF NEW YORK CITY, Appellant. (Supreme Court, Appellate Division, First Department. May 11, 1906.) Action by Edward S. Allen, as administrator, against the Union Railway Company of New York City. B. H. Ames, for appellant. J. C. Robinson, for respondent. No opinion Judgment and order affirmed, with costs.

ARCIERI, Respondent, v. LONG ISLAND R. CO., Appellant. (Supreme Court, Appellate Division, First Department. April 6, 1906.) Action by Ermenia Arcieri as administratrix, against the Long Island Railroad Company. W. C. Beecher, for appellant. R. Maggio, for respondent.

PER CURIAM. Judgment and order affirmed, with costs. Order filed.

McLAUGHLIN and HOUGHTON, JJ., dissent.

In re ASHHEIM. (Supreme Court, Appellate Division, First Department. April 6, 1906.) In the matter of Solomon W. Ashheim. No opinion. Motion granted. Settle order on notice.

BACK et al., Respondents, v. MULLER, Appellant, et al. (Supreme Court, Appellate Division, Second Department. April 20, 1906.) Action by Louis Back and Charles Fredrick as executors, etc., against Rosie Muller and the South Brooklyn Savings Institution. No opinion. Judgment affirmed, with costs.

In re BAINBRIDGE'S ESTATE. (Supreme Court, Appellate Division, Second Department. March 9, 1906.) In the matter of the estate of Hannah Maria Bainbridge, deceased. No opinion. Motion granted. Order to be settled before Mr. Justice Woodward.

BALDWIN, Appellant, v. McGRATH, Respondent, et al. (Supreme Court, Appellate Division, First Department. May 11, 1906.) Action by Clarence D. Baldwin against John J. McGrath, impleaded, etc. L. H. Beers, for appellant. C. F. Brown, for respondent. No opinion. Judgment affirmed, with costs. Order filed.

BAMBACE v. INTERURBAN ST. RY. CO. (Supreme Court, Appellate Division, First Department. April 6, 1906.) Action by Joseph Bambace against the Interurban Street Railway Company. No opinion. Motion denied, without costs. Order filed.

In re BANISTER'S WILL. (Supreme Court. Appellate Division, Fourth Department. March 14, 1906.) In the matter of probate of the alleged last will and testament of George Banister, deceased.

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PER CURIAM. Decree of Surrogate's Court ffirmed, with costs to respondents payable out f the estate.

McLENNAN, P. J., not voting.

BARBER, Appellant, v. DREYFUS, Rependent. (Supreme Court, Appellate Divi-ion, Second Department. March 9, 1906.) Ac-ion by Ada S. Barber against Henry Dreyfus. Io opinion. Judgment of the Municipal Court ffirmed, with costs.

BARG, Respondent, v. DRY DOCK, E. B. & 3. R. CO., Appellant. (Supreme Court, Appelate Division, Second Department. April 27, 906.) Action by Benjamin Barg against the Dry Dock, East Broadway & Battery Railroad Company. No opinion. Judgment of the Municipal Court affirmed, with costs.

BARR, Respondent, v. NEW YORK CENT. & H. R. R. CO., Appellant. (Supreme Court, Appellate Division, Fourth Department. March , 1906.) Action by J. Frank Barr against the New York Central & Hudson River Railroad Company.

PER CURIAM. Judgment and order afirmed, with costs.

HISCOCK, J., not voting; he having ceased o be a member of the court since the argument f the appeal herein.

BARSON et al., Respondents, v. MULLIGAN, Appellant. (Supreme Court, Appellate Division, First Department. March 9, 1906.) Action by Charles H. Barson and another against William G. Mulligan, impleaded, etc. W. G. Mulligan, for appellant. H. A. Forster, for respondents. No opinion. Order affirmed, with $10 costs and disbursements. Order filed.

BAUGHEN, Respondent, v. NEW YORK CITY RY. CO., Appellant. (Supreme Court, Appellate Divicion, Second Department. April 27, 1906.) Action by Samuel Baughen against the New York City Railway Company. No opinion. Judgment of the Municipal Court unanimously affirmed with costs.

BEAVER, Appellant, v. METROPOLITAN ST. RY. CO., Respondent. (Supreme Court, Appellate Division, First Department. April 6, 1906.) Action by Lucretia C. Beaver against the Metropolitan Street Railway Company. R. Goeller, for appellant. B. H. Ames, for respondent.

PER CURIAM. Judgment affirmed, with costs. Order filed.

O'BRIEN, P. J., and PATTERSON, J., dissent.

BEAVER, Appellant, v. METROPOLITAN ST. RY. CO., Respondent. (Supreme Court, Appellate Division, First Department. April 6, 1906.) Action by Samuel Beaver against the Metropolitan Street Railway Company. R. Goeller, for appellant. B. H. Ames, for respondent.

PER CURIAM. Judgment affirmed, with costs. Order filed.

O'BRIEN, P. J., and PATTERSON, J., dissent.

BECKER, Respondent, v. METROPOLITAN LIFE INS. CO., Appellant. (Supreme Court, Appellate Division, Third Department. May 2, 1906.) Action by Martha Becker against the Metropolitan Life Insurance Company.

PER CURIAM. Judgment and order affirmed, with costs.

PARKER, P. J., not voting.

BEECROFT et al., Respondents, v. NEW YORK ATHLETIC CLUB OF CITY OF NEW YORK, Appellant. (Supreme Court, Appellate Division, Second Department. April 20, 1906.) Action by William G. Beecroft and Edgar C. Beecroft, as executors, etc., against the New York Athletic Club of the City of New York. No opinion. Motion for leave to appeal to the Court of Appeals denied. See 97 N. Y. Supp. 831.

BELDEN, Respondent, v. OLDSMOBILE CO., Appellant. (Supreme Court, Appellate Division, First Department. March 9, 1906.) Action by William Belden against the Oldsmobile Company. C. Andrade, Jr., for appellant. G. W. Coleman, for respondent.

PER CURIAM. Judgment and order affirmed, with costs. Order filed.

O'BRIEN, P. J., and McLAUGHLIN, J., dissent.

BELLINGER, Respondent, v. RICE, Appellant. (Supreme Court, Appellate Division, Fourth Department. March 14, 1906.) Action by Charles J. Bellinger against William S. Rice.

PER CURIAM. Order reversed, with $10 costs and disbursements, and motion granted, with $10 costs. *Held*, that the affidavit upon which the order was granted was insufficient.

McLENNAN, P. J., not voting.

BENEDICT, Appellant, v. PINCUS et al. Respondents. (Supreme Court, Appellate Division, First Department. May 11, 1906.) Action by Julian Benedict against Louis Pincus and another. J. P. McGovern, for appellant. J. W. Weed, for respondents. No opinion. Judgment affirmed, with costs. Order filed.

BENNETT, Respondent, v. PACKARD, Appellant. (Supreme Court, Appellate Division, Fourth Department. May 2, 1906.) Action by Matthew W. Bennett against Mark Packard. No opinion. Judgment and order affirmed, with costs.

BERKOWITZ, Appellant, v. CHICAGO, M. & ST. P. RY. CO. et al., Respondents. (Supreme Court, Appellate Division, Second Department. April 27, 1906.) Action by David Berkowitz against the Chicago, Milwaukee & St. Paul Railway Company and another. No

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opinion. Judgment of the Municipal Court reversed as to the defendant the New York Central & Hudson River Railroad Company, and new trial ordered; costs to abide the event.

B. F. BOYER CO., Respondent, v. SHAFFER, Appellant. (Supreme Court, Appellate Division. Second Department. April 27 1906.) Action by the B. F. Boyer Company against Isaac Shaffer. No opinion. Judgment of the Municipal Court affirmed by default, with costs.

BISHOP et al., Respondents, v. AMERICAN BRIDGE CO. OF NEW YORK, Appellant. (Supreme Court, Appellate Division, Third Department. March 7, 1906.) Action by Nellie Bishop and another, as administrators, etc., against American Bridge Company of New York.

PER CURIAM. Judgment and order unanimously affirmed, with costs.

KELLOGG, J., not sitting.

BJERRUM, Respondent, v. SPRINGFIELD BREWERIES CO., Appellant. (Supreme Court, Appellate Division, Second Department. April 20, 1906.) Action by Ernest A. T. Bjerrum against the Springfield Breweries Company. No opinion. Judgment and order affirmed, with costs.

BLANCK, Respondent, v. PRESTON, Appellant. (Supreme Court, Appellate Division, Second Department. April 20, 1906.) Action by Mary Ann Blanck against Charles M. Preston, as receiver of the New York Building Loan Banking Company. No opinion. Motion for reargument granted, and case set down for Monday, May 7, 1906.)

In re BOARD OF RAPID TRANSIT R. COM'RS FOR CITY OF NEW YORK. (Supreme Court Appellate Division, Second Department. April 20 1906.) In the matter of the application of the board of rapid transit railroad commissioners for the city of New York for the appointment of three commissioners, etc.; Fourth Avenue route. Abraham Abraham, George B. Abbott, and Norman S. Dike appointed commissioners.

In re BOARD OF RAPID TRANSIT R. COM'RS FOR CITY OF NEW YORK. (Supreme Court, Appellate Division, Second Department. April 20, 1906.) In the matter of the application of the board of rapid transit railroad commissioners for the city of New York for the appointment of three commissioners, etc.; Brooklyn and Manhattan loop lines, Brooklyn route. Henry B. Ketcham, Edward S. Fowler, and Rudolph Block appointed commissioners.

In re BOARD OF RAPID TRANSIT R. COM'RS FOR CITY OF NEW YORK. (Supreme Court, Appellate Division, Second Department. April 20, 1906.) In the matter of the application of the board of rapid transit railroad commissioners for the city of New York for the appointment of three commissioners to determine and report, etc.; Thirty-Fourth Street route, in the borough of Queens. George B. Young, David F. Manning, and William M. Griffith appointed commissioners.

In re BRADY'S ESTATE. (Supreme Court, Appellate Division, Second Department. April 20, 1906.) In the matter of the estate of Rosetta Brady, deceased. No opinion. Motion granted, unless appellant serve his proposed case within 10 days and pay $10 costs, in which event the motion is denied.

In re BROOKLYN BAR ASS'N. (Supreme Court, Appellate Division, Second Department. April 20, 1906.) In the matter of the application of the Brooklyn Bar Association to punish Benjamin E. Valentine, an attorney. No opinion. Petition granted, and, pursuant to section 67 of the Code of Civil Procedure, Benjamin E. Valentine is hereby disbarred, and his name is stricken from the roll of attorneys and counselors of the Supreme Court of the state of New York.

BROOKLYN UNION ELEVATED R. CO., Respondent, v. CITY OF NEW YORK, Appellant. (Supreme Court, Appellate Division, Second Department. April 27, 1906.) Action by the Brooklyn Union Elevated Railroad Company against the city of New York. No opinion. Judgment and orders affirmed, with costs.

BROWN, Respondent, v. NEW YORK CENT. & H. R. R. CO., Appellant. (Supreme Court, Appellate Division, Fourth Department. March 7, 1906.) Action by Joseph Brown against the New York Central & Hudson River Railroad Company.

PER CURIAM. Judgment and order affirmed, with costs.

WILLIAMS and NASH, JJ., dissent.

BUEL, Appellant, v. BROOKLYN HEIGHTS R. CO., Respondent. (Supreme Court, Appellate Division, Second Department. March 9, 1906.) Action by Ida Buel against the Brooklyn Heights Railroad Company. No opinion. Order setting aside verdict and granting new trial affirmed, with costs.

BUSKIST, Respondent, v. WAIT, Appellant. (Supreme Court, Appellate Division, Fourth Department. March 14, 1906.) Action by Charles J. Buskist against Orrin Wait. No opinion. Judgment and order affirmed, with costs.

CANONICO v. CUNARD S. S. CO. (Supreme Court, Appellate Division, First Department. April 25, 1906.) Action by Errico Canonico against the Cunard Steamship Company. No opinion. Application denied, with $10 costs. Order signed.

CARROLL v. LONG ISLAND R. CO. et al. (Supreme Court, Appellate Division, Second Department. March 9, 1906.) Action by Margaret Carroll against the Long Island Railroad Company and another. No opinion. Judgment modified, by striking out the provision for a

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tra allowance, and judgment, as modified, and der, unanimously affirmed, with costs.

CENTURY MERCANTILE CO., Respondt, v. HEERAN, Sheriff, Appellant. (Action o. 2). (Supreme Court, Appellate Division, hird Department. May 2, 1906.) Action by e Century Mercantile Company against Matew A. Heeran, late sheriff of Rensselaer unty.

PER CURIAM. Interlocutory judgment afmed, with costs, with usual leave to defendant withdraw demurrer and answer, upon payent of costs of demurrer and of this appeal. CHESTER, J., dissents. PARKER, P. J., t voting.

CHAPMAN, Respondent, v. DELAWARE, L. W. R. CO., Appellant. (Supreme Court, Apllate Division, Fourth Department. May 2, 06.) Action by Olive Chapman against the elaware, Lackawanna & Western Railroad ompany. No opinion. Judgment and order firmed, with costs.

CHEEVER, Respondent, v. NEW YORK RANSP. CO., Appellant. (Supreme Court, ppellate Division, Second Department. April 0, 1906.) Action by Hattie Cheever against e New York Transportation Company. No pinion. Judgment and order unanimously afrmed, with costs.

CHRISTIE, Appellant, v. MILLER et al., espondents. (Supreme Court, Appellate Dision, First Department. March 9, 1906.) Acion by David Christie against Henry F. Miller nd another. P. Mitchell, for appellant. D. B. gden, for respondents. No opinion. Judgent affirmed, with costs. Order filed.

In re CITIZENS' TRUST CO. OF BROOKYN. (Supreme Court, Appellate Division, econd Department. April 20, 1906.) In the atter of the application of the Citizens' Trust ompany of Brooklyn to be designated as a deositary for court funds. No opinion. Report f the referee confirmed, prayer of the petioner granted, and order signed.

In re CITY COLLEGE SITE. In re BERNHARDT. (Supreme Court, Appellate Divi-ion, First Department. April 6, 1906.) In he matter of the City College site. In the matter of Bernhardt. T. Connoly, for City College ite. J. S. Frank, for Bernhardt. No opinion. Order affirmed, with $10 costs and disbursenents. Order filed.

In re CITY COLLEGE SITE. In re PINKNEY. (Supreme Court, Appellate Division, First Department. April 6, 1906.) In the matter of the City College site. In the matter of Pinkney. T. Connoly, for City College site. J. S. Frank, for Pinkney. No opinion. Order affirmed, with $10 costs and disbursements. Order filed.

CLARK, Respondent, v. GENERAL CHEMICAL CO., Appellant. (Supreme Court, Appellate Division, Second Department. March 9, 1906.) Action by Oliver H. Clark against the General Chemical Company. No opinion. Judgment and order unanimously affirmed, with costs.

CLARK, Respondent, v. LYNCH et al., Appellants. (Supreme Court, Appellate Division, Fourth Department. May 2, 1906.) Action by Charles E. Clark against Michael Lynch and another. No opinion. Motion for reargument denied, with $10 costs and disbursements.

COATSWORTH, Appellant, v. LEHIGH VALLEY R. CO. et al., Respondents. (two cases.) (Supreme Court, Appellate Division, Fourth Department. March 7, 1906.) Action by Reuben H. Coatsworth against the Lehigh Valley Railroad Company, and another. No opinion. The four justices qualified to sit in the hearing and determination of the appeals in the above cases being equally divided, the said appeals are ordered transferred to the Third Judicial Department for hearing and determination, pursuant to the provision of section 231 of the Code of Civil Procedure.

COHEN, Appellant, v. BEHR et al, Respondents. (Supreme Court, Appellate Division, Second Department. April 27, 1906.) Action by Max Cohen against Rebecca Behr and Samuel B. Behr. No opinion. Judgment affirmed, with costs.

COLEMAN et al., Appellants, v. NEW YORK CENT. & H. R. R. CO., Respondent. (Supreme Court, Appellate Division, Fourth Department. March 14, 1906.) Action by Eugene J. Coleman and another against the New York Central & Hudson River Railroad Company.

PER CURIAM. Judgment and order affirmed, with costs, on opinion of McLennan, P. J., in same case, reported 98 App. Div. 349, 90 N. Y. Supp. 264.

SPRING, J., dissents. Kruse, J., not sitting.

CONLON, Respondent, v. CITY OF NEW YORK, Appellant. (Supreme Court, Appellate Division, First Department. April 6, 1906.) Action by Francis Conlon against the city of New York. T. Connoly, for appellant. C. M. Beattie, for respondent.

PER CURIAM. Judgment and order affirmed with costs. Order filed.

INGRAHAM, J., dissents.

CONNELL, Respondent, v. CONNELL, Appellant. (Supreme Court, Appellate Division, Second Department. April 20, 1906.) Action by Mary E. Connell against William F. Connell. No opinion. Order affirmed, with $10 costs and disbursements.

CONROY, Appellant, v. ACKEN et al., Respondents. (Supreme Court, Appellate Division, Second Department. April 20, 1906.) Action by Bridget Conroy, as administratrix, etc., of Michael Conroy, deceased, against Samuel I. Acken and others. No opinion. Motion to amend order granted.

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CORBALLY, Respondent, v. ERIE R. CO., Appellant. (Supreme Court, Appellate Division, Second Department. April 20, 1906.) Action by James W. Corbally against the Erie Railroad Company. No opinion. Judgment modified, by deducting the amount of the extra allowance, for want of power in the trial court to grant the same, and judgment, as modified, and order, unanimously affirmed, without costs.

CORNWALL, Respondent, v. NEW YORK CENT. & H. R. R. CO., Appellant. (Supreme Court, Appellate Division, Fourth Department. May 2, 1906.) Action by Anna V. Cornwall against the New York Central & Hudson River Railroad Company.

PER CURIAM. Order affirmed, with costs.

WILLIAMS, J., dissents.

DASSAU, Respondent, v. NEW YORK ICE CO., Appellant. (Supreme Court, Appellate Division, First Department. March 9, 1906.) Action by John Dassau against the New York Ice Company. J. W. Hawes, for appellant. J. A. Douglas, for respondent. No opinion. Judgment and order reversed, new trial ordered, costs to appellant to abide event, unless plaintiff stipulates to reduce judgment as entered, including costs, etc., to $4,177.20, in which event judgment, as so modified, and order, affirmed, without costs. Settle order on notice.

DE AGRAMONTE, Respondent, v. CITY OF MT. VERNON, Appellant. (Supreme Court, Appellate Division, Second Department. April 20, 1906.) Action by Louisa De Agramonte against the city of Mt. Vernon. No opinion. Appeal dismissed, without costs.

DE BARBIERI, Respondent, v. SOCIETA ITALIANA GIUSEPPE MAZZINI DI MUTUO SOCCORSO, Appellant. (Supreme Court, Appellate Division, First Department. April 6, 1906.) Action by Maria De Barbieri, as administratrix, against the Societa Italiana Giuseppe Mazzini di Mutuo Soccorso. S. L. Samuels, for appellant. J. J. Freschi, for respondent. No opinion. Judgment and order reversed, and new trial ordered, with costs to appellant to abide event, unless plaintiff stipulates to reduce judgment as entered, including costs, to $499.02, in which event judgment, as modified, and order, affirmed, without costs. Settle order on notice.

DEMMERLE, Appellant, v. CITY OF NEW YORK et al., Respondents. (Supreme Court, Appellate Division, First Department. April 6, 1906.) Action by Charles C. Demmerle against the city of New York and others. L. L. Kellogg, for appellant. G. L. Sterling, for respondents. No opinion. Order affirmed, with $10 costs and disbursements. Order filed.

DENIKE v. DENIKE. (Supreme Court, Appellate Division, Second Department. April 20, 1906.) In the matter of supplementary proceedings by Abraham Denike, judgment creditor, against Charles W. Denike, judgment debtor. No opinion. Motion denied, without costs.

DIAB, Appellant, v. LUFTY et al., Respondents. (Supreme Court, Appellate Division, First Department. May 11, 1906.) Action by N jeeb M. Diab against Anton A. Lufty and o ers. J. W. Osborne, for appellant. H. Kringle, for respondents. No opinion. Ord affirmed, with $10 costs and disbursemen Order filed.

DIEHL, Appellant, v. CITY OF NEW YORI Respondent. (Supreme Court, Appellate Di sion, First Department. April 6, 1906.) A tion by George Diehl, Jr., against the city New York. T. F. Wentworth, for appella T. Connoly, for respondent.

PER CURIAM. Order affirmed, with co and disbursements. Order filed.

O'BRIEN, P. J., and CLARKE, J., dissent.

DOERSCH, Respondent, v. CENTRAL PA PER BOX CO., Appellant. (Supreme Cou Appellate Division, Second Department. Ap 20, 1906.) Action by Conrad Doersch agai the Central Paper Box Company. No opinio Judgment affirmed, with costs.

DONNELLY, Appellant, v. HELLMAN, R spondent. (Supreme Court, Appellate Divisio Second Department. April 27, 1906.) Actio by John H. Donnelly against Myer Hellman.

PER CURIAM. We decline to consider th appeal for the reasons, first, it does not conta all the evidence given upon the trial, as requir by section 317 of the Municipal Court A (Laws 1902, p. 1580, c. 580); second, no ca has been settled, as required by section 31 third, the return does not have indorsed there the allowance of the justice before whom th action was tried, as required by sections 317 a 318. Appeal dismissed, with costs.

HOOKER, J., concurs in result.

In re DONOHUE'S WILL. (Supreme Cour Appellate Division, Second Department. Apr 20, 1906.) In the matter of the probate of th last will and testament of George W. Donoh deceased. No opinion. Judgment affirmed, wit costs.

DOOHER, Respondent, v. BARRY, Ap pellant. (Supreme Court, Appellate Divisio Second Department. April 27, 1906.) Action Anthony J. Dooher against John T. Barry. N opinion. Judgment of the Municipal Court a firmed, with costs.

In re DOREMUS. (Supreme Court, Appe late Division, First Department. April 2 1906.) In the matter of David I. Doremus. N opinion. Motion denied on payment of $1 costs. Leave given to apply to the court belo to open default. Order filed.

DORF et al., Appellants, v. HENRY MILES & SONS, Respondent. (Supreme Court, Ap pellate Division, Second Department. April 2 1906.) Action by Max Dorf and David Bar against Henry Miles & Sons. No opinion. Judgment affirmed, with costs.

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OWNEY, Appellant, v. HODGINS et al., pondents. (Supreme Court, Appellate Divi-, First Department. March 9, 1906.) Ac- by Patrick H. Downey against William H. igins and another. D. L. Weil, for appel- T. Farley, for respondents. No opinion. ler affirmed, with $10 costs and disburse- ats. Order filed.

OYLE, Appellant, v. DELANEY, Respon- t. (Supreme Court, Appellate Division, st Department. March 9, 1906.) Action by mas S. Doyle against Joseph M. Delaney. L. Cutting, for appellant. W. J. Barr, for onent. No opinion. Order affirmed, with costs and disbursements.

UFFY, Appellant, v. TODD et al., Respon- ts. (Supreme Court, Appellate Division, rd Department. May 2, 1906.) Action by ajamin J. Duffy against Caroline E. Todd and ers. No opinion. Judgment and order unani- asly affirmed, with costs.

UTCHESS COUNTY, Appellant, v. STATE, spondent. (Supreme Court, Appellate Divi- n, Third Department. March 7, 1906.) Ac- n by Dutchess county against the state of w York. No opinion. Judgment unanimously rmed, with costs to the respondent.

BLING BREWING CO., Respondent, v. W YORK CITY INTERBOROUGH R. CO., pellant. (Supreme Court, Appellate Divi- n, First Department. April 6, 1906.) Action the Ebling Brewing Company against the w York City Interborough Railroad Company. W. Wickersham, for appellant. H. Nathan, respondent. No opinion. Order affirmed, h $10 costs and disbursements. Order filed.

ISIG, Respondent, v. SMITH, Appellant. upreme Court, Appellate Division, Second De- tment. April 20, 1906.) Action by Monash sig against John or Isaac Smith. No opinion. dgment of the Municipal Court affirmed, with ts.

NEQUIST, Respondent, v. CITY OF NEW RK, Appellant. (Supreme Court, Appel- e Division, Second Department. April 20, 06.) Action by John Enequist against the y of New York. No opinion. Judgment of Municipal Court affirmed, with costs.

NEQUIST, v. READ HOLLIDAY & SONS, mited, et al. (Supreme Court, Appellate Di- ion, Second Department. April 20, 1906.) tion by Erik Enequist against Read Holliday Sons, Limited, and others; Read Holliday, as istee, etc. No opinion. Order affirmed, with 0 costs and disbursements.

NGELBERG, Respondent, v. CAVANAGH ROS. & CO., Appellants. (Supreme Court, pellate Term. April 24, 1906.) Appeal from unicipal Court, Borough of Manhattan, Fifth strict. Action by Kopel Engelberg against vanagh Bros. & Co. From a judgment for intiff, defendants appeal. Affirmed. Steiner & Peterson, for appellants. Abraham H. Solotaroff, for respondent.

SCOTT, P. J. There was nothing in this case except a question of fact, and I see no reason for disturbing the verdict of the jury. In my opinion the judgment should be affirmed, with costs.

BISCHOFF, J., concurs.

TRUAX, J. (dissenting). The plaintiff contracted to make for the defendant a quantity of belts out of the "best white oak tanned strap leather, government standard, weighing not less than six ounces to the square foot." The said belts were to be of "dark russet and equal in quality to that shown in the standard sample." There is no evidence in the case that the leather was "government standard," and the evidence in the case shows that the belts were made out of leather weighing less than six ounces to the square foot, and that they were not of dark russet color but were light russet. The plaintiff, not having kept his contract, cannot recover under it. Judgment appealed from should be reversed, and a new trial ordered, with costs to the appellant to abide the event.

In re ENNIS et al. (Supreme Court, Appellate Division, Second Department. April 20, 1906.) In the matter of the application of Thomas A. Ennis and Charles F. Stoppani to vacate an order for the examination of John J. Roach. No opinion. This appeal may be withdrawn on payment of $10 costs and disbursements.

FANNING, Respondent, v. VARICK CONTRACTING CO., Appellant. (Supreme Court, Appellate Division, First Department. March 9, 1906.) Action by Thomas J. Fanning against the Varick Contracting Company. E. Russell, for appellant. M. J. Farley, for respondent. No opinion. Judgment affirmed, with costs. Order filed.

FARRELL, Respondent, v. GASKILL, Appellant. (Supreme Court, Appellate Division, First Department. May 11, 1906.) Action by Thomas F. Farrell against Georgie E. Gaskill. R. L. Cutting, for appellant. P. Davis, for respondent. No opinion. Order affirmed, with $10 costs and disbursements. Order filed.

In re FAY. (Supreme Court, Appellate Division, Fourth Department. May 2, 1906.) In the matter of Edward Leo Fay, an attorney. No opinion. Upon reading and filing certified copy of the record of conviction of said Edward Leo Fay of a felony, he is disbarred and removed from his office of attorney and counselor at law, and his name ordered stricken from the roll of attorneys and counselors.

FELDMAN, Respondent, v. GOLDBERG, Appellant. (Supreme Court, Appellate Division, Second Department. April 20, 1906.) Action by Samuel Feldman against Schalam Goldberg. No opinion. Judgment and order of the County Court of Kings county affirmed, with costs.

FELTENSTEIN, Appellant, v. ERNST et al., Respondents. (Supreme Court, Appellate Division, First Department. May 11, 1906.) Action by Sidonia Feltenstein against Moritz

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L. Ernst and another. M. Feltenstein, for appellant. E. Goldmark, for respondents.

PER CURIAM. Determination affirmed, and judgment absolute directed in favor of defendant, with costs. Order filed.

O'BRIEN, P. J., dissents.

FERM, Appellant, v. NEW YORK, O. & W. RY. CO., Respondent. (Supreme Court, Appellate Division, Second Department. April 20, 1906.) Action by Anna C. Ferm against the New York, Ontario & Western Railway Company. No opinion. The defendant's motion to change the place of trial for the convenience of witnesses should have been denied for laches, because of the unexplained delay of 13 months after joinder of issue. Order reversed, with $10 costs and disbursements, and motion denied, with costs.

FIRESTONE, Respondent, v. REALTY ASSOCIATES, Appellant. (Supreme Court, Appellate Division, Second Department. April 20, 1906.) Action by Nachman Firestone against the Realty Associates. No opinion. Judgment and order unanimously affirmed, with costs.

FIRST NAT. BANK OF BINGHAMTON, Respondent, v. SUGERMAN, Appellant. (Supreme Court, Appellate Division, Third Department. May. 2, 1906.) Action by the First National Bank of Binghamton against Philip Sugerman.

PER CURIAM. Judgment affirmed, with costs.

KELLOGG, J., dissents. PARKER, P. J., not voting.

FIRST NAT. BANK OF OSSINING. Respondent, v. HOAG, Appellant, et al. (Supreme Court, Appellate Division, Second Department. April 20, 1906.) Action by the First National Bank of Ossining, formerly the First National Bank of Sing Sing, against John Hoag, impleaded, etc. No opinion. Judgment affirmed, with costs.

FITZPATRICK, Respondent, v. OLDNER et al., Appellants. (Supreme Court, Appellate Division, Second Department. April 20, 1906.) Action by Rose L. Fitzpatrick against John G. Oldner and Mollie Oldner. No opinion. Judgment of the Municipal Court affirmed, with costs.

FLASH, Respondent, v. EARLY, Appellant (two cases). (Supreme Court, Appellate Division, Second Department. April 20, 1906.) Actions by Oscar S. Flash against Joseph N. Early. No opinion. Judgments of the Municipal Court unanimously affirmed, with costs.

FOLEY, Appellant, v. SMITH, Respondent. (Supreme Court, Appellate Division, First Department. April 6, 1906.) Action by John C. Foley against Thomas F. Smith, as clerk, etc. M. D. Steuer, for appellant. T. Connoly, for respondent. No opinion. Order affirmed, with $50 costs and disbursements. Order filed.

TORGESEN, Appellant, v. SCHULTZ, Respondent. (Supreme Court, Appellate Division, First Department. April 6, 1906.) Action by Dene Torgesen against Carl H. Schultz. H. W. Taft, for appellant. C. C. Nadal, for respondent. No opinion. Judgment affirmed, with costs. Order filed.

FOX et al., v. NEW YORK CITY INTERBORO R. CO. (Supreme Court, Appellate Division, First Department. April 25, 1906.) Action by Frederick P. Fox and another against the New York City Interboro Railroad Company. No opinion. Motion granted. Questions to be certified on settlement of order. Settle order on notice. See 98 N. Y. Supp. 338.

FRANKLIN et al., Respondents, v. LEITER, Appellant, et al. (Supreme Court, Appellate Division, First Department. March 9, 1906.) Action by B. Franklin and another against Joseph Leiter, impleaded, etc. A. M. Beard, for appellant. E. L. Mooney, for respondents. No opinion. Order affirmed, with $10 costs and disbursements. Order filed.

FREER, Appellant, v. STATE, Respondent. (Supreme Court, Appellate Division, Third Department. May 2, 1906.) Action by William B. Freer against the state of New York. No opinion. Order unanimously affirmed, without costs.

FREER, Appellant, v. STATE, Respondent. (Supreme Court, Appellate Division, Third Department. May 2, 1906.) Action by William B. Freer against the state of New York. No opinion. Judgment unanimously affirmed, with costs.

FRIEDMAN, Appellant, v. CITY OF NEW YORK, Respondent. (Supreme Court, Appellate Division, First Department. April 6, 1906.) Action by Benjamin Friedman against the city of New York. T. McIlvaine, for appellant. T. Connoly, for respondent. No opinion. Judgment affirmed, with costs. Order filed.

GARRETT, Respondent, v. COCKERILL, Appellant. (Supreme Court, Appellate Division, First Department. May 11, 1906.) Action by Michael Garrett against John F. Cockerill. F. B. Campbell, for appellant. R. G. Heyn, for respondent. No opinion. Order affirmed, with $10 costs and disbursements. Order filed.

GAUSE, Appellant, v. COMMONWEALTH TRUST CO., Respondent. (Supreme Court, Appellate Division, First Department. March 9, 1906.) Action by Harry T. Gause against the Commonwealth Trust Company. H. Taylor, for appellant. C. E. Souther, for respondent. No opinion. Orders affirmed, with $10 costs and disbursements. Order filed. See 97 N. Y. Supp. 1091.

GAUSE v. COMMONWEALTH TRUST CO. (Supreme Court, Appellate Division, First De-

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:tment. April 6, 1906.) Action by Harry T. use against the Commonwealth Trust Compa- No opinion. Application denied, with $10 :ts. Order filed.

ENEVA MINERAL SPRINGS CO., Limit- v. STEELE et al. (Supreme Court, Appel- e Division, Fourth Department. March 7, 06.) Action by the Geneva Mineral Springs mpany, Limited, against Charles A. Steele d others. No opinion. Order affirmed, with- t costs. See 97 N. Y. Supp. 996.

EO. A. OHL & CO. Appellant, v. BROOK- N HEIGHTS R. CO., Respondent. (Su- me Court, Appellate Division, Second De- rtment. May 9, 1906.) Appeal from Munic- il Court, Borough of Brooklyn, First Dis- ct. Action by the George A. Ohl & Co. ainst the Brooklyn Heights Railroad Compa- . From a judgment dismissing the complaint, intiff appeals. Reversed, and new trial or- red. Raphael Link, for appellant. H. F. es, for respondent.

WOODWARD, J. The plaintiff was non- ited in an action to recover damages to per- nal property due to defendant's negligence, the ground that the evidence failed to show edom from contributory negligence. I think e evidence showed that the plaintiff's driver ercised some degree of care under the cir- mstances of the case and that he was en- led to go to the jury. The judgment should reversed, and a new trial ordered, costs to ide the event.

GILLIAM v. DYETT et al. (Supreme Court, ppellate Division, First Department. April 6, 06.) Action by Anna T. Gilliam against mes S. Dyett and others. No opinion. Mo- on granted. Order filed.

GLANCKOFF, Respondent, v. SCHULTZ, ppellant. (Supreme Court, Appellate Division, irst Department. April 6, 1906.) Action by scar Glanckoff against Carl R. Schultz. T. ansen, for appellant. E. J. Myers, for re- ondent. No opinion. Judgment and order af- med, with costs. Order filed.

GLEASON, Respondent, v. MAYHEW, Ap- llant. (Supreme Court, Appellate Division, ourth Department. March 7, 1906.) Action Henry N. Gleason against William Mayhew. o opinion. Judgment affirmed, with costs.

GRIFFIN, Appellant, v. NEW YORK CITY Y. CO., Respondent. (Supreme Court, Ap- llate Division, First Department. March 9, 06.) Action by Henry P. Griffin against the ew York City Railway Company. J. D. Lan- on, for appellant. B. H. Ames, for respondent. o opinion. Judgment and order affirmed, with sts. Order filed.

GRUEN, Appellant, v. TRUSTEES OF EABODY EDUCATION FUND, Respondent. Supreme Court, Appellate Division, First De- artment. May 11, 1906.) Action by Frank . Gruen against the trustees of Peabody Edu- cation Fund. G. W. Carr, for appellant. S. Evarts, for respondent. No opinion. Order and judgment affirmed, with costs. Order filed.

GUTHEIL, Respondent, v. CITY OF NEW YORK, Appellant. (Supreme Court, Appellate Division, Second Department. April 20, 1906.) Action by John J. Gutheil against the city of New York. No opinion. Motion to dismiss appeal granted, with $10 costs.

GUTKES, Appellant, v. MORRIS et al., Respondents. (Supreme Court, Appellate Division, Second Department. April 27, 1906.) Action by August H. Gutkes against Nelson Morris and others. No opinion. Interlocutory judgment affirmed, with costs, upon the opinion of Mr. Justice Gaynor at Special Term. 93 N. Y. Supp. 254.

GUTKES, Appellant, v. NEW YORK PRODUCE EXCH., Respondent, et al. (Supreme Court, Appellate Division, Second Department. April 20, 1906.) Action by August H. Gutkes against the New York Produce Exchange, impleaded, etc. No opinion. Interlocutory judgment affirmed, with costs. See 93 N. Y. Supp. 254.

HAIGH v. WHITLOCK. (Supreme Court, Appellate Division, First Department. April 25, 1906.) Action by Joseph L. Haigh against Benjamin M. Whitlock. No opinion. Appeal dismissed, with $10 costs. Order filed.

HALLORAN, Respondent, v. STRAUS et al., Appellants. (Supreme Court, Appellate Division, First Department. March 9, 1906.) Action by Mary A. Halloran against Isidor Straus and another. E. E. Wise, for appellants. A. Stickney, Jr., for respondent.

PER CURIAM. Judgment and order affirmed, with costs.

INGRAHAM, J., dissents.

HANDIBODE, Respondent, v. BURKE et al., Appellants. (Supreme Court, Appellate Division, First Department. April 6, 1906.) Action by Peter Handibode, Jr., against Luke A. Burke and others. W. F. Kimber, for appellants. L. L. Kellogg, for respondent. No opinion. Judgment affirmed, with costs. Order filed.

HARRISON, Respondent, v. JACOBS, Appellant. (Supreme Court, Appellate Division, Fourth Department. March 14, 1906.) Action by Myron E. Harrison against Bertram D. Jacobs.

PER CURIAM. Judgment affirmed, with costs.

McLENNAN, P. J., not voting.

HAWES, Respondent, v. CORPORATION LIQUIDATING CO., Appellant. (Supreme Court, Appellate Division, First Department. May 11, 1906.) Action by Gilbert R. Hawes against the Corporation Liquidating Company. L. Frankel, for appellant. G. R. Hawes, for

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respondent. No opinion. Judgment and order affirmed, with costs. Order filed.

In re HAWLEY et al. (Supreme Court, Appellate Division, Fourth Department. March 7, 1906.) In the matter of judicial settlement of the accounts of Nora C. Hawley and another, as, etc., of William S. Hawley, deceased. No opinion. Decision and remittitur amended, so as to allow a full bill of costs to the adult respondents and $50 costs and disbursements to the special guardian, against the appellant personally.

HETTRICK, Respondent, v. SELNER, Appellant. (Supreme Court, Appellate Division, Second Department. April 20, 1906.) Action by William J. Hettrick, Jr., by his guardian ad litem, against Jacob Selner. No opinion. Judgment of the Municipal Court affirmed, with costs.

HIGGINS, Respondent, v. WENTWORTH, Appellant. (Supreme Court, Appellate Division, Second Department. April 27, 1906.) Action by William H. Higgins against Reginald De Merritt Wentworth.

PER CURIAM. Order affirmed, with $10 costs and disbursements.

JENKS, J., not voting.

HILDRETH v. CITY OF NEW YORK. (Supreme Court, Appellate Division, First Department. April 6, 1906.) Action by Percy S. Hildreth against the city of New York. No opinion. Motion granted. Order filed.

In re HIRSCH. (Supreme Court, Appellate Division, First Department. April 6, 1906.) In the matter of Ferdinand Hirsch. No opinion. Motion granted, as stated in memorandum per curiam. Settle order on notice.

HOFFMAN HOUSE, NEW YORK, Respondent, v. MANHATTAN STORAGE & WAREHOUSE CO. et al., Appellants. (Supreme Court, Appellate Division, First Department. March 9, 1906.) Action by the Hoffman House, New York, against the Manhattan Storage & Warehouse Company and Rose L. Barkley. J. J. Kirby, for appellants. A. A. Wray, for respondent. No opinion. Judgment affirmed, with costs. Order filed.

HOLSAPPLE, Appellant, v. AMERICAN HIDE & LEATHER CO. Respondent. (Supreme Court, Appellate Division, Third Department. May 2, 1906.) Action by Ida M. Holsapple, as administratrix, etc., against the American Hide & Leather Company. No opinion. Judgment unanimously affirmed, with costs.

HOLSGROVE, Respondent, v. INTERURBAN ST. R. CO., Appellant. (Supreme Court, Appellate Division, First Department. April 6, 1906.) Action by Jeremiah Holsgrove against the Interurban Street Railroad Company. B. H. Ames, for appellant. H. A. Powell, for respondent.

PER CURIAM. Judgment and order affirmed, with costs. Order filed.

INGRAHAM, J., dissents.

HORN, et al., Respondents, v. THOMAS R. LEVIS & CO., Appellants. (Supreme Court, Appellate Division, Fourth Department. May 2, 1906.) Action by James T. Horn and another against Thomas R. Levis & Co. No opinion. Judgment and order affirmed, with costs.

HORN, Appellant, v. WORDEN et al., Respondents. (Supreme Court, Appellate Division, Third Department. May 2, 1906.) Action by Charles F. W. Horn against Henry Worden, William S. Worden, and Edwin J. Worden.

PER CURIAM. Judgment and order unanimously affirmed, with costs.

KELLOGG, J., not sitting.

HORRMANN et al. v. FURGUESON et al. (Supreme Court, Appellate Division, Second Department. April 20, 1906.) Action by William Horrmann and William K. Leicht, as surviving trustees, etc., against Cornelius Furgueson, Jr., etc., and others. No opinion. Order, so far as appealed from, affirmed, with costs.

HOUSE et al., Appellants, v. CITY OF ONEIDA et al., Respondents. (Supreme Court, Appellate Division, Third Department. May 2, 1906.) Action by Charles House and others against the city of Oneida and others.

PER CURIAM. Judgment affirmed, with costs.

PARKER, P. J., not voting.

HUGHES v. HAVENS et al. (Supreme Court, Appellate Division, Fourth Department. March 14, 1906.) Action by Evan Hughes against Herbert E. Havens and another.

PER CURIAM. Plaintiff's exception overruled, motion for new trial denied, and judgment ordered for the defendants, with costs.

McLENNAN, P. J., not voting.

In re HULL. (Supreme Court, Appellate Division, Third Department. March 7, 1906.) In the matter of the final accounting of James Hull, as executor of the last will of Mary E. Hull, deceased. No opinion. Decree unanimously affirmed, with costs to the contestant to be paid out of the estate. See 89 N. Y. Supp. 939.

HULL, Respondent, v. NEW YORK CENT. & H. R. R. Co., Appellant. (Supreme Court, Appellate Division, Fourth Department. May 2, 1906.) Action by S. Augusta Hull against the New York Central & Hudson River Railroad Company.

PER CURIAM. Judgment and order affirmed, with costs.

McLENNAN, P. J., and NASH, J., dissent, and vote for reversal on the ground that the

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stimony of the defendant's witnesses that the comotive was subjected to frequent and orough inspection by competent inspectors is ıcontradicted and that there should have been dismissal of the complaint upon this ground. nith v. N. Y. C. & H. R. R. Company, 164 N. 491, 58 N. E. 655; Biddiscomb v. Cameron, App. Div. 561, 55 N. Y. Supp. 127, affirmed 1 N. Y. 637, 57 N. E. 1104.

HUNN, Appellant, v. WILMARTH et al., espondents. (Supreme Court, Appellate Dision, Second Department. April 20, 1906.) ction by Walter S. Hunn against Clarence M. 'ilmarth and others. No opinion. Motion for ave to appeal to the Court of Appeals denied.

HUTCHINSON, Respondent, v. STERN, Apllant. (Supreme Court, Appellate Division, ourth Department. May 2, 1906.) Action by erbert Hutchinson against Sigmund Stern. o opinion. Interlocutory judgment affirmed, ith costs, with leave to plead over upon payent of the costs of the demurrer and of this ppeal.

INDRIZZO, Respondent, v. NEW YORK ITY RY. CO., Appellant. (Supreme Court, ppellate Division, Second Department. March 1906.) Action by Vito Indrizzo against the ew York City Railway Company. No opinion. udgment of the Municipal Court affirmed, with osts.

ISAACS, Respondent, v. WANAMAKER, ppellant. (Supreme Court, Appellate Divion, Fourth Department. May 2, 1906.) Acon by David Isaacs against John Wanamaker. PER CURIAM. Judgment affirmed, with osts.

WILLIAM and NASH, JJ., dissent.

JAMESON, Respondent, v. KLAVOON, Apellant. (Supreme Court, Appellate Division, ourth Department. May 2, 1906.) Action by eorge A. Jameson against John Klavoon. PER CURIAM. Judgment of Municipal ourt reversed, with costs. *Held*, that the Muicipal Court acquired no jurisdiction of the dendant.

WILLIAMS, J., not voting.

JANIN, Respondent, v. JACOBSON, Apellant. (Supreme Court, Appellate Division, econd Department. April 27, 1906.) Action y Charles A. Janin against Nathan Jacobson. o opinion. Judgment of the Municipal Court eversed, and new trial ordered, costs to abide ie event, on the grounds that the plaintiff acted the interest of the purchaser, instead of in ie sole interest of the defendant, and that the urchaser never made a written agreement of urchase, but refused to do so on the terms proosed by the defendant.

J. J. SPURR & SONS, Inc., Respondent, v. MPIRE STATE SURETY CO., Appellant, t al. (Supreme Court, Appellate Division, Secnd Department. April 20, 1906.) Action by . J. Spurr & Sons, incorporated, against the Empire State Surety Company, impleaded, etc. No opinion. Motion granted.

JOHNSON, Respondent, v. EMPIRE STATE DAIRY CO., Appellant. (Supreme Court, Appellate Division, Second Department. April 20, 1906.) Action by John Johnson, against the Empire State Dairy Company.

PER CURIAM. Order affirmed, with costs.

MILLER, J., dissents.

JUDSON, Respondent, v. RICHARDS, Appellant, et al. (Supreme Court, Appellate Division, First Department. April 6, 1906.) Action by Isabella F. Judson against J. Tredwell Richards, impleaded, etc. J. T. Richards, for appellant. F. H. Mills, for respondent. No opinion. Order affirmed, with $10 costs and disbursements. Order filed.

KATZENSTEIN v. JONASSON et al. (Supreme Court, Appellate Division, First Department. April 25, 1906.) Action by Charles Katzenstein against Joseph Jonasson and another. No opinion. Application denied, with $10 costs. Order signed.

KEARNEY, Appellant, v. NEW YORK CITY RY. CO., Respondent. (Supreme Court, Appellate Division, First Department. May 11, 1906.) Action by Nellie Kearney against the New York City Railway Company. J. A. Douglas, for appellant. A. J. Ernest, for respondent. No opinion. Order affirmed, with $10 costs and disbursements. Order filed.

KELLOGG, Appellant, v. KOVAR, Respondent. (Supreme Court, Appellate Division, First Department. April 6, 1906.) Action by Luther L. Kellogg against Harry L. Kovar. L. L. Kellogg, for appellant. E. A. Jones, for respondent. No opinion. Judgment and order affirmed, with costs. Order filed.

KELLOGG, Appellant, v. KOVAR, Respondent. (Supreme Court, Appellate Division, First Department. April 6, 1906.) Action by Macintosh Kellogg against Harry L. Kovar. L. L. Kellogg, for appellant. E. A. Jones, for respondent. No opinion. Judgment and order affirmed, with costs. Order filed.

In re KENNEDY'S ESTATE. (Supreme Court, Appellate Division, Fourth Department. March 14, 1906.) In the matter of the estate of James Kennedy, deceased.

PER CURIAM. Order affirmed, with $10 costs and disbursements.

McLENNAN, P. J., not voting.

In re KIERNAN. (Supreme Court, Appellate Division, First Department. March 9, 1906.) In the matter of John Kiernan. No opinion. Order affirmed, with $10 costs and disbursements. Order filed.

KING, Respondent, v. NEW YORK CENT. & H. R. R. CO., Appellant. (Supreme Court, Appellate Division, Third Department. March



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7, 1906.) Action by Sydney King against the New York Central & Hudson River Railroad Company. No opinion. Judgment and order unanimously affirmed, with costs.

KISSINGER v. LIVINGSTONE. (Supreme Court, Appellate Division, First Department. April 6, 1906.) Action by Jacob Kissinger against William Livingstone. No opinion. Motion denied. Order filed.

KLARMANN, Respondent, v. GRAUER, Appellant. (Supreme Court, Appellate Division, Second Department. April 20, 1906.) Action by Frank Peter Klarmann against J. George Grauer. No opinion. Judgment and order unanimously affirmed, with costs.

KLEIN, Respondent, v. GARVEY, Appellant. (Supreme Court, Appellate Division, First Department. April 6, 1906.) Action by Jacob Klein against Martin T. Garvey. C. S. Petrasch, for appellant. J. H. Cohn, for respondent.

PER CURIAM. Judgment and order affirmed, with costs. Order filed.

McLAUGHLIN and HOUGHTON, JJ., dissent.

KLEIN et al., Respondents, v. MORRISEY, Appellant. (Supreme Court, Appellate Division, Second Department. April 20, 1906.) Action by Valentine Klein and Frances Klein against Richard Morrisey. No opinion. Judgment of the Municipal Court affirmed, with costs.

KLETZEIN, Respondent, v. KLETZEIN et al., Appellants. (Supreme Court, Appellate Division, Second Department. April 20, 1906.) Action by Ernest W. Kletzein against Emma Kletzein and others. No opinion. Judgment reversed, and new trial granted, costs to abide the final award of costs, on the ground that the findings of the court are not supported by the evidence.

KNECHT, Respondent, v. NEW YORK CITY RY. CO., Appellant. (Supreme Court, Appellate Term. April 24, 1906.) Appeal from Municipal Court, Borough of Manhattan, Third District. Action by George Knecht against the New York City Railway Company. From judgment in favor of plaintiff, defendant appeals. Reversed, and new trial ordered. William E. Weaver, for appellant. Edward D. Loughman, for respondent.

PER CURIAM. The defendant concedes its liability, but questions the amount awarded as damages. Plaintiff's injuries were very slight, and the damages seem to be unreasonably large. There is reason to believe that the jury may have been influenced by the persistent efforts to bring to their attention the unfortunate results suffered by other persons by reason of the same accident. The judgment must be reversed, and a new trial granted, with costs to appellant to abide the event, unless plaintiff stipulates to reduce the judgment to $200.50, in which case the judgment, as modified, will be affirmed, without costs to either party.

KOSOWER v. SANDLER. (Supreme Court, Appellate Division, First Department. April 25, 1906.) Action by Abraham Kosower against Joseph Sandler. No opinion. Application denied, with $10 costs. Order signed.

KRANZ, Respondent, v. LEWIS, Appellant. (Supreme Court, Appellate Division, Second Department. April 27, 1906.) Action by William E. Kranz, as administrator, etc., of Henry Kranz, deceased, against Sollie Lewis. No opinion. Interlocutory judgment affirmed by default, with costs.

KUSHES v. GINSBERG. (Supreme Court, Appellate Division, First Department. April 6, 1906.) Action by Alter Kushes against Isidore Ginsberg. No opinion. Motion denied. Order filed.

LADD, Appellant, v. TITLE GUARANTEE & TRUST CO., Respondent. (Supreme Court, Appellate Division, First Department. May 11, 1906.) Action by Abraham W. Ladd against the Title Guarantee & Trust Company. F. Barker, for appellant. E. E. Sprague, for respondent. No opinion. Judgment affirmed, with costs. Order filed.

LAKE ERIE BOILER COMPOUND CO., Appellant, v. CALDWELL, Sheriff, Respondent. (Supreme Court, Appellate Division, Fourth Department. March 14, 1906.) Action by the Lake Erie Boiler Compound Company against Samuel Caldwell, as sheriff, etc. No opinion. Judgment affirmed, with costs.

LATUREN, Appellant, v. BOLTON DRUG CO., Limited, Respondent. (Supreme Court, Appellate Division, Second Department. April 20, 1906.) Action by Emma F. Laturen against the Bolton Drug Company, Limited. No opinion. Judgment and orders unanimously affirmed, with costs.

LAUGHLIN, Appellant, v. PEOPLE'S GASLIGHT & COKE CO., Respondent. (Supreme Court, Appellate Division, Fourth Department. March 7, 1906.) Action by John Laughlin against the People's Gaslight & Coke Company.

PER CURIAM. Judgment and order affirmed, with costs.

KRUSE, J., dissents.

LEVY, Appellant, v. BINGHAM et al., Respondents. (Supreme Court, Appellate Division, Second Department. April 20, 1906.) Action by Bertha Levy against Theodore A. Bingham and others.

PER CURIAM. The papers upon which the order was granted do not show that the case is one of those specified in section 983 of the Code of Civil Procedure, and so far as the record before us discloses there was nothing before the court on which to base the order

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ppealed from. The order changing the place f trial from the county of Kings to the county f New York is reversed, with $10 costs and isbursements, and the motion denied, with $10 osts.

LEVY, Appellant, v. CITY OF NEW YORK t al., Respondents. (Supreme Court, Appelate Division, Second Department. April 20, 906.) Action by Albert E. Levy against the ity of New York and another. No opinion. lotion to dismiss appeal granted, with $10 osts.

LEVY, Appellant, v. CITY OF NEW YORK : al., Respondents. (Supreme Court, Appellate ivision, Second Department. April 20, 1906.) ction by Katie Levy against the city of New ork and another. No opinion. Motion to dis- iss appeal granted, with $10 costs.

LIPSHITZ, Appellant, v. SALAWAY et al., espondents. (Supreme Court, Appellate Divi- on, Second Department. April 20, 1906.) Ac- on by Gussie Lipshitz against Samuel Salaway id others. No opinion. The court had no ower to extend the time in which to serve e notice of appeal. Order reversed, with $10 osts and disbursements, and motion denied, ith costs, on the authority of Lavalle v. kelly, 90 N. Y. 546.

LIPSCHITZ et al., Appellants, v. SCHNEI- ER, Respondent. (Supreme Court, Appellate ivision, Second Department. April 20, 1906.) ction by Harry Lipschitz and Isaac Goldman gainst David Schneider. No opinion. Judg- ent affirmed, with costs.

LOEWER v. GERMAN-AMERICAN BANK al. (Supreme Court, Appellate Division, ourth Department. March 7, 1906.) Action John A. Loewer against the German-Ameri- n Bank and others. No opinion. Judgment firmed, with separate bills of costs against e plaintiff and defendant Joseph O. Meyer favor of the respondents appearing on this peal by separate attorneys.

LOMAS, Appellant, v. NEW YORK CITY Y. CO., Respondent. (Supreme Court, Ap- llate Division, Second Department. April 20, 06.) Action by Mary Lomas against the New ork City Railway Company. No opinion. Mo- on denied.

LORDVILLE & E. BRIDGE CO., Appel- nt, v. DE LACKNER, Respondent. (Supreme ourt, Appellate Division, Third Department. ay 2, 1906.) Action by the Lordville & Equi- nk Bridge Company against Charles De Lack- r. No opinion. Order modified, so as to quire the plaintiff to state the times when, aces where, and the number of persons carried ch time it is claimed the defendant trans- rted or ferried across the Delaware river, d the times when and places where it is imed the defendant transported or ferried eight across said river, and, as thus modified, firmed, without costs.

LOVETT, Respondent, v. LOVETT, Appel lant. (Supreme Court, Appellate Division, Second Department. April 20, 1906.) Action by George E. Lovett against Grace E. Lovett. No opinion. Order affirmed, without costs.

LOWRY, Respondent, v. INTERURBAN ST. RY. CO., Appellant. (Supreme Court, Appellate Division, First Department. April 6, 1906.) Action by Mary Lowry, as administratrix, against the Interurban Street Railway Company. B. H. Ames, for appellant. Isaac Cohen, for respondent. No opinion. Judgment and order reversed, and new trial ordered, with costs to appellant to abide event, unless plaintiff stipulates to reduce judgment as entered, including costs, etc., to $5,622.17, in which event judgment, as so modified, and order, affirmed, without costs. Settle order on notice.

LOWTHER, Respondent, v. LOWTHER, Appellant. (Supreme Court, Appellate Division, First Department. March 9, 1906.) Action by Clarence L. Lowther against Christopher, M. Lowther, impleaded. W. W. Shaw, for appellant. L. E. Warren, for respondent. No opinion. Order affirmed, with $10 costs and disbursements. Order filed.

McAULEY, Appellant, v. NEW YORK & Q. C. RY. CO., Respondent. (Supreme Court, Appellate Division, Second Department. April 27, 1906.) Action by Edward McAuley against the New York & Queens County Railway Company.

PER CURIAM. Judgment affirmed, with costs.

HOOKER, J., dissents.

In re McCABE. (Supreme Court, Appellate Division, Second Department. April 20, 1906.) In the matter of the application of Edgar McCabe for admission to the bar. No opinion. Application granted and order signed.

McLAUGHLIN v. CONNORS et al. (Supreme Court, Appellate Division, Third Department. March 7, 1906.) In the matter of the complaint of John J. McLaughlin against John P. Connors and others. No opinion. Order affirmed, with $10 costs and disbursements, and new election ordered. If counsel do not agree upon form of order, same to be settled, on two days' notice, by CHESTER, J.

MacMULLEN, Respondent, v. CITY OF MIDDLETOWN, Appellant. (Supreme Court, Appellate Division, Second Department. April 20, 1906.) Action by Charles MacMullen against the city of Middletown. No opinion. Motion to amend order granted. Motion for leave to appeal to the Court of Appeals granted, and questions certified. See 98 N. Y. Supp. 145.

McNABB et al., Respondents, v. MERYASH et al., Appellants. (Supreme Court, Appellate Division, First Department. May 11, 1906.) Action by Henry McNabb and another against Rebecca Meryash and others. E. W. S. Johnston, for appellants. F. E. M. Bullowa, for

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respondents. No opinion. Judgment affirmed, with costs. Order filed.

McPHERSON, Respondent, v. GENERAL SYNOD OF THE REFORMED CHURCH IN AMERICA, Appellant. (Supreme Court, Appellate Division, Second Department. March 9, 1906.) Action by Rosie McPherson against the General Synod of the Reformed Church in America. No opinion. Order setting aside verdict and granting new trial affirmed, with costs.

MAHER et al., Respondents, v. KENNEDY et al., Appellants. (Supreme Court, Appellate Division, First Department. May 11, 1906.) Action by Patrick Maher and another against John Kennedy and others. A. B. Cruikshank, for appellants. W. F. Clare, for respondents. No opinion. Judgment affirmed, with costs. Order filed.

MALLOY, Respondent, v. CITY OF NEW YORK, Appellant. (Supreme Court, Appellate Division, First Department. April 6, 1906.) Action by William R. Malloy, by guardian against the city of New York. T. Farley, for appellant. H. A. Powell, for respondent.

PER CURIAM. Judgment and order affirmed, with costs, on the authority of Landau v. City, 180 N. Y. 48, 72 N. E. 631, 105 Am. St. Rep. 709.

HOUGHTON, J., dissents. Order filed.

MANTHAI, Appellant, v. ERIE R. CO., Respondent, et al. (Supreme Court, Appellate Division, Second Department. April 20, 1906.) Action by Emma K. Manthai, as administratrix, etc., of Herman C. Manthai, deceased, against the Erie Railroad Company, impleaded, etc. No opinion. Judgment affirmed, with costs.

MARSON, Respondent, v. CITY OF ROCHESTER, Appellant. (Supreme Court, Appellate Division, Fourth Department. March 28, 1906.) Action by William H. Marson against the city of Rochester. No opinion. Motion for leave to appeal to the Court of Appeals granted, and question certified to the court for review.

MARTIN, Respondent, v. HOROWITZ, Appellant. (Supreme Court, Appellate Term. April 24, 1906.) Appeal from Municipal Court, Borough of Manhattan, Fourth District. Action by Thomas F. Martin against David Horowitz. From a judgment for plaintiff, defendant appeals. Reversed and remanded. Bernard Ginzberg, for appellant. Feeney & Kornblue, for respondent.

PER CURIAM. Declaring upon an account stated for newspapers sold to defendant, the plaintiff proved certain dealings with one Schwartz, who, it is claimed, had transferred his business to the defendant; but there was an absolute failure of proof that any bill or bills for the amount in suit had ever been rendered to the defendant, and the only suggestion of the rendering of a statement of even the gross amount claimed to be due is contained in the testimony of the plaintiff's witness that the defendant promptly repudiated the asserted debt. There is nothing to indicate that the parties consented to the substitution of an issue arising out of a claim for goods sold and delivered; but, assuming the substitution, there was no prima facie proof of the price or value of the goods. Judgment reversed, and a new trial ordered, with costs to the appellant to abide the event.

MEEKER, Respondent, v. SMITH et al., Appellants. (Supreme Court, Appellate Division, Third Department. May 2, 1906.) Action by Sarah Thro Meeker, as administratrix, etc., of Henry W. Meeker, deceased, against Clark M. Smith and others.

PER CURIAM. Judgment and orders affirmed, with costs.

KELLOGG, J., dissents. PARKER, P. J., not voting.

MELTZER, Respondent, v. INTERURBAN ST. RY. CO., Appellant. (Supreme Court, Appellate Division, First Department. March 9, 1906.) Action by William A. Meltzer against the Interurban Street Railway Company. No opinion. Judgment and order affirmed, with costs. Order filed.

MEXICO ONYX QUARRY CO., Appellant, v. KELLEY, Respondent. (Supreme Court, Appellate Division, First Department. March 9, 1906.) Action by the Mexico Onyx Quarry Company against David J. Kelley. W. J. Dawley, for appellant. M. Stein, for respondent. No opinion. Order affirmed, with $10 costs and disbursements. Order filed.

MILLER et al., Respondents, v. CARPENTER, Appellant. (Supreme Court, Appellate Division, Second Department. April 20, 1906.) Action by Elizabeth Miller and others, as executors, etc., of Joseph O. Miller, deceased, against Reese Carpenter. No opinion. Judgment affirmed, with costs.

MINOR v. GARDEN. (Supreme Court, Appellate Division, First Department. April 25, 1906.) Action by Gilbert W. Minor against W. Morton Garden. No opinion. Motion granted, unless appellant pay $10 costs of motion and file and serve corrected record as stated in memorandum per curiam. Settle order on notice.

MOORES, Appellant, v. STATE, Respondent. (Supreme Court, Appellant Division, Third Department. May 2, 1906.) Action by Hallie Moores against the state of New York. No opinion. Judgment unanimously affirmed, with costs.

MURPHY, Respondent, v. EMSHEIMER, Appellant. (Supreme Court, Appellate Division, Second Department. April 20, 1906.) Action by Emma L. Murphy against Jacob Emsheimer. No opinion. Judgment and order unanimously affirmed, with costs.

MYERS, Appellant, v. TOWN OF GATES, Respondent. (Supreme Court, Appellate Divi-

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sion, Fourth Department. March 7, 1906.) Action by Fred Myers against the town of Gates. No opinion. Motion for reargument denied. Motion for leave to appeal to the Court of Appeals granted, for the reason that the appeal presents unusual and novel questions as to the duty of the highway commissioner in the peculiar circumstances of this case.

In re NESBITT et al. (Supreme Court, Appellate Division, First Department. March 9, 1906.) In the Matter of Frances S. A. Nesbitt and another. No opinion. Order affirmed, with $10 costs and disbursements.

In re NIAGARA, L. & O. POWER CO. (Supreme Court, Appellate Division, Fourth Department. May 2, 1906.) In the matter of the application of the Niagara, Lockport & Ontario Power Company to acquire real estate property of Ella J. Weaver. No opinion. Judgment and orders affirmed, with costs.

O'CONNELL, Respondent, v. UTICA & M. R. CO., Appellant. (Supreme Court, Appellate Division, Fourth Department. March 7, 1906.) Action by Mary O'Connell against the Utica & Mohawk Railroad Company.

PER CURIAM. Judgment and order affirmed, with costs.

WILLIAMS and NASH, JJ., vote for reduction of the verdict.

OHLAU, Appellant, v. LEMCKE, Respondent. (Supreme Court, Appellate Division, Second Department. April 20, 1906.) Action by Charles H. Ohlau against Bertha Lemcke. No opinion. Judgment of the Municipal Court unanimously affirmed, with costs.

OLCOTT et al. v. BALDWIN et al. (Supreme Court, Appellate Division, Second Department. April 20, 1906.) Action by J. Van Vechten Olcott and James W. B. Rockwell, as executors, etc., against William D. Baldwin, individually and as surviving executor, etc., and others. No opinion. Judgment modified, by reducing the sum allowed the plaintiffs and the defendant William D. Baldwin, for commissions as executors, from the sum of $2,151.32, to the sum of $2,029.96, and, as modified, affirmed, with costs to all parties payable out of the estate.

OLSEN, Appellant, v. HENDERSON, Respondent. (Supreme Court, Appellate Division, Second Department. April 20, 1906.) Action by Andrew Olsen against Mary Dawson Henderson. No opinion. Motion for reargument granted, and case set down for Monday, May 7, 1906.

OSBORN, Appellant, v. CARDEZA et al., Respondents. (Supreme Court, Appellate Division, Second Department. April 20, 1906.) Action by Ellen C. Osborn against Howard J. M. Cardeza and others. No opinion. Judgment affirmed, with costs.

O'SHAUGHNESSY, Appellant, v. CITY OF NEW YORK, Respondent. (Supreme Court, Appellate Division, First Department. April 6, 1906.) Action by James O'Shaughnessy against the city of New York. B. H. Ames, for appellant. T. Connoly, for respondent. No opinion. Judgment and order affirmed, with costs. Order filed.

OSMULSKI, Appellant, v. NEW YORK & Q. C. RY. CO., Respondent. (Supreme Court, Appellate Division, Second Department. April 20, 1906.) Action by John Osmulski against the New York & Queens County Railway Company. No opinion. Judgment and order unanimously affirmed, with costs.

OWEN, Appellant, v. WHITEHOUSE, Respondent. (Supreme Court, Appellate Division, Second Department. March 9, 1906.) Action by Percy Owen against James Whitehouse.

PER CURIAM. We think the defect complained of was an irregularity merely, amendable under section 721 et seq. of the Code of Civil Procedure; and, as it clearly appears that the defendant was not misled, the motion to vacate the attachment should have been denied. The order appealed from is reversed, with $10 costs and disbursements, and the motion denied, with costs.

JENKS, J., dissents.

In re PACE. (Supreme Court, Appellate Division, Second Department. April 20, 1906.) In the matter of the application of Charles A. S. Pace for admission to the bar. No opinion. Application granted and order signed.

PARISH, Appellant, v. ULSTER & D. R. CO., Respondent. (Supreme Court, Appellate Division, Third Department. May 2, 1906.) Action by Harriet M. Parish against the Ulster & Delaware Railroad Company. No opinion. Judgment unanimously affirmed, with costs.

PEACOCK, Respondent, v. BAILEY, Appellant. (Supreme Court, Appellate Division, Second Department. April 20, 1906.) Action by Samuel J. Peacock against Thomas Bailey. No opinion. Judgment and order affirmed, with costs.

PEOPLE, Respondent, v. COUCHOIS, Appellant. (Supreme Court, Appellate Division, First Department. April 6, 1906.) Proceeding by the people of the state of New York against Garrett J. Couchois. W. W. Cantrell, for appellant. R. S. Johnstone, for the People. No opinion. Judgment affirmed. Order filed.

PEOPLE v. DOLAN. (Supreme Court, Appellate Division, First Department. April 6, 1906.) Proceeding by the people of the state of New York against James F. Dolan. No opinion. Motion granted. Order filed.

PEOPLE, Respondent, v. ECKERT, Appellant. (Supreme Court, Appellate Division, Fourth Department. March 14, 1906.) Proceed-

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ing by the people of the state of New York against Alison G. Eckert.

PER CURIAM. Judgment affirmed.

McLENNAN, P. J., not voting.

PEOPLE, Respondent, v. GIANVECCHIO, Appellant. (Supreme Court, Appellate Division, First Department. May 11, 1906.) Proceeding by the people of the state of New York against Gaetano Gianvecchio. R. Maggio, for appellant. A. A. Mayper, for respondent. No opinion. Judgment affirmed. Order filed.

PEOPLE v. KOPP. (Supreme Court, Appellate Division, First Department. April 6, 1906.) Proceeding by the people of the state of New York against George Kopp. No opinion. Motion granted. Order filed.

PEOPLE v. MERCHANTS' TRUST CO. (PATTERSON, Intervener). (Supreme Court, Appellate Division, Third Department. March 7, 1906.) Proceeding by the people of the state of New York against the Merchants' Trust Company; Charles E. Patterson, intervener. No opinion. Order affirmed, with $10 costs and disbursements.

PEOPLE v. REPUBLIC SAVINGS & LOAN ASS'N. In re KILGEN. (Supreme Court, Appellate Division, Second Department. April 20, 1906.) Proceeding by the people of the state of New York against the Republic Savings & Loan Association. In the matter of the claim of George J. Kilgen. No opinion. Judgment and order affirmed, with costs to the respondents, receivers of the Republic Savings & Loan Association.

PEOPLE, Respondent, v. ROGERS, Appellant. (Supreme Court, Appellate Division, Second Department. April 20, 1906.) Proceeding by the people of the state of New York against John Rogers. No opinion. Judgment of conviction, and order denying motion for a new trial, affirmed.

PEOPLE, Respondent, v. SCHNEIDER, Appellant. (Supreme Court, Appellate Division, Second Department. March 9, 1906.) Proceeding by the people of the state of New York against John Schneider. No opinion. Judgment of conviction affirmed.

PRICE, Respondent, v. INTERURBAN ST. RY. CO., Appellant. (Supreme Court, Appellate Division, First Department. April 6, 1906.) Action by Benjamin Price against the Interurban Street Railway Company. B. H. Ames, for appellant. P. Ingraham, for respondent. No opinion. Judgment and order reversed, and new trial ordered, costs to appellant to abide event, unless plaintiff stipulates to reduce judgment as entered, including costs, etc., to the sum of $4,185.98, in which event, judgment, as so modified, and order, affirmed, without costs. Settle order on notice.

PRUYN, Respondent, v. GUAYQUIL & Q. RY. CO. et al., Appellants. (Supreme Court, Appellate Division, Third Department. May 2, 1906.) Action by Robert C. Pruyn, as a stockholder of the Guayquil & Quito Railway Company, against the Guayquil & Quito Railway Company and others.

PER CURIAM. Interlocutory judgment affirmed, with costs, with usual leave to defendant to withdraw demurrer and answer upon payment of costs of demurrer and of this appeal.

KELLOGG, J., dissents. PARKER, P. J., not voting.

RAISLER HEATING CO., Appellant, v. VERSCHLEISER, Respondent. (Supreme Court, Appellate Term. April 24, 1906.) Appeal from Municipal Court, Borough of Manhattan, Sixth District. Action by the Raisler Heating Company against Max Verschleiser. From a judgment for defendant, plaintiff appeals. Reversed and remanded. W. E. Benjamin, for appellant. Goldfogle, Cohn & Lind, for respondent.

TRUAX, J. On the 1st day of December, 1903, the plaintiff wrote to the defendant: "We understand that you require a new set of grate bars, and, if you desire us to supply same, kindly send us an order by return mail, and we will have them come forward. It would be advisable for you to have a set of these bars on hand at all times. Do you want us to put the rear section in your boiler? If so, kindly send us order, and we will give same prompt attention." On the 5th day of December, 1903, the defendant wrote as follows to the plaintiff: "Install in the boiler at 66 & 68 East Fourth street four new grate bars and also put in rear section. Do this at once and charge the same to my account." It is contended by the defendant that the words, "Do this at once and charge the same to my account," were written after he had signed the order, and that they were not in the original order. An inspection of the paper shows that they were written before the defendant signed the paper and that they were not a forgery, as claimed by the defendant. The claim on the trial was that the plaintiff was to do the work at its own expense. This claim is disproved by the fact that the defendant in writing promised to pay for the work. The judgment appealed from is reversed, and a new trial ordered, with costs to the appellant to abide the event. All concur.

RAND, Respondent, v. SAGE, Appellant. (Supreme Court, Appellate Division, Second Department. April 20, 1906.) Action by Ezekiel C. M. Rand against Russell Sage. No opinion. Judgment and order unanimously affirmed, with costs.

RAYMOND v. SECURITY TRUST, ETC., CO. (Supreme Court, Appellate Division, First Department. April 6, 1906.) Action by Ralph Raymond against the Security Trust, etc., Company. No opinion. Motion denied, without costs. Order filed.

RAWITZER et al., Respondents, v. BECKMAN CO., Appellant. (Supreme Court, Appel-

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late Division, First Department. May 11, 1906.) Action by Simon Rawitzer and another against the Beckman Company. W. E. Benjamin, for appellant. D. P. Hays, for respondents. No opinion. Judgment and order affirmed, with costs. Order filed.

REDMOND, Appellant, v. HATCH et al., Respondents. (Supreme Court, Appellate Term. April 24, 1906.) Appeal from Municipal Court, Borough of Manhattan. Action by William J. Redmond against Frederick W. Hatch and others. From a judgment for defendants, and an order denying a new trial, plaintiff appeals. Reversed, and new trial ordered, with costs. Thomas C. McDonald, for appellant. Rollins & Rollins, for respondents.

PER CURIAM. The testimony shows that the plaintiff, who was a police officer, while standing at a street crossing regulating traffic on the streets, and in such a position that he could not see the defendant's driver, was knocked down and run over in broad daylight; that the driver of the defendant's horses had ample room to pass plaintiff without striking him; and that there was nothing to obscure the vision of the driver. The driver was not called on the trial. We are of the opinion that the plaintiff showed that he was free from contributory negligence and that the injuries that he received were caused through the negligence of the defendant's driver. Judgment appealed from is reversed, and a new trial ordered, with costs to the appellant to abide the event.

REED v. PROVIDENT SAVINGS LIFE ASSUR. SOC. et al. (Supreme Court, Appellate Division, Second Department. April 20, 1906.) Action by Theodore F. Reed against the Provident Savings Life Assurance Society and others. No opinion. Judgment affirmed, with costs.

REIBSTEIN, Appellant, v. NASSAU ELECTRIC R. CO., Respondent. (Supreme Court, Appellate Division, Second Department. March 9, 1906.) Action by Morris Reibstein against the Nassau Electric Railroad Company. No opinion. Judgment of the Municipal Court affirmed, with costs.

REILLY, Respondent, v. EMPIRE LIFE INS. CO., Appellant. (Supreme Court, Appellate Division, Second Department. April 20, 1906.) Action by Benjamin J. Reilly against the Empire Life Insurance Company. No opinion. Judgment affirmed, on the authority of Reilly v. Empire Life Ins. Co., 99 App. Div. 535, 90 N. Y. Supp. 866, with costs.

In re REINCKE. (Supreme Court, Appellate Division, Second Department. March 9, 1906.) In the matter of the application of Sarah A. Reincke for leave to sue Charles L. Spier and Eugene B. Howell, as receivers of the Staten Island Midland Railroad Company. No opinion. Orders affirmed, with $10 costs and disbursements.

REINHEIMER, Appellant, v. HEYMAN, Respondent. (Supreme Court, Appellate Division, Second Department. April 20, 1906.) Action by Ferdinand Reinheimer against Henry Heyman. No opinion. Judgment affirmed, with costs.

REISER, Respondent, v. METROPOLITAN EXPRESS CO., Appellant. (Supreme Court, Appellate Division, First Department. April 6, 1906.) Action by M. Gustine Reiser against the Metropolitan Express Company. A. K. Wing, for appellant. B. F. Feiner, for respondent.

PER CURIAM. Determination affirmed, with costs. Order filed.

INGRAHAM and CLARKE, JJ., dissent.

RENDE, Respondent, v. NEW YORK & T. S. CO., Appellant. (Supreme Court, Appellate Division, Second Department. April 20, 1906.) Action by Domenico Rende, administrator, etc., of Giuseppe Rende, deceased, against the New York & Texas Steamship Company.

PER CURIAM. Judgment and order affirmed, with costs.

JENKS, J., dissents.

RICKETTS, Respondent, v. RAMSDELL et al., Appellants. (Supreme Court, Appellate Division, Second Department. April 20, 1906.) Action by Mary J. Ricketts against Henry Powell Ramsdell and others, individually and as executor, etc. No opinion. Order resettled by inserting a recital that the appeal was argued before five justices of this court, and the decision concurred in by four; the remaining justice having, prior to the decision, been appointed a member of the Court of Appeals. See Town of North Hempstead v. Eldridge (decided by this court March 2, 1906), 98 N. Y. Supp. 157.

ROBINSON, Respondent, v. NILES, Appellant. (Supreme Court, Appellate Division, First Department. March 9, 1906.) Action by Katherine Robinson against E. Ellsworth Niles. C. De W. Rogers, for appellant. J. A. Douglas, for respondent. No opinion. Order affirmed, with $10 costs and disbursements. Order filed.

ROOSEVELT, Appellant, v. HOLLAND TRUST CO., Respondent. (Supreme Court, Appellate Division, First Department. April 6, 1906.) Action by Robert B. Roosevelt, Jr., against the Holland Trust Company. G. H. Yeaman, for appellant. L. L. Kellogg, for respondent. No opinion. Judgment affirmed, with costs. Order filed.

PEOPLE, Respondent, v. SMALL, Appellant. (Supreme Court, Appellate Division, Third Department. May 2, 1906.) Proceeding by the people of the state of New York against Abraham Small.

PER CURIAM. Judgment of conviction affirmed.

CHESTER and COCHRANE, JJ., dissent.

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PEOPLE, Appellant, v. TROUPE, Respondent, et al. (Supreme Court, Appellate Division, Third Department. March 7, 1906.) Proceeding by the people of the state of New York against Isabella L. Troupe, impleaded with the unknown heirs at law of Matilda C. Johnston, deceased.

PER CURIAM. Judgment affirmed, with costs.

PARKER, P. J., and COCHRANE, J., dissent.

PEOPLE, Respondent, v. VERMILYA, Appellant. (Supreme Court, Appellate Division, Third Department. May 2, 1906.) Proceeding by the people of the state of New York against Judson D. Vermilya. No opinion. Judgment and order unanimously affirmed, with costs.

PEOPLE ex rel. CONTINENTAL INS. CO., Respondent, v. O'DONNEL et al., Appellants. (Supreme Court, Appellate Division, First Department. March 9, 1906.) Proceeding by the people of the state of New York, on the relation of the Continental Insurance Company, against Frank A. O'Donnel and others. J. J. Delany, for appellants. D. Rumsey, for respondent. No opinion. Order affirmed, with $10 costs and disbursements. Order filed.

PEOPLE ex rel. FIELDING v. GREENE, Police Com'r. (Supreme Court, Appellate Division, Second Department. April 27, 1906.) Proceeding by the people of the state of New York, on the relation of William H. Fielding, against Francis V. Greene, as police commissioner. No opinion. Determination confirmed, with costs.

PEOPLE ex rel. GARDNER, Respondent, v. SUPREME COURT I. O. F., Appellant. (Supreme Court, Appellate Division, Third Department. March 7, 1906.) Proceeding by the people of the state of New York, on the relation of Louis Gardner, against the Supreme Court of the Independent Order of Foresters.

PER CURIAM. Judgment unanimously affirmed, with costs.

KELLOGG, J., not sitting.

PEOPLE ex rel. GOTTSBERGER, Appellant, v. LITTLETON, Respondent. (Supreme Court, Appellate Division, Second Department. April 27, 1906.) Proceeding by the people of the state of New York, on the relation of Francis Gottsberger, against Martin W. Littleton, as president of the borough of Brooklyn. No opinion. Motion denied.

PEOPLE ex rel. JAY, Appellant, v. O'DONNELL et al., Respondents. (Supreme Court, Appellate Division, First Department. March 9, 1906.) Proceeding by the people of the state of New York, on the relation of William Jay, as executor, against Frank A. O'Donnell and others. F. B. Candler, for appellant. C. A. Peters, for respondents. No opinion. Order affirmed, with $10 costs and disbursements. Order filed.

PEOPLE ex rel. JOHN TURLS SONS. Appellants, v. DONNELL et al., Respondents. (Supreme Court, Appellate Division, First Department. April 6, 1906.) Proceeding by the people of the state of New York, on the relation of John Turls Sons, against Frank A. Donnell and others. W. W. Niles, for appellants. W. H. King, for respondents. No opinion. Order affirmed, with costs and disbursements. Order filed.

PEOPLE ex rel. LA CHICOTTE, Appellant, v. BEST, Com'r, Respondent. (Supreme Court. Appellate Division, First Department. April 6, 1906.) Proceeding by the people of the state of New York, on the relation of Henry A. La Chicotte, against George E. Best, as commissioner, etc. F. G. Caffey, for appellant. W. B. Crowell, for respondent. Order affirmed, with $50 costs and disbursements, on the authority of Hatch v. Lantry, 88 App. Div. 583, 85 N. Y. Supp. 193. Order filed.

PEOPLE ex rel. NORTHERN ASSUR. Co., Respondent, v. O'DONNEL et al., Appellants. (Supreme Court, Appellate Division, First Department. March 9, 1906.) Proceeding by the people of the state of New York, on the relation of the Northern Assurance Company, against Frank A. O'Donnel and others. J. J. Delany, for appellants. D. Rumsey, for respondent. No opinion. Order affirmed, with $10 costs and disbursements. Order filed.

PEOPLE ex rel. PRUSSIAN LIFE INS. CO. OF BERLIN, Respondent, v. HENDRICKS, Superintendent of Insurance, Appellant. (Supreme Court, Appellate Division, Third Department. May 2, 1906.) Proceeding by the people of the state of New York, on the relation of the Prussian Life Insurance Company of Berlin, against Francis Hendricks, as superintendent of insurance of the state of New York. No opinion. Order affirmed, with costs.

PEOPLE ex rel. ROCHESTER RY. & LIGHT CO. v. STEARNS et al. (Supreme Court, Appellate Division, Third Department. March 7, 1906.) Proceeding by the people of the state of New York, on the relation of the Rochester Railway & Light Company, against Lester F. Stearns and others, as tax commissioners, etc., and the city of Rochester.

PER CURIAM. Order reversed, with $10 costs and disbursements, on the authority of People ex rel. Rochester Telephone Co. v. Priest, 181 N. Y. 300, 73 N. E. 1100; and motion remitted to the Special Term for the exercise of its discretion.

PARKER, P. J., and SMITH, J., dissent

PEOPLE ex rel. TROY STEEL CO. et al., Respondents, v. MUNN et al., Appellants. (Supreme Court, Appellate Division, Third Department. March 7, 1906.) Proceeding by the people of the state of New York, on the relation of the Troy Steel Company and William F. Donovan, against William H. Munn and others, general assessors of the city of Troy, and Le Roy Rickerson, comptroller of the city of Troy.

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No opinion. Judgment unanimously affirmed, with costs.

PERLSTEIN, Respondent, v. HELMAN, Appellant. (Supreme Court, Appellate Division, Second Department. March 9, 1906.) Action by Myer S. Perlstein against Bertha Helman.

PER CURIAM. The acceptance of the reduced basement would be a consideration for the reduction of the rent, and it was a question of fact for the jury whether the agreement of reduction on that consideration was made. Judgment of the Municipal Court reversed, and new trial ordered, costs to abide the event.

In re PERRY. (Supreme Court, Appellate Division, First Department. April 6, 1906.) In the matter of Loyd Perry. No opinion. Respondent disbarred. Order filed.

PETERS, Respondent, v. MATTHEWS, Appellant. (Supreme Court, Appellate Division, First Department. May 11, 1906.) Action by Margaret Peters, as administratrix, against John Matthews. F. B. Campbell, for appellant. C. Caldwell, for respondent. No opinion. Order affirmed, with $10 costs and disbursements. Order filed.

PETERS, Respondent, v. KELLY, Appellant. (Supreme Court, Appellate Division, First Department. May 11, 1906.) Action by Margaret Peters against Mary Kelly. G. H. Taylor, for appellant. T. J. O'Neill, for respondent. No opinion. Order modified, by striking out the condition therein contained, and, as modified, affirmed, with $10 costs and disbursements to the defendant. Order filed.

PETERSON, Appellant, v. BONERT, Respondent. (Supreme Court, Appellate Division, Second Department. April 20, 1906.) Action by Otto F. Peterson against Louis Bonert. No opinion. Judgment of the Municipal Court affirmed, with costs.

PFEIFFER, Appellant, v. HEARTSTONE, Respondent, et al. (Supreme Court, Appellate Division, First Department. April 6, 1906.) Action by Alexander Pfeiffer against Rose Heartstone, impleaded, etc. I. N. Jacobson, for appellant. S. Goodelman, for respondent. No opinion. Judgment affirmed, with costs, with leave to plaintiff to amend on payment of costs in this court and in the court below. Order filed.

In re PIER NO. 15, EAST RIVER. (Supreme Court, Appellate Division, First Department. May 11, 1906.) In the matter of Pier No. 15, East river.

PER CURIAM. Order affirmed, with costs and disbursements, on opinion on former appeal. 95 App. Div. 502, 88 N. Y. Supp. 906. Order filed.

McLAUGHLIN, J., dissents, on dissenting opinion on that appeal.

PIERSON, Respondent, v. INTERURBAN ST. RY. CO., Appellant. (Supreme Court, Appellate Division, First Department. May 11, 1906.) Action by Mons Pierson against the Interurban Street Railway Company. E. D. O'Brien, for appellant. S. F. Kneeland, for respondent. No opinion. Judgment and order affirmed, with costs. Order filed.

POLHEMUS et al., Respondents, v. ECCLES, Appellant. (Supreme Court, Appellate Division, Second Department. April 20, 1906.) Action by Horace G. Polhemus, Jr., and Olivette G. Polhemus against George W. Eccles. No opinion. Judgment affirmed, with costs.

POTSDAM ELECTRIC LIGHT & POWER CO., Respondent, v. VILLAGE of POTSDAM et al., Appellants. (Supreme Court, Appellate Division, Third Department. May 2, 1906.) Action by the Potsdam Electric Light & Power Company against the village of Potsdam and others.

PER CURIAM. Judgment affirmed, with costs, upon the opinion of Justice Henry T. Kellogg at Special Term. 97 N. Y. Supp. 190.

PARKER, P. J., not voting.

In re POTTER. (Supreme Court, Appellate Division, Fourth Department. March 14, 1906.) In the matter of the judicial settlement of the accounts of Harmon S. Potter, as executor, etc., of William Faroo, deceased.

PER CURIAM. Decree of Surrogate's Court affirmed, with costs to respondent payable out of the estate.

McLENNAN, P. J., not voting.

ROSENSTEIN et al., Appellants, v. TRADERS' INS. CO. OF CHICAGO, ILL., Respondent. (Supreme Court, Appellate Division, Fourth Department. March 14, 1906.) Action by Solomon Rosenstein and another against the Traders' Insurance Company of Chicago, Ill.

PER CURIAM. Judgment and order affirmed, with costs, on prevailing opinion in same case in 79 App. Div. 481, 79 N. Y. Supp. 736, and opinion in 102 App. Div. 147, 92 N. Y. Supp. 326.

McLENNAN, P. J., dissents on grounds stated in dissenting opinion in 79 App. Div. 481–487, 79 N. Y. Supp. 736. KRUSE, J., not sitting.

SCHERMERHORN, Respondent, v. GLENS FALLS PORTLAND CEMENT Co., Appellant. (Supreme Court, Appellate Division, Third Department. March 7, 1906.) Action by John I. Schermerhorn against the Glens Falls Portland Cement Company. No opinion. Judgment and order unanimously affirmed, with costs.

SCHERZER, Respondent, v. MARTIN et al., Appellants. (Supreme Court, Appellate Division, Second Department. April 20, 1906.) In the matter of the application of Herman Scherzer against Sarah Martin and others. No opinion. Motion denied.

SCHLESINGER v. BERNSTEIN et al. (Supreme Court, Appellate Division, First De-

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partment. April 6, 1906.) Action by Leo Schlesinger, as receiver, against Samuel Bernstein and others. No opinion. Motion to dismiss appeal granted, with $10 costs. Order filed.

SCHLESINGER, Respondent, v. BLUSSTONE et al., Appellants. (Supreme Court, Appellate Division, First Department. March 9, 1906.) Action by Leo Schlesinger, as receiver, against Joseph I. Blusstone and others. A. H. Parkhurst, for appellants. S. F. Kneeland, for respondent. No opinion. Order affirmed, with $10 costs and disbursements. Order filed.

SCHLESINGER v. MANHATTAN RY. CO. (Supreme Court, Appellate Division, First Department. April 25, 1906.) Action by Alfred Schlesinger against the Manhattan Railway Company. No opinion. Application denied, with $10 costs. Order signed.

In re SCHMID. (Supreme Court, Appellate Division, Second Department. April 20, 1906.) In the matter of the application of Anton Schmid for the revocation of letters of administration issued to Johanna Ilg on the goods, chattels, and credits of Louise Sprathoff, deceased. No opinion. Motion denied, with $10 costs. See 98 N. Y. Supp. 921.

SCHOENER, Respondent, v. HARTFORD CARPET CORP., Appellant. (Supreme Court, Appellate Division, Second Department. April 20, 1906.) Action by Henry Schoener, an infant, by William Schoener, his guardian ad litem, against the Hartford Carpet Corporation. No opinion. Judgment and order unanimously affirmed, with costs.

SCHROEDER, Respondent, v. MEYER, Appellant. (Supreme Court, Appellate Division, Second Department. April 20, 1906.) Action by George J. Schroeder against Ehler Meyer. No opinion. Judgment and order affirmed, with costs.

SCHULTZ, Respondent, v. GREENWOOD CEMETERY et al., Appellants. (Supreme Court, Appellate Division, Second Department. April 20, 1906.) Action by Mary A. Schultz against the Greenwood Cemetery and William Smith. No opinion. Judgment and order unanimously affirmed, with costs.

SEGER, Respondent, v. FARMERS' LOAN & TRUST CO., Appellant, et al. (Supreme Court, Appellate Division, First Department. April 6, 1906.) Action by George N. Seger, as administrator, against the Farmers' Loan & Trust Company, impleaded, etc. J. F. Horan, for appellant. J. C. Gulick, for respondent. No opinion. Judgment affirmed, with costs. Order filed.

SEIDMAN, Respondent, v. JANOS et al., Appellants. (Supreme Court, Appellate Division, Second Department. April 20, 1906.) Action by Joseph A. Seidman against Morris Janos and Jacob Janos. No opinion. Motion denied, in case the appellants serve their case within five days and pay $10 costs; otherwise, motion granted, with $10 costs.

SEYMOUR, Respondent, v. STATE, Appellant. (Supreme Court, Appellate Division, Third Department. May 2, 1906.) Action by John Seymour against the state of New York. No opinion. Judgment unanimously affirmed, with costs.

SHARPLES, Appellant, v. ANGELL, Respondent. (Supreme Court, Appellate Division, Third Department. March 7, 1906.) Action by P. M. Sharples against C. Everett Angell. No opinion. Judgment and order unanimously affirmed, with costs.

SHEDD et al., Appellants, v. LENT et al., Respondents. (Supreme Court, Appellate Division, Second Department. March 9, 1906.) Action by William T. Shedd, individually and as executor, etc., of William G. T. Shedd, deceased, Margaret S. Gold, Katharine L. Barbour, and John M. Shedd against Orsamus B. Lent and the town of Cortlandt.

PER CURIAM. Interlocutory judgment affirmed, with costs.

MILLER, J., dissents.

SHERMAN v. MATTHIEU et al. (Supreme Court, Appellate Division, Third Department. May 2, 1906.) Action by John C. Sherman, as administrator, etc., of Lucy B. Potter deceased against Eva A. Matthieu and Melissa Robertson. No opinion. Judgment unanimously affirmed, with costs.

SHOLES, Respondent, v. SEAMANS, Appellant, et al. (Supreme Court, Appellate Division, First Department. April 6, 1906.) Action by Zalmon C. Sholes, as administrator, against Clarence W. Seamans, impleaded, etc. P. Armitage, for appellant. J. A. Dutton, for respondent. No opinion. Order affirmed, with $10 costs and disbursements. Order filed.

SIMSON, Appellant, v. PARKER et al., Respondents. (Supreme Court, Appellate Division, Fourth Department. May 2, 1906.) Action by William B. Simson against Charles B. Parker and others. No opinion. Judgment affirmed, with costs.

SKENANDOAA COTTON CO., Respondent, v. FULD & HATCH KNITTING CO., Appellant. (Supreme Court, Appellate Division, Fourth Department. March 14, 1906.) Action by the Skenandoaa Cotton Company against the Fuld & Hatch Knitting Company. No opinion. Order affirmed, with $10 costs and disbursements.

SLOSS IRON & STEEL CO., Appellant, v. JACKSON ARCHITECTURAL IRON WORKS, Respondent. (Supreme Court, Appellate Division, First Department. May 11, 1906.) Action by the Sloss Iron & Steel Company against the Jackson Architectural Iron

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Works. L. H. Freedman, for appellant. C. W. Pierson, for respondent. No opinion. Order affirmed, with costs. Order filed.

SMITH, Respondent, v. DAVEGA, Appellant. (Supreme Court, Appellate Division, First Department. May 11, 1906.) Action by George F. Smith against Isaac Davega, Jr. D. Tim, for appellant. J. C. Weschler, for respondent. No opinion. Judgment and order affirmed, with costs. Order filed.

SOOP, Appellant, v. BURHANS, Respondent. (Supreme Court, Appellate Division, Third Department. March 7, 1906.) In the Matter of the petition of Henry C. Soop, as agent and attorney of the estate of Thomas Cornell, against Webster H. Burhans.

PER CURIAM. Order affirmed with costs.

CHESTER and KELLOGG, JJ., dissent.

SPRING, Respondent, v. RYAN, Appellant. (Supreme Court, Appellate Division, Fourth Department. May 2, 1906.) Action by T. Davis Spring against Frank M. Ryan. No opinion. Motion to dismiss appeal denied, without costs.

STEINFELD et al., Appellants, v. LINCOLN et al., Respondents. (Supreme Court, Appellate Division, First Department. May 11, 1906.) Action by Samuel Steinfeld and another against George D. Lincoln and others. L. J. Vorhaus, for appellants. E. G. Moody, for respondents. No opinion. Order affirmed, with $10 costs and disbursements. Order filed.

STONE, Respondent, v. ROCHESTER HERALD CO., Appellant. (Supreme Court, Appellate Division, First Department. March 9, 1906.) Action by Junius H. Stone against the Rochester Herald Company. J. S. Havens, for appellant. C. E. Thornall, for respondent. No opinion. Order affirmed, with $10 costs and disbursements. Order filed.

STURMDORF v. SAUNDERS. (Supreme Court, Appellate Division, Second Department. April 20, 1906.) Action by William Sturmdorf against Franklin E. Saunders and others. No opinion. Motion granted.

SWING, Appellant, v. MOHAWK VALLEY LUMBER CO., Respondent. (Supreme Court, Appellate Division, Third Department. May 2, 1906.) Action by James B. Swing, as trustee for the creditors, etc., of the Union Mutual Fire Insurance Company of Cincinnati, Ohio (dissolved), against the Mohawk Valley Lumber Company. No opinion. Judgment modified, by striking therefrom the words "on the merits," and, as thus modified, judgment and order unanimously affirmed, with costs.

SYKES, Respondent, v. J. WALTER THOMPSON CO., Appellant. (Supreme Court, Appellate Division, First Department. May 11, 1906.) Action by Thomas F. Sykes against the J. Walter Thompson Company. D. Edwards, for appellant. W. D. Reed, for respondent. No opinion. Order affirmed, with $10 costs and disbursements. Order filed.

TAYLOR, Respondent, v. BROWN et al., Appellants (two cases). (Supreme Court, Appellate Division, First Department. May 11, 1906.) Action by James E. Taylor against W. David Brown and others. J. Delahunty, for appellants. C. Goldzier, for respondent. No opinion. Order affirmed, with $10 costs and disbursements. Order filed.

THOMAS v. GEORGE G. FUESSELA SONS. (Supreme Court, Appellate Division, First Department. April 25, 1906.) Action by May E. Thomas against George G. Fuessela Sons. No opinion. Motion denied, on payment of $10 costs. Leave given to apply to the court below to open default. Order filed.

TOCCI v. GIANVECCHIO. (Supreme Court, Appellate Division, First Department. April 25, 1906.) Action by Felice Tocci against Gaetano Gianvecchio. No opinion. Application denied, with $10 costs. Order signed.

TOWN OF NORTH HEMPSTEAD, Appellant, v. ELDRIDGE, Respondent. (Supreme Court, Appellate Division, Second Department. March 22, 1906.) Action by the town of North Hempstead against Louise U. Eldridge. No opinion. Order resettled by inserting a recital that the appeal was argued before five justices of this court, and the decision concurred in by four; the remaining justice having, prior to the decision, been appointed a member of the Court of Appeals. See 98 N. Y. Supp. 157.

TRALL, Respondent, v. SCOTT et al., Appellants. (Supreme Court, Appellate Division, Fourth Department. May 2, 1906.) Action by Weld G. Trall against James Scott and another. No opinion. Motion denied, with $10 costs.

TREFFINGER v. M. GROH'S SONS. (Supreme Court, Appellate Division, First Department. April 25, 1906.) Action by Gottlieb Treffinger against M. Groh's Sons. No opinion. Motion granted. Order filed.

TROTT, Appellant, v. SCHMITT, Respondent. (Supreme Court, Appellate Division, Second Department. April 27, 1906.) Action by Verene Trott, as executrix of the estate of William Trott, deceased, against Valentin Schmitt. No opinion. Judgment reversed on argument, and new trial granted, costs to abide the event, on the ground that the complaint sufficiently states a cause of action for money loaned.

In re VENABLES. (Supreme Court, Appellate Division, First Department. April 25, 1906.) In the matter of George W. Venables. No opinion. Motion denied, with $10 costs. Order filed.

VON DER HEIDE, Respondent, v. SCHUTTE et al., Appellants. (Supreme Court, Appellate Division, Second Department. April 20, 1906.) Action by Margaret M. Von Der Heide

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against Lena Schutte and others. No opinion. Orders affirmed, with $10 costs and disbursements.

WARD, Respondent, v. HAWKINS IRON CONST. CO., Appellant. (Supreme Court, Appellate Division, First Department. April 6, 1906.) Action by Patrick J. Ward against the Hawkins Iron Construction Company. A. E. Smith, for appellant. J. N. Tuttle, for respondent. No opinion. Judgment and order reversed, and new trial ordered, with costs to appellant to abide event, unless plaintiff stipulates to reduce judgment as entered, including costs, etc., to $648.54, in which event judgment, as modified, and order, affirmed, without costs. Settle order on notice.

WATERS, Appellant, v. HORACE WATERS & CO. et al., Respondents. (Supreme Court, Appellate Division, First Department. April 6, 1906.) Action by Fanny L. Waters against the Horace Waters & Co. and others. E. W. Hatch, for appellant. N. B. Sanborn, for respondents. No opinion. Order affirmed, with $10 costs and disbursements. Order filed.

WEBER v. MERENESS et al. (Supreme Court, Appellate Division, Fourth Department. March 14, 1906.) Action by Henry F. Weber against Charles S. Mereness, Jr., as trustee, etc., and others. No opinion. Order affirmed, with $10 costs and disbursements.

WEBER, Appellant, v. WALLERSTEIN et al., Respondents. (Supreme Court, Appellate Division, Fourth Department. May 2, 1906.) Action by Henry Weber against Edward Wallerstein and others. No opinion. Motion for leave to appeal to the Court of Appeals denied, with $10 costs.

In re WEBSTER. (Supreme Court, Appellate Division, Fourth Department. May 2, 1906.) In the matter of the application of John B. Webster for the resubmission of local option questions to the electors of the town of Hanover. No opinion. Order affirmed, with $10 costs and disbursements.

WEEKS v. COE. (Supreme Court, Appellate Division, Second Department. April 20, 1906.) In the matter of judgment moneys recovered in action of Count W. Weeks against E. Holloway Coe, as executor, etc. No opinion. Motion for leave to appeal to the Court of Appeals denied.

WEINSTEIN, Appellant, v. SHAPIRO et al., Respondents. (Supreme Court, Appellate Division, Second Department. April 20, 1906.) Action by Joseph Weinstein against Sam Shapiro and Abe Goodman. No opinion. Judgment of the Municipal Court affirmed, with costs.

WEIZINGER, Appellant, v. ERIE R. CO., Respondent. (Supreme Court, Appellate Division, First Department. April 6, 1906.) Action by Paul Weizinger against the Erie Railroad Company. L. L. Bamberger, for appellant. W. T. Denison, for respondent. No opinion. Judgment affirmed, with costs. Order filed.

WELLS, Appellant, v. METROPOLITAN ST. RY. CO., Respondent. (Supreme Court, Appellate Division, Second Department. April 20, 1906.) Action by Henry E. Wells against the Metropolitan Street Railway Company. No opinion. Motion for reargument denied. See 97 N. Y. Supp. 1150.

WELLS, Appellant, v. METROPOLITAN ST. RY. CO., Respondent. (Supreme Court, Appellate Division, Second Department. April 20, 1906.) Action by Sarah Ann Wells against the Metropolitan Street Railway Company. No opinion. Motion for reargument denied.

WHALEN et al. v. FONDA, J. & G. R. CO. (Supreme Court, Appellate Division, Third Department. May 2, 1906.) Appeal from Trial Term. Action by John W. Whalen and others against the Fonda, Johnstown & Gloversville Railroad Company. From a judgment and orders in favor of the defendant, plaintiffs appeal. Affirmed.

PER CURIAM. Judgment and orders affirmed, without costs on the appeal of either party.

SMITH, J. (dissenting). The jury has found both plaintiff and defendant negligent. Their conclusion warrants the judgment entered, provided they were guided to that conclusion by proper rules of law stated by the trial judge in his charge. In stating what duty was required of the plaintiff the trial judge said: "If they had the duty to look when they entered on the track, did they not have a duty to continue to look? I so charge you; that their duty was not fully performed by looking to see a car when they entered upon the track, but they should continue the observation so long as they were on the track." Further: "I charge you as a matter of law that this car, run in the manner that they knew it was, had the preference, and they should have been ready to have made the track clear when the car came, and whether they should do it by having a man look is not for us to speculate." In Atlantic Coast Electric Railroad Company v. Wilson, 62 N. J. Law, 773, 42 Atl. 1041, the Court of Errors and Appeals of New Jersey has stated the rule that, as between an electric trolley car and a traveler upon the highway upon a country crossing, "neither party at such a crossing has a paramount right of way." In Solomon v. Buffalo Railway Company, 96 App. Div. 487, 89 N. Y. Supp. 99, the rule is recognized that at street intersections a trolley company has no paramount right over a traveler who is crossing the street, and it is further held: "A refusal to charge in such a case that the rights of the street car and of the vehicle at the point in question were equal is not cured by a charge that it was incumbent upon the street railway company 'to use all reasonable care and caution to avoid injury to the plaintiff (an occupant of the vehicle) or to any one else.'" A part of the charge quoted would seem to state the duty of the plaintiff to have been to keep off from the

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track at their peril. While this may be deemed to have been modified by other parts of the charge, which stated that they had the right to be upon the track in the performance of their work and that it was their duty to exercise reasonable care, this broad statement could not but have been prejudicial to the interests of the plaintiff in the determination by the jury as to whether they had exercised reasonable care. If, however, this statement may be deemed so far to have been modified by other parts of the charge as to state fairly the rule of law, nevertheless the statement is clearly made that the defendant railroad company had a preference at this crossing. Within the authorities cited a trolley company has no preference over a traveler. I can see no reason why this plaintiff has not an equal right with a traveler. He is lawfully upon the highway at that crossing, and necessarily there in the performance of his work in the repair of the highway. I know of no reason, therefore, why the defendant should have any preference there which would compel the plaintiff to keep clear of the track at its peril. I dissent, therefore, from an affirmance of the judgment so far as the judgment dismisses the plaintiff's complaint.

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In re WILKIN. (Supreme Court, Appellate Division, Fourth Department. March 14, 1906.) In the matter of the final judicial settlement of Anna M. C. Wilkin, as, etc., of James Cunningham, deceased.

PER CURIAM. Order affirmed, with $10 costs and disbursements.

WILLIAMS, J., dissents.

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WILLARD et al., Appellants, v. MARTIN, Respondent. (Supreme Court, Appellate Division, First Department. April 6, 1906.) Action by Eugene S. Willard and another against William R. H. Martin. J. A. Kelly, for appellants. H. A. Bayne, for respondent. No opinion. Judgment affirmed, with costs. Order filed.

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In re WILLIS AVE. BRIDGE. (Supreme Court, Appellate Division, First Department. April 6, 1906.) In the matter of Willis Avenue Bridge. No opinion. Motion for reargument denied. Leave to go to Court of Appeals granted. Settle order on notice.

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WILSON v. METROPOLITAN ST. RY. CO. (Supreme Court, Appellate Division, First Department. April 20, 1906.) Appeal from Trial Term, New York County. Action by Catherine A. Wilson against the Metropolitan Street Railway Company. From a judgment for plaintiff, and from an order denying a motion for a new trial, defendant appeals. Affirmed. Edward D. O'Brien, for appellant. Abel Crook, for respondent.

PER CURIAM. Judgment affirmed, with costs.

INGRAHAM, J. (dissenting). I do not concur in the affirmance of this judgment, as I think the charge, made at the request of the plaintiff, that, "it being proved that the plaintiff, a passenger in one of the defendant's cars, was thrown down by reason of the car in which she was riding coming in collision with another in front upon the same track, operated by the same defendant, the negligence of the defendant is presumed," was error which requires a reversal of the judgment. In the main charge the learned trial judge, after stating the general proposition that if the injury was sustained in consequence of the negligence of the defendant, without any fault or negligence on her part, the plaintiff was entitled to recover, and that the burden of proof was upon the plaintiff to establish by a preponderance of evidence that the injury, if any, which she received was due to the negligence of the defendant in the operation and management of the road controlled by it, said: "There are some other charges upon this phase of the case which will be taken up when I consider the requests from both sides, but I will not enlarge upon them now." The court, then charged, at the request of the defendant, that "no verdict can be rendered for plaintiff unless she has proved by a preponderance of credible testimony two things: (1) That the injury was received through the negligence of the defendant; (2) and that no negligence of plaintiff herself contributed in the slightest degree to her injury;" and that "if the motorman of the car in which the plaintiff was a passenger used reasonable care to bring his car to a stop instantly, and the accident was due to a mere error of judgment, without negligence, the verdict must be for the defendant;" and also, "if any presumption of negligence arising from the mere fact of collision of the cars has been rebutted by the evidence of the defendant, the burden of proving negligence of defendant causing her injury rests upon the plaintiff. If upon the whole evidence the conclusion of negligence or absence of negligence can be drawn with equal fairness, that burden is not discharged, and the verdict must be for the defendant." Then follows the charge at the request of the plaintiff to which attention has been called. The application of the maxim "res ipsa loquitur" which applies in this case is not a presumption, but a rule of evidence; and the application of the maxim to an action to recover for personal injuries is a rule of evidence. There is imposed upon a common carrier the obligation to use care and prudence in operating its road for the protection of its passengers, and where an injury results to a passenger, caused in the operation of the road in the control of its employés, the fact of the accident is evidence from which a jury can find that it was caused by negligence. It is not a presumption of negligence, but a question of the sufficiency of the evidence of negligence. The question of negligence is always one of fact to be determined from the evidence, and a verdict cannot be based upon a presumption of law that the defendant was negligent. The proper rule is stated in Cosulich v. S. O. Co., 122 N. Y. 127, 25 N. E. 261, 19 Am. St. Rep. 475: "But when the thing causing the injury is shown to be under the control of the defendant, and the accident is such as in the ordinary course of business does not happen if reasonable care is used, it does, in absence of explanation by the defendant, afford sufficient evidence that the accident arose from want of care on its part." The whole subject of the application of the maxim "res

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ipsa loqitur" was considered by the court of Appeals in Griffen v Manice, 166 N. Y. 188, 59 N. E. 925, 52 L. R. A. 922, 82 Am. St. Rep. 630. In that case it is said by way of illustration: "If it be shown, however, that he was precipitated against the seat by reason of the train coming in collision with another train, or in consequence of the car being derailed, the presumption of negligence arises. The 'res,' therefore, includes the attending circumstances, and, so defined, the application of the rule presents principally the question of the sufficiency of circumstantial evidence to establish, or to justify the jury in inferring, the existence of the traversable or principal fact in issue—the defendant's negligence. The maxim is also in part based on the consideration that, where the management and control of the thing which has produced the injury is exclusively vested in the defendant, it is within his power to produce evidence of the actual cause that produced the accident, which the plaintiff is unable to present." The use of this language, "the presumption of negligence," if standing by itself, might indicate a legal presumption which the jury were bound to apply. What follows, however, I think, clearly illustrates the meaning of the learned Chief Judge and expressly negatives such a construction. He speaks of the presumption of negligence, but immediately afterwards he says that "the application of the rule presents principally the question of the sufficiency of circumstantial evidence to establish, or to justify the jury in inferring, the existence of the traversable or principal fact in issue, the defendant's negligence," and that the res includes the attending circumstances, and was evidence to be considered by the jury in determining whether the accident was caused by the defendant's negligence. The question of the defendant's negligence was to be determined upon the evidence, including the inferences to be drawn from the attending circumstances, with the explanation offered by the defendant; but the general rule still applied that the burden was upon the plaintiff to show negligence, and the jury could only find a verdict for the plaintiff when they were satisfied by a preponderance of evidence that the accident was caused by the negligence of the defendant. This charge of the learned trial court, standing by itself, instructed the jury that from the happening of the accident negligence was presumed, and I do not understand that the jury were justified in presuming negligence, but were only to determine from the evidence whether or not negligence as a fact existed.

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WILSON et al., Respondents, v. RAYMOND, Appellant. (Supreme Court, Appellate Division, Second Department. April 27, 1906.) Action by Joseph G. Wilson and William H. Griffin against Harry Raymond.

PER CURIAM. Judgment of the Municipal Court affirmed, with costs.

RICH, J., dissents.

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WIMMER, Respondent, v. METROPOLITAN ST. RY. CO., Appellant. (Supreme Court, Appellate Division, First Department. May 11, 1906.) Action by Mary Wimmer against the Metropolitan Street Railway Company. J. F. Daly, for appellant. L. Skidmore, for respondent. No opinion. Judgment and order reversed, and new trial ordered, costs to appellant to abide event, unless plaintiff stipulates to reduce judgment as entered, including interest, costs, etc., to $15,338.63, in which event judgment, as so modified, and order, affirmed, without costs. Settle order on notice.

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WINTER Respondent, v. CITY OF NIAGARA FALLS, Appellant. (Supreme Court, Appellate Division, Fourth Department. March 14, 1906.) Action by Albert J. Winter against the city of Niagara Falls. No opinion. Order reversed, without costs, and motion granted, upon payment of $10 costs to the plaintiff, together with the costs of the action after service of answer, with leave to the plaintiff to discontinue the action, if so advised, without costs.

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WOHLERS, Respondent, v. MANHATTAN RY. CO. et al., Appellants. (Supreme Court. Appellate Division, First Department. April 6, 1906.) Action by Henry Wohlers against the Manhattan Railway Company and another. J. T. Davies, for appellants. V. P. Donihee, for respondent. No opinion. Judgment affirmed, with costs. Order filed.

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WYCKOFF, Appellant, v. FELT et al., Respondents. (Supreme Court, Appellate Division, First Department. May 11, 1906.) Action by Jacob V. D. Wyckoff against Henry L. Felt and another. W. Man, for appellant. B. L. Kraus, for respondents. No opinion. Judgment and order affirmed, with costs. Order filed.

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YOUNG v. TILYOU et al. (Supreme Court. Appellate Division, Second Department. April 27, 1906.) Action by Axel Young against George C. Tilyou and Frederick Ingersoll, sued as John Doe, and others. No opinion. Jndgment affirmed, with costs.

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ZAPFE v. JOHN MULLINS & SONS, Appellant. (Supreme Court, Appellate Division, Second Department. April 20, 1906.) Appeal from Trial Term, Kings County. Action by Albert Zapfe, as executor, etc., substituted in place of Franz Zapfe, deceased, against John Mullins & Sons. From an order denying defendants' motion for a new trial, they appeal. Affirmed. Frederick Hulse, for appellants. Isaac M. Kapper (Thomas E. Pearsall, on the brief), for respondent.

PER CURIAM. Order affirmed, with costs.

GAYNOR, J. (dissenting). I do not see how we can avoid reversing this order. As the deceased was crossing the street afoot he was struck by the end of the pole of the defendant's wagon drawn by a team of horses, and hurt. The team was coming along the left side of the street, and toward the plaintiff's left. He testified that he did not look that way in crossing, for the reason that wagons on that side had to come from the other direction. This erroneous notion runs through the case. The learned trial judge charged as follows: "As between a peder-

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trian in the act of crossing a street and the driver of a team of horses, there is no law that absolutely requires the teamster with his horses to proceed upon the right hand side of the street. Whether he shall do so or not, and whether negligence on his part may be predicated upon the fact that he failed to do so, depends upon the circumstances of each case as it arises, and it depends upon the circumstances of this case as you find them to be. So that one of the facts that seems to me important for you to consider and determine is, was the street torn up at that place, was there an excavation being made; and if so, was that a sufficient explanation for the driver being in the position in which he was when the collision occurred. If there was no excavation being made there, then it is for you to say whether the evidence affords any reason why this driver should have been in the position in which he claims he was, instead of on the other side of the street. If, on the other hand, the street was being excavated, then it is for you to say whether that was a sufficient reason for him to be where he says he was, or where the plaintiff says he was, when this collision occurred." The substance of this is that if there was a good reason for the driver being on the left side it was not negligence for him to be there, but if there was not, then the jury could find that he was negligently there; if he had to come there to avoid an excavation on the other side, he was excusable for being there, but if this was not so, the fact of his being there was not excused. This was prejudicial error. Negligence could not be predicated on the mere fact of driving along the left side of the road, in the absence of any ordinance or statute forbidding it. The custom or common law of the road in respect of passing to the right relates only to vehicles; it has nothing to do with the duty of drivers to pedestrians. Wright v. Fleischman, 41 Misc. Rep. 533, 85 N. Y. Supp. 62. The order should be reversed.

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LORD, Respondent, v. EQUITABLE LIFE ASSUR. SOC. OF UNITED STATES, Appellant, et al. (Supreme Court, Appellate Division, Second Department. November, 1905.) Action by Franklin B. Lord against the Equitable Life Assurance Society of the United States, impleaded with Alfonso De Navarro and others. No opinion. Order granting preliminary injunction affirmed, with $10 costs and disbursements, on the opinion upon the appeal from the interlocutory judgment. 109 App. Div. 252, 96 N. Y. Supp. 10.

HOOKER, J., dissents.

END OF CASES IN VOL. 98.

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*** Point annotated. See syllabus.**

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*One keeping with knowledge of its vicious propensities a dangerous animal incurs a prima



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facie liability for any injuries caused by it.—Hunter v. Metropolitan Express Co. (Sup.) 234.

*The presumption that one keeping an animal with knowledge of its dangerous propensities is liable for injuries caused by it can be rebutted only by proof that the injured party wantonly excited him or unnecessarily put himself in the animal's way.—Hunter v. Metropolitan Express Co. (Sup.) 234.

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*Where the court is without jurisdiction of the subject-matter of the proceeding, the objection to jurisdiction may be taken on appeal in the first instance, or at any time.—Peabody v. Long Acre Square Bldg. Co. (Sup.) 242.

Where questions bearing on damages for personal injuries were objected to at the trial, and rulings sustaining the objections were excepted to, plaintiff was not required to except to the charge on the question of damages.—Rudomin v. Interurban St. Ry. Co. (Sup.) 501.

An exception to the granting of a motion to dismiss *held* not to entitle the excepting party to contend on appeal that the court had no authority to grant the motion after verdict.—Antes v. Watkins (Sup.) 519.

Appeal from a nonsuit *held* not aided by a request after the nonsuit to amend the complaint.—Sutherland v. Ammann (Sup.) 574.

A judgment directing defendant to restore a chattel to plaintiff or pay him a specified sum *held* not subject to attack on appeal on the ground that there was no evidence to show the value of the chattel at the time of trial, as provided by Code Civ. Proc. § 1726.—Macdonald v. Macdonald (Sup.) 581.

*Where motion to dismiss was not renewed at close of entire evidence, action of trial court in submitting issues to jury *held* not open to review.—Biogioni v. Eglee Bunting Co. (Sup.) 591.

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*Point annotated. See syllabus.

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*Question not raised below cannot be raised or first time on appeal.—Hellthaler v. Teft Veller Co. (Sup.) 823.

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*The entry of a judgment with the adjustment of costs still open does not suffice to upport a notice of entry which will operate o limit the time of taking an appeal.—Dobyns . Commercial Trust Co. (Sup.) 748.

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Error of the justice in refusing to vacate a warrant of attachment was not ground for reversal of a judgment against the defendant subsequently rendered in the action.—Delamanarus v. Chuclos (Sup.) 515.

An appeal *held* a direct appeal from an intermediate order denying a motion for leave to serve a supplemental answer.—Gleason v. Northwestern Mut. Life Ins. Co. (Sup.) 991.

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The propriety of setting off costs as against defendant's attorney's lien *held* open to consideration on an appeal by defendant.—Agricultural Ins. Co. v. Smith (Sup.) 347.

Defendant cannot urge that refusal of improperly worded instruction requested by him



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**§ 15. —— Harmless error.**

*Where a defense involved no controverted facts, and the legal effect of the evidence concluded the case against plaintiff, errors on other issues *held* harmless.—Kosower v. Sandler (Sup.) 65.

In action of conversion, error in instruction as to measure of damages *held* not harmless in view of evidence and verdict.—Corn Exch. Bank v. Peabody (Sup.) 78.

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Erroneous view of the trial court concurred in by defendant's counsel *held* no ground for reversing a judgment for plaintiff warranted by the facts.—Dealy v. Coble (Sup.) 452.

In a suit to reform a contract of pledge, the admission of evidence of a consideration for the pledge *held* not reversible error, though no consideration was pleaded.—First Nat. Bank v. Bacon (Sup.) 717.

In an action for assault, the error in excluding certain testimony *held* not rendered harmless by admission of certain subsequent testimony.—Salzman v. Mandel (Sup.) 825.

Any error in the exclusion of evidence is harmless where the same matters are brought out by other evidence.—Wightman v. Catlin (Sup.) 1071.

*Where no question of fact for the determination of the jury arose on a trial, objections to the formation of the jury will not be considered.—Associate Presbyterian Congregation of Hebron v. Hanna (Sup.) 1082.

**§ 16. Determination and disposition of cause.**

*The Supreme Court *held*, on appeal from a judgment of the court of claims in favor of claimant, not authorized to increase the judgment.—Ostrander v. State (Sup.) 1061; Crowley v. State (Sup.) 1094.

An interlocutory judgment erroneously decreeing specific performance of a contract, and ordering an accounting, *held* not sustainable by striking out the provision for specific performance.—Rudiger v. Coleman (Sup.) 461.

A judgment for damages in an action for personal injuries modified by striking out allowance for punitive damages.—Walsh v. Hyde & Behman Amusement Co. (Sup.) 960.

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In summary proceeding to recover possession of real property, objection to the jurisdiction of the court *held* waived by defendants proceeding to trial.—Peabody v. Long Acre Square Bldg. Co. (Sup.) 242.

## APPLIANCES.

Liability of employer for defects, see "Master and Servant," § 4.

## APPLICATION.

Of payment, see "Payment," § 1.

## APPOINTMENT.

Of trustee, see "Trusts," § 3.

## APPRAISAL.

Of property subject to transfer tax, see "Taxation," § 4.



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## ARBITRATION AND AWARD.

See "Reference."

**§ 1. Award.**

*Where a submission agreement was so defective that the court had no power to order judgment on the award, it had no power to vacate the award.—Electric Steel Elevator Co. v. John Kam Malting Co. (Sup.) 604.

## ARCHITECTS.

Brokerage services by, see "Brokers," §§ 3, 4.

## ARGUMENT OF COUNSEL.

In civil action, see "Trial," § 3.
Review as dependent on presentation of grounds of review in record, see "Appeal," § 7.

## ARREST.

See "Bail."

## ASSAULT AND BATTERY.

Bias of witness, see "Witnesses," § 3.
Harmless error in exclusion of evidence, see "Appeal," § 15.

## ASSESSMENT.

Insurance assessments, see "Insurance," § 10.
Of compensation for property taken for public use, see "Eminent Domain," §§ 1, 2.
Of expenses of public improvements, see "Municipal Corporations," § 3.
Of tax, see "Taxation," § 2.

## ASSIGNMENTS.

Fraud as to creditors, see "Fraudulent Conveyances."
In bankruptcy, see "Bankruptcy."

***Transfers of particular species of property, rights, or instruments.***

See "Bonds," § 1; "Chattel Mortgages," § 1.
Corporate shares, see "Corporations," § 2.

**§ 1. Requisites and validity.**

An assignment of a claim, thought to be worthless, for a mere nominal amount, *held* subject to rescission where it appeared that the claim was in fact secured, of which neither party had notice at the time of the assignment.—Flynn v. Smith (Sup.) 56.

A right of action for false representations on a sale of property to decedent *held* assignable by his administrator, under Code Civ. Proc. § 1910, and 2 Rev. St. (1st Ed.) p. 447, pt. 3, c. 8, tit. 3, § 1.—Wickham v. Roberts (Sup.) 1092.

## ASSIGNMENTS FOR BENEFIT OF CREDITORS.

See "Bankruptcy."

## ASSOCIATIONS.

See "Building and Loan Associations"; "Joint Stock Companies."

## ASSUMPSIT, ACTION OF.

See "Account Stated"; "Money Received"; "Work and Labor."

## ASSUMPTION.

Of risk by employé, see "Master and Servant," § 8.

## ASYLUMS.

See "Hospitals."

## ATTACHMENT.

See "Execution."
Review of order refusing to vacate, see "Appeal," § 10.
Review of orders in attachment, see "Appeal," § 2.

## ATTEMPT.

To commit crime, see "Criminal Law," § 1.

## ATTORNEY AND CLIENT.

Action in tort to recover attorney's fees paid, see "Torts."
Argument and conduct of counsel at trial in civil actions, see "Trial," § 3.
Blackmail by attorney, see "Threats."
Champertous agreements, see "Champerty and Maintenance."
Corporation counsel, see "Municipal Corporations," § 1.
Counsel fees in suits for divorce, see "Divorce," § 2.
Review of argument of counsel as dependent on presentation of grounds of review in record, see "Appeal," § 7.

**§ 1. Retainer and authority.**

*An attorney under general retainer ordinarily has no implied authority to bind his client by a contract to sell land.—In re Amsterdam Ave. (Sup.) 331; Baker v. City of New York, Id.; In re Amsterdam Ave. (Sup.) 334; Herb v. Same, Id.; Hay v. Same, Id.

**§ 2. Compensation and lien of attorney.**

Where attorneys had a lien on an annuity to an amount equal to 10 per cent. of the annual payments, and both the annuitant and the trust company obligated to pay the annuity repudiated the agreement, the attorneys' remedy was by suit to enforce their lien.—Ransom v. Cutting (Sup.) 282.

Contract for attorneys' services in a will contest based on a percentage of the recovery or




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settlement *held* not unconscionable.—Ransom v. Cutting (Sup.) 282.

On a claim for legal services rendered to a corporation, evidence *held* insufficient to support a finding that the services were actually rendered.—People v. New York Bldg. Loan Banking Co. (Sup.) 290; In re Bacon's Claim, Id.

An attorney's lien *held* to have attached to defendant's judgment for costs, though the answer had contained no counterclaim (Code Civ. Proc. § 66).—Agricultural Ins. Co. v. Smith (Sup.) 347.

An attorney's affidavit on return of an order to show cause why an action should not be dismissed under a stipulation of the parties *held* not available as a petition for the allowance of the attorney's fees, as provided by Code Civ. Proc. § 66.—Sullivan v. McCann (Sup.) 947.

Where nothing was obtained by plaintiffs on dismissal of a cause, and there was no extinguishment of the claim sued on, there was no lien which was enforceable by plaintiffs' attorney against defendants in the action.—Sullivan v. McCann (Sup.) 947.

Where an attorney had a contract for a contingent fee, and his clients dismissed the action under an agreement with the defendants, the attorney had a right to have the amount due him fixed, as provided by Code Civ. Proc. § 66.—Sullivan v. McCann (Sup.) 947.

*Under the common law of the state, a lawyer may recover by action just compensation for his services.—Spencer v. Busch (Sup.) 690.

## AUTHORITY.

Of agent, see "Principal and Agent," §§ 1, 2.
Of attorney, see "Attorney and Client," § 1.
Of broker, see "Brokers," § 1.

## AWARD.

See "Arbitration and Award," § 1.

## BAIL.

**§ 1. In criminal prosecutions.**

Under Code Cr. Proc. §§ 527, 529, 555, 556, a person convicted of an offense not punishable with death, who has appealed and obtained an order from a justice of the Supreme Court staying execution pending an application for a certificate of reasonable doubt, may be admitted to bail pending the granting or refusal of such certificate.—People v. Reardon (Sup.) 399.

## BAILMENT.

See "Carriers," § 2; "Pledges."

## BALLOTS.

See "Elections," § 1.

## BANKRUPTCY.

Abatement of action upon bankruptcy of party, see "Abatement and Revival," § 1.
Motion for security for costs in action brought by person subsequently adjudged bankrupt, see "Costs," § 2.

**§ 1. Assignment, administration, and distribution of bankrupt's estate.**

*A bankrupt's trustee takes the bankrupt's property in the same condition and subject to the same liens as it was held by the bankrupt.—First Nat. Bank v. Bacon (Sup.) 717.

A bankrupt's trustee is not a bona fide purchaser of the bankrupt's property for value.—First Nat. Bank v. Bacon (Sup.) 717.

A certain transaction *held* not to amount to a preferential transfer by a bankrupt, within Bankr. Act July 1, 1898, c. 541, § 60, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445].—Stern v. Mayer (Sup.) 1028.

Under Bankruptcy Act July 1, 1898, c. 541, § 11, 30 Stat. 549 [U. S. Comp. St. 1901, p. 3426], it is improper for a trustee to be substituted as plaintiff in a suit by the bankrupt in a state court without first obtaining the consent of the federal court to such substitution.—Hahlo v. Cole (Sup.) 1049.

**§ 2. Rights, remedies, and discharge of bankrupt.**

National Bankruptcy Act, § 17, as amended by Act Feb. 5, 1903, c. 487, § 5, 32 Stat. 798 [U. S. Comp. St. Supp. 1905, p. 684], does not except from discharge liabilities for goods purchased by a husband or parent and used by wife or child.—Schellenberg v. Mullaney (Sup.) 432.

## BANKS AND BANKING.

Gift of deposit, see "Gifts," § 1.

**§ 1. Banking corporations and associations.**

Under Const. art. 8, § 7, and Banking Law, Laws 1892, p. 1869, c. 689, §§ 52, 53, the transfer of bank stock to relieve the transferror from liability for the bank's debts must be made while the bank is solvent.—Persons v. Gardner (Sup.) 807.

**§ 2. Functions and dealings.**

*Under Laws 1892, p. 1857, c. 689, § 25, subd. 4, as amended by Laws 1895, p. 749, c. 929, when considered in connection with subdivision 1, a note executed by the teller of a bank for a loan made by it to him without the approval of the directors is not void.—People's Trust Co. v. Pabst (Sup.) 1045.

## BAR.

Of action by former adjudication, see "Judgment," § 5.
Of dower, see "Dower," § 1.

*Point annotated. See syllabus.

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## BASTARDS.

**§ 1. Proceedings under bastardy laws.**

Where the county court erroneously discharged a defendant on appeal from an order of filiation from the obligation of his undertaking, and erroneously ordered his costs to be refunded to him, *held*, that the court had authority to vacate such order.—Burnham v. Tryon (Sup.) 600.

Under Code Cr. Proc. §§ 850, 851, 873, 866, *held*, that an order on appeal from the magistrates in bastardy proceedings requiring that there be refunded to defendant the amount certified by the magistrates as the cost of arrest and order of filiation was erroneous.—Burnham v. Tryon (Sup.) 600.

## BENEFICIAL ASSOCIATIONS.

Building or loan associations, see "Building and Loan Associations."

## BENEFITS.

From local improvements, see "Municipal Corporations," § 3.

## BEQUESTS.

See "Wills."

## BIAS.

Of witness, see "Witnesses," § 3.

## BILL OF EXCHANGE.

See "Bills and Notes."

## BILL OF LADING.

See "Carriers," § 2.

## BILL OF PARTICULARS.

See "Pleading," § 6.

## BILLS AND NOTES.

Admissions by holder, see "Evidence," § 4.
Alteration of bill or note, see "Alteration of Instruments."
Conclusiveness of judgment on notes, see "Judgment," § 6.
For loan by bank, see "Banks and Banking," § 2.
Former adjudication in action on note as bar, see "Judgment," § 5.
Guaranty of note, see "Guaranty," §§ 2, 3.
Notes secured by chattel mortgage, see "Chattel Mortgages," § 1.

**§ 1. Requisites and validity.**

An agreement to forbear immediate proceedings for the collection of a draft *held* a sufficient consideration for the execution of a note given as security therefor.—Emerson v. Sheffer (Sup.) 1057.

**§ 2. Modification, renewal, and rescission.**

The mere giving of a renewal note does not operate as a payment, but the question is one of intention.—First Nat. Bank v. Gridley (Sup.) 445.

**§ 3. Rights and liabilities on indorsement or transfer.**

Where a certified check was returned by bank to the payee and transferred by him a second time 14 months later, transferee *held* to have been put on notice.—Silverman v. National Butchers' & Drovers' Bank (Sup.) 209.

Mere surmise or suspicion is not sufficient to put a purchaser of negotiable paper upon inquiry.—Hibbs v. Brown (Sup.) 353.

The fact that the maker of a note procures its discount for his own benefit is notice to the discounter that an indorsement is not in the usual course of business, but for the maker's accommodation.—First Nat. Bank v. Gridley (Sup.) 445.

By the express provisions of Negotiable Instruments Law, Laws 1897, p. 730, c. 612, § 71, an indorsement of all the payees is necessary to give good title to the transferee.—First Nat. Bank v. Gridley (Sup.) 445.

Under Negotiable Instruments Law, Laws 1897, pp. 734, 745, c. 612, §§ 116, 205, *held*, that there was no implied warranty on the part of an accommodation indorser extending to the changed condition of the note after it parted from her possession.—First Nat. Bank v. Gridley (Sup.) 445.

*A person's indorsement of a check *held* a warranty of the genuineness of a prior indorsement.—Oriental Bank v. Gallo (Sup.) 561.

A bank paying money to a person holding a check under a forged indorsement *held* entitled, under the facts, to recover the amount paid.—Oriental Bank v. Gallo (Sup.) 561.

*A purchaser of a check disclosing an alteration on its face *held* not a holder in due course, as defined by Negotiable Instruments Law, Laws 1897, p. 732, c. 612, § 91.—Elias v. Whitney (Sup.) 667.

*Under Negotiable Instruments Law, Laws 1897, p. 735, c. 612, § 118, indorsers are prima facie liable as between themselves in the order of their indorsement.—State Bank v. Kahn (Sup.) 858.

Payment by a surety of certain judgment debtors of a judgment recovered against them on a note *held* to discharge the liability of an accommodation indorser against whom no judgment had been rendered.—State Bank v. Kahn (Sup.) 858.

*That the payee of a note executed by a corporation through its officers is a director does not put a purchaser of the note upon inquiry as to whether its issuance was author-



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ized.—Orr v. South Amboy Terra Cotta Co. (Sup.) 1026.

**§ 4. Presentment, demand, notice, and protest.**

An accommodation indorser of a note *held* not to have waived notice of dishonor. Negotiable Instruments Law, Laws 1897, p. 742, c. 612, § 180.—First Nat. Bank v. Gridley (Sup.) 445.

**§ 5. Payment and discharge.**

*An agreement to accept a note in payment of another one *held* based upon a sufficient consideration.—Brink v. Stratton (Sup.) 421.

Under Negotiable Instruments Law, Laws 1897, p. 744, c. 612, § 201, subd. 4, a valid tender of payment made by a prior party discharges one secondarily liable.—State Bank v. Kahn (Sup.) 858.

**§ 6. Actions.**

In an action on a note *held* a question for the jury whether the note bore on its face such evidence of alteration as to charge the holder with notice of its infirmity.—First Nat. Bank v. Gridley (Sup.) 445.

By the express provisions of Negotiable Instruments Law, Laws 1897, p. 744, c. 612, § 204, where an instrument or any signature thereon appears to have been canceled, the burden is on the party who alleges that the cancellation was made unintentionally or under a mistake or without authority.—First Nat. Bank v. Gridley (Sup.) 445.

A finding that the prior indorsement of a check was a forgery *held* warranted under the evidence.—Oriental Bank v. Gallo (Sup.) 561.

*A defendant sued on a note must, in order to avail himself of the defense that plaintiff is not a bona fide holder, allege that fact in his answer.—Koppel v. Hatch (Sup.) 619.

Where it was claimed that a note to secure a bankrupt's debt was without consideration because the creditor was prevented from suing on the claim by Bankr. Act July 1, 1898, c. 541, § 11, 30 Stat. 549 [U. S. Comp. St. 1901, p. 3426], the burden was on the defendant to affirmatively prove facts bringing the creditor within the prohibition of such section.—Emerson v. Sheffer (Sup.) 1057.

## BLACKMAIL.

See "Threats."

## BONA FIDE PURCHASERS.

Of bill of exchange or promissory note, see "Bills and Notes," § 3.
Of bonds, see "Bonds," § 1.
Trustee in bankruptcy, see "Bankruptcy," § 1.

## BONDS.

Of county contractor, see "Counties," § 1.
Of joint-stock association, see "Joint-Stock Companies."
Questions for jury in general in action on, see "Trial," § 4.
Sureties on bonds, see "Principal and Surety."

*Bonds in legal proceedings.*

See "Bail"; "Costs," § 2; "Injunction," § 4.
For abandonment of wife, see "Husband and Wife," § 2.

**§ 1. Negotiability and transfer.**

Under Negotiable Instruments Law, Laws 1897, p. 722, c. 612, §§ 20–22, bonds of a joint-stock association exonerating shareholders from personal liability for payment thereof *held* negotiable.—Hibbs v. Brown (Sup.) 353.

Under Negotiable Instruments Law, Laws 1897, p. 722, c. 612, § 20, subd. 3, negotiability of bonds issued by joint-stock association *held* not affected by provision of deed of trust securing the same reserving to a majority of the bondholders the right to authorize the trustees to waive default in the payment of interest coupons.—Hibbs v. Brown (Sup.) 353.

The negotiability of interest coupons of bonds issued by a joint-stock association *held* dependent on and controlled by the negotiability of the bonds.—Hibbs v. Brown (Sup.) 353.

Mere surmise or suspicion is not sufficient to put a purchaser of negotiable paper upon inquiry.—Hibbs v. Brown (Sup.) 353.

Under Negotiable Instruments Law, Laws 1897, p. 732, c. 612, § 97, holders of a bond issued by a joint-stock association *held* holders in due course.—Hibbs v. Brown (Sup.) 353.

**§ 2. Actions.**

In an action on a bond for performance of a contract *held* that an accounting between the parties to the original contract, in which an officer of the surety participated, was competent evidence.—Keene v. Newark Watch Case Material Co. (Sup.) 68.

Under Code Civ. Proc. §§ 481, 1915, *held* that the complaint in an action on a bond was insufficient.—Gansevoort Bank v. Empire State Surety Co. (Sup.) 882.

## BOUNDARIES.

**§ 1. Description.**

*A conveyance of a lot fronting on a street extending along the bank of a navigable river *held* to convey the riparian rights of the vendor.—Johnson v. Grenell (Sup.) 629.

*A purchaser of a lot *held* to take the fee to the center of a street.—Johnson v. Grenell (Sup.) 629.

**§ 2. Evidence, ascertainment, and establishment.**

The presumption that a conveyance of a lot fronting on a street along the bank of a navigable river included the street *held* not overcome by certain facts.—Johnson v. Grenell (Sup.) 629.

*Point annotated. See syllabus.

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## BREACH.

Of contract, see "Contracts," § 3; "Sales," § 3; "Vendor and Purchaser," § 2.
Of covenant, see "Covenants," § 1.
Of warranty, see "Sales," §§ 4, 6.

## BROKERS.

See "Factors"; "Principal and Agent."
Action against broker on account stated, see "Account Stated."
Competency of witnesses in action by or against, see "Witnesses," § 1.
Indemnity for claim for commissions, see "Indemnity."

**§ 1. Employment and authority.**
Evidence *held* not to show real estate broker employed by defendant to sell his property.—Davenport v. Corbett (Sup.) 403.

**§ 2. Duties and liabilities to principal.**
Client depositing sum with brokers as margin for purchase and sale of securities *held* entitled to recover deposit, with interest, where no purchases or sales were ever made.—Haight v. Haight & Freese Co. (Sup.) 471.

*Client *held* entitled to accounting in equity of transactions with broker.—Haight v. Haight & Freese Co. (Sup.) 471.

**§ 3. Compensation and lien.**
*Facts *held* to show a real estate broker entitled to recover commissions for finding a purchaser.—Getzelsohn v. Donnelly (Sup.) 213.

*In an action by real estate broker for commissions, a letter from defendant to plaintiff *held* a sufficient authority to offer the property for sale.—Getzelsohn v. Donnelly (Sup.) 213.

*A real estate agent *held* not to have produced purchasers, so as to be entitled to a commission.—Weiss v. Rubinson (Sup.) 429.

*Where efforts of a real estate broker fail, his employer is not precluded from thereafter negotiating with the person produced by the broker, without being obliged to pay commissions.—Miller v. Vining (Sup.) 466.

*Broker *held* not entitled to commissions where parties disagreed as to when transfer should take place.—Haase v. Schneider (Sup.) 587.

*In an action by a real estate broker to recover from defendants certain commissions, an instruction *held* properly refused.—Alden v. Robinson (Sup.) 675.

*A broker who procures a purchaser of real estate ready and able to take the property at the price fixed by the owner is entitled to his commission.—Moore v. Maguire (Sup.) 752.

The right of a broker, employed to procure a purchaser, to his commissions, does not accrue until he has notified the owner or agent that he has procured a purchaser.—Bloodgood v. Short (Sup.) 775.

An architect procuring capitalists willing to construct a hotel on the land of an owner *held* entitled to the compensation agreed on on the owner failing to comply with the terms of the agreement between himself and the capitalists procured.—Lucas v. Smith (Sup.) 1037.

**§ 4. Actions for compensation.**
In an action by a broker to recover a commission for procuring a purchaser, the evidence considered, and *held* insufficient to show that defendant had placed the property with plaintiff for sale.—Lederer v. McElroy (Sup.) 247.

In action by brokers for commission, evidence *held* to show knowledge of broker that defendant was not the owner of the property, and that claim for commission from seller had been released.—Weiss v. Bleier (Sup.) 539.

A complaint in an action by an architect for compensation for procuring capitalists willing to undertake the construction of a hotel on land belonging to defendant *held* to show a performance by the architect of the contract of employment.—Lucas v. Smith (Sup.) 1037.

## BUILDING AND LOAN ASSOCIATIONS.

Member of building and loan association, having received no advances, *held* not entitled to come in on distribution of assets on association's insolvency as creditor distinct from those entitled to share in the distribution when made among members, even as to amount paid by him denominated interest on mortgage to association.—People v. New York Building-Loan Banking Co. (Sup.) 898; In re Montagues' Claim, Id.

## BUILDING CONTRACTS.

See "Contracts," §§ 2, 3; "Mechanics' Liens"; "Principal and Surety," § 2.

## CALENDARS.

Of causes for trial, see "Trial," § 1.

## CANCELLATION OF INSTRUMENTS.

See "Lis Pendens"; "Reformation of Instruments."
Cancellation of insurance policy, see "Insurance," § 6.
Rescission of contracts, see "Sales," § 2.
Setting aside fraudulent conveyances, see "Fraudulent Conveyances," § 2.

## CARNAL KNOWLEDGE.

See "Rape."

## CARRIERS.

Instructions in general in action for injuries to passenger, see "Trial," § 5.
Review of discretion of court in granting new trial in action for injuries to passenger, see "Appeal," § 13.



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**§ 1. Control and regulation of common carriers.**

A telegraph company which maintains messenger boys for its patrons, making a charge therefor, is not a common carrier as to the services rendered by the messengers.—Hirsch v. American Dist. Telegraph Co. (Sup.) 371.

Laws 1890, p. 1114, c. 565, § 105, does not make a railroad company liable to a penalty where the failure of a passenger to receive a transfer resulted wholly from the misjudgment, neglect, or mistake of a conductor.—Schwartzman v. Brooklyn Heights R. Co. (Co. Ct.) 941.

**§ 2. Carriage of goods.**

In action against express company for failure to deliver merchandise, an amendment to answer *held* properly denied.—Kaplan v. Metropolitan Express Co. (Sup.) 228.

Provision in bill of lading that claims for loss or damage must be made within three months *held* waived by refusal to pay the claim based on merits.—Isham v. Erie R. Co. (Sup.) 609.

*Carrier undertaking to transport goods beyond terminus *held* liable for delay at terminus.—Isham v. Erie R. Co. (Sup.) 609.

Order of persons other than consignee to hold shipment *held* insufficient to justify the delay by the carrier.—Isham v. Erie R. Co. (Sup.) 609.

*Notwithstanding provision in bill of lading, carrier *held* liable for withholding delivery of goods at its terminus to lighters.—Isham v. Erie R. Co. (Sup.) 609.

Shipper *held* not entitled to recover difference between value of yarns when shipped and amount for which they sold in damaged condition.—D'Olier v. New York Cent. & H. R. R. Co. (Sup.) 649.

**§ 3. Carriage of passengers.**

The opening only two-thirds its width of the door of a subway car *held* not the proximate cause of the injury to a passenger whose finger was crushed by the door being open wide as he entered.—Maillefert v. Interborough Rapid Transit Co. (Sup.) 207.

The opening wide of the door of a subway car as a passenger was entering, when it was only open two-thirds its width, whereby his finger was crushed, *held* not negligence.—Maillefert v. Interborough Rapid Transit Co. (Sup. 207.

*Proof in an action for injuries received by a passenger on a street car *held* not to prove actionable negligence.—Molloy v. New York City Ry. Co. (Sup.) 211.

*The maxim res ipsa loquitur is applicable to a case where a passenger in a street car is injured by the fall of a device used for registering fares.—Weir v. Union Ry. Co. (Sup.) 268.

In an action against a carrier for injuries to a passenger owing to the fall of a device used for registering fares, evidence considered, and *held* sufficient to warrant a finding that there had not been proper inspection on the part of the carrier.—Weir v. Union Ry. Co. (Sup.) 268.

In an action against a street railroad company for injuries to a passenger, evidence *held* insufficient to show that car was started while plaintiff was alighting.—Greehy v. Metropolitan St. Ry. Co. (Sup.) 274.

In an action for death of a passenger by being thrown from the front platform of a street car, plaintiff *held* not to have established that deceased was not guilty of contributory negligence.—Depew v. New York City Ry. Co. (Sup.) 276.

*A passenger riding on the front platform of a street car *held* bound to take some precaution to guard against losing his balance by any sudden motion of the car.—Depew v. New York City Ry. Co. (Sup.) 276.

*In an action for death of a passenger by being thrown from a street car by a depression in the track, whether the carrier was guilty of negligence *held* for the jury.—Depew v. New York City Ry. Co. (Sup.) 276.

*The variance between the complaint, in an action for injuries to a passenger, and the proof, *held* fatal to a recovery.—Scheu v. Union Ry. Co. (Sup.) 278.

*In an action against a street railroad company for injuries to a passenger, evidence *held* insufficient to show negligence.—Bollinger v. Interurban St. Ry. Co. (Sup.) 641.

*In an action by a passenger for injuries from being struck by a wagon while standing upon the running board of a car, plaintiff *held* not guilty of contributory negligence.—Walsh v. Interurban St. Ry. Co. (Sup.) 656.

In an action against a street railroad company for injuries to a passenger, evidence *held* to require submission to the jury of the issue of defendant's negligence.—Walsh v. Interurban St. Ry. Co. (Sup.) 656.

Though approaches to the station of a railway company are owned by the city, and the company cannot repair without permission, it should provide against injury to its passengers by erecting barricades or giving warning.—Schlessinger v. Manhattan Ry. Co. (Sup.) 840.

*It is the duty of a railway company to exercise care in affording safe approaches to its stations, though they are owned by the city.—Schlessinger v. Manhattan Ry. Co. (Sup.) 840.

*Starting of car while passenger was attempting to alight at a point other than usual stopping place *held* not negligence.—Laverty v. Interurban St. Ry. Co. (Sup.) 846.

*In an action against a street railroad company by a passenger, evidence *held* to justify submission to the jury of the question of defendant's negligence.—Windels v. Interborough Rapid Transit Co. (Sup.) 854.

*In an action against a street railway company for injuries to a passenger, the question of defendant's negligence and plaintiff's contributory negligence *held* for the jury.—Brettner v. Westchester Electric Ry. Co. (Sup.) 857.

*** Point annotated. See syllabus.**

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Passenger on street car *held* not entitled to recover if the car from which she was alighting when injured was moving at the time.—Goldstein v. Metropolitan St. Ry. Co. (Sup.) 862.

## CASE ON APPEAL.

Making and settlement, see "Appeal," § 7.

## CATTLE.

See "Animals."

## CAUSA MORTIS.

See "Gifts," § 2.

## CAUSE OF ACTION.

See "Action."

## CERTIFICATE.

Liquor tax certificates, see "Intoxicating Liquors," § 1.
Of reasonable doubt, see "Criminal Law," § 5.

## CERTIORARI.

**§ 1. Nature and grounds.**
*Certiorari *held* not the proper remedy for review of removal, under New York City Charter, Laws 1901, p. 242, c. 466, § 537, of a member of the street-cleaning department.—People v. Woodbury (Sup.) 142.

**§ 2. Proceedings and determination.**
Under the facts *held* that no further return to a writ of certiorari, to review the action of the police commissioner in dismissing a member of the police force, should be required.—People v. McAdoo (Sup.) 40.

## CHAMPERTY AND MAINTENANCE.

Where an attorney sues on a note bought by him, the burden was on him, under Code Civ. Proc. §§ 73, 76, to show that he took it in payment for property sold, for services actually rendered, or for a debt antecedently contracted.—Lieberman v. Mandel (Sup.) 201.

*Unsolicited contract for attorneys' services *held* not champertous.—Ransom v. Cutting (Sup.) 282.

Facts *held* not to show the purchase of a thing in action by an attorney violative of Code Civ. Proc. § 73.—Wightman v. Catlin (Sup.) 1071.

A question put to a witness *held* objectionable as too general.—Wightman v. Catlin (Sup.) 1071.

Where the defense was that plaintiff's attorney was interested in the claim in violation of Code Civ. Proc. § 73, certain evidence *held* inadmissible as irrelevant.—Wightman v. Catlin (Sup.) 1071.

## CHANCERY.

See "Equity."

## CHANGE OF VENUE.

Of civil actions, see "Venue," § 2.

## CHARGE.

To jury in civil actions, see "Trial," § 5.
To jury in criminal prosecutions, see "Criminal Law," § 3.

## CHARITIES.

**§ 1. Construction, administration, and enforcement.**
*A hospital organized under Laws 1889, p. 93, c. 95, *held* not liable for the negligence of its ambulance driver.—Noble v. Hahnemann Hospital of Rochester (Sup.) 605.

## CHATTEL MORTGAGES.

See "Pledges."

**§ 1. Assignment of mortgage or debt.**
*The transfer of part of several notes secured by a chattel mortgage passes an interest in the mortgage without any formal assignment thereof.—Chandless v. Globe Storage & Carpet Cleaning Co. (Sup.) 511.

**§ 2. Foreclosure.**
*Where, after default in payment of debt secured by chattel mortgage, the mortgagee sold the property, and purchased it at the sale for less than its value, a judgment creditor of the mortgagor could not thereafter recover from the mortgagee the difference between the amount of the mortgage indebtedness and the value of the property.—Cartier v. Pabst Brewing Co. (Sup.) 516.

## CHEAT.

See "Fraud."

## CHECKS.

See "Bills and Notes."

## CHILD.

See "Adoption"; "Bastards"; "Guardian and Ward"; "Infants"; "Parent and Child."
Construction of word used in deed, see "Deeds," § 2.
Contributory negligence of, see "Negligence," § 2.
Contributory negligence of child injured by operation of street railroads, see "Street Railroads," § 2.

## CHOSE IN ACTION.

Assignment, see "Assignments."

*** Point annotated. See syllabus.**

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## CHURCH.

See "Religious Societies."

## CITATION.

See "Process."

## CITIES.

See "Municipal Corporations."

## CITIZENS.

See "Indians."
Equal protection of laws, see "Constitutional Law," § 4.

## CIVIL RIGHTS.

See "Constitutional Law," § 4.

## CIVIL SERVICE.

See "Municipal Corporations," § 1.
Judicial power to review rules of civil service commission, see "Constitutional Law," §§ 2, 3.

## CLAIM AND DELIVERY.

See "Replevin."

## CLAIMS.

Against estate of decedent, see "Executors and Admistrators," § 3.
Against state, see "States," § 1.

## CLASS LEGISLATION.

See "Licenses," § 1.

## COLLATERAL AGREEMENT.

Parol evidence, see "Evidence," § 8.

## COLLATERAL ATTACK.

On judgment, see "Judgment," § 4.

## COLLATERAL INHERITANCE TAXES.

See "Taxation," § 4.

## COLLATERALS.

See "Descent and Distribution," § 1.

## COLLATERAL SECURITY.

See "Pledges."

## COLLATERAL UNDERTAKING.

See "Frauds, Statute of," § 1; "Guaranty."

## COLLECTION.

Of costs, see "Costs," § 6.
Of estate of decedent, see "Executors and Administrators," § 2.

## COLONIAL GRANTS.

See "Public Lands," § 1.

## COLOR OF TITLE.

To sustain adverse possession, see "Adverse Possession."

## COMMERCE.

Carriage of goods and passengers, see "Carriers."

## COMMISSION MERCHANTS.

See "Factors."

## COMMISSIONS.

*Of particular classes of officers or other persons.*
See "Brokers," § 3; "Executors and Administrators," § 6; "Factors."
Guardian, see "Guardian and Ward," § 1.
Trustee, see "Trusts," § 6.

## COMMON CARRIERS.

See "Carriers."

## COMMON LAW.

Compensation of attorney, see "Attorney and Client," § 2.
Marriage, see "Marriage."

## COMMON SCHOOLS.

See "Schools and School Districts," § 1.

## COMPENSATION.

*Of particular classes of officers or other persons.*
See "Brokers," § 3; "Executors and Administrators," § 6; "Factors."
Attorney, see "Attorney and Client," § 2.
Corporation counsel, see "Municipal Corporations," § 1.
Guardian, see "Guardian and Ward," § 1.
Municipal employés, see "Municipal Corporations," § 1.
School employés, see "Schools and School Districts," § 1.
Servant, see "Master and Servant," § 2.
Trustee, see "Trusts," § 6.


*** Point annotated. See syllabus.**

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## COMPETENCY.

Of evidence in civil actions, see "Evidence," § 3.
Of experts as witnesses, see "Evidence," § 9.
Of witnesses in general, see "Witnesses," § 1.

## COMPLAINT.

In civil actions, see "Pleading."
In criminal prosecution, see "Criminal Law," § 2.

## COMPROMISE AND SETTLEMENT.

See "Payment"; "Release."

## CONCLUSION.

Of witness, see "Evidence," § 9.

## CONDEMNATION.

Taking property for public use, see "Eminent Domain."

## CONDITIONAL SALES.

See "Sales," § 7.

## CONDITIONS.

In guaranty, see "Guaranty," § 1.
In mortgages, see "Mortgages," § 1.
In wills, see "Wills," § 6.
Precedent to action for breach of contract, see "Contracts," § 4.
Precedent to action for reformation of instrument, see "Reformation of Instruments," § 1.
Precedent to action on judgment, see "Judgment," § 8.
Precedent to action to recover money paid on contract for sale of realty and damages for breach of contract, see "Vendor and Purchaser," § 3.
Precedent to cancellation of insurance policy, see "Insurance," § 6.
To change of venue, see "Venue," § 2.

## CONFLICT OF LAWS.

See "Deeds," § 1.

## CONNECTING CARRIERS.

See "Carriers," § 2.

## CONSENT.

To construction of street railroad, see "Street Railroads," § 1.
To liquor license, see "Intoxicating Liquors," § 1.

## CONSIDERATION.

Of bill of exchange or promissory note, see "Bills and Notes," § 1.
Of contract, see "Contracts," § 1.

## CONSIGNMENT.

See "Factors."

## CONSTITUTIONAL LAW.

*Provisions relating to particular subjects.*

See "Judges," §§ 1, 2; "Navigable Waters," § 1.
Enactment and validity of statutes, see "Statutes," § 1.

**§ 1. Construction, operation, and enforcement of constitutional provisions.**

*Laws 1901, p. 1326, c. 538, amending General Corporation Law, § 15, *held* not applicable to an action by an assignee of a foreign corporation suing on a contract made prior to the amendment.—McNamara v. Keene (Sup.) 860.

**§ 2. Distribution of governmental powers and functions.**

The Legislature has no power to enact statutes declaring what the law was at a prior time.—Weisberg v. Weisberg (Sup.) 260.

The court has power to review a rule of a municipal civil service commission setting up requirements for examination for promotion in the civil service and to declare the rule invalid if it is unreasonable and improper.— In re Ricketts (Sup.) 502.

**§ 3. Obligation of contracts.**

*Geneva City Charter, Laws 1897, p. 444, c. 360, § 65, as amended by Laws 1905, p. 1032, c. 462, authorizing the city's board of public works in improving a street occupied by a street railroad to require the railroad company to change the location of its tracks, *held* not unconstitutional as impairing the obligation of the railroad company's franchise with the city. —People v. Geneva, W. S. F. & C. L. Traction Co. (Sup.) 719.

**§ 4. Equal protection of laws.**

Municipal Court Act of the City of New York, Laws 1902, p. 1494, c. 580, § 12 (7), as amended by Laws 1904, p. 1429, c. 598, providing for rotation in the holding of court in different districts by justices of the Municipal Court, *held* not to deny any one the equal protection of the law in contravention of the Constitution of the United States.—Sakolski v. Schenkel (Sup.) 190.

**§ 5. Due process of law.**

Section 30 of the charter of the city of Middletown (Laws 1902, p. 1367), requiring notice of condition of sidewalk or street as condition precedent to action for injuries, *held* invalid as depriving person injured of right to legal remedy.—MacMullen v. City of Middletown (Sup.) 145.

## CONTINGENT FEES.

See "Attorney and Client," § 2.

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## CONTINGENT REMAINDERS.

Creation, see "Wills," § 6.

## CONTRACTS.

Agreements within statute of frauds, see "Frauds, Statute of."
Alteration, see "Alteration of Instruments."
Assignment, see "Assignments."
Instructions in general action on, see "Trial," § 5.
Laws impairing obligation, see "Constitutional Law," § 3.
Liquidated damages or penalties, see "Damages," § 1.
Operation and effect of champerty, see "Champerty and Maintenance."
Operation and effect of customs or usages, see "Customs and Usages."
Operation and effect of usury laws, see "Usury," § 1.
Parol or extrinsic evidence, see "Evidence," § 8.
Reformation, see "Reformation of Instruments."
Restraining performance or breach, see "Injunction," § 1.
Review of finding in action for breach, see "Appeal," § 14.
Specific performance, see "Specific Performance."
Subrogation to rights or remedies of creditors, see "Subrogation."

*Contracts of particular classes of parties.*

See "Attorney and Client." § 2; "Carriers," § 2; "Counties," § 1; "Husband and Wife," § 1; "Infants," § 1; "Master and Servant"; "Municipal Corporations," §§ 2, 3; "Religious Societies."
Board of education, see "Schools and School Districts," § 1.

*Contracts relating to particular subjects.*

See "Patents," § 1.
Compensation of attorney, see "Attorney and Client," § 2.
Employment of insurance agent, see "Insurance," § 3.
Ground for mehanics' liens, see "Mechanics' Liens," § 1.
Limitation of liability of carrier, see "Carriers," § 2.
Making bequest or devise, see "Wills," § 3.

*Particular classes of express contracts.*

See "Adoption"; "Bills and Notes"; "Bonds"; "Chattel Mortgages"; "Covenants"; "Guaranty"; "Indemnity"; "Insurance"; "Liens"; "Partnership"; "Sales."
Agency, see "Principal and Agent."
Bill of lading, see "Carriers," § 2.
Employment, see "Master and Servant."
Leases, see "Landlord and Tenant."
Mutual benefit insurance, see "Insurance," § 10.
Sales of realty, see "Vendor and Purchaser."
Suretyship, see "Principal and Surety."

*Particular classes of implied contracts.*

See "Account Stated"; "Money Received"; "Work and Labor."

*Particular modes of discharging contracts.*

See "Payment"; "Release."

**§ 1. Requisites and validity.**

A promise *held* made without consideration.—Martin v. Flahive (Sup.) 577.

*A separation agreement construed, and *held* not invalid, as offering the wife a premium to procure divorce.—Trust Company of America v. Nash (Sup.) 734.

*Certain letters *held* to constitute a valid and binding contract for the sale of bonds.—Baker v. Packard (Sup.) 804.

A contract by which testator agreed to pay plaintiff, with whom he had had illicit relations for a number of years, $500 a year for 15 years, *held* not void as obtained by duress as a matter of law.—Wakley v. King (Sup.) 957.

A requirement by a county board of supervisors that bidders for the publication of the journal of the board shall use the printers' union label is against public policy and unlawful.—People v. Edgcomb (Sup.) 965.

**§ 2. Construction and operation.**

The assignment of a contract for purchase construed as to the person to whom a payment is to be made.—Gordon v. Stern (Sup.) 229.

Facts *held* not to show a contract between a telegraph company and plaintiff for the delivery of a package by a messenger of the company. Hirsch v. American Dist. Telegraph Co. (Sup.) 371.

*Where a contract for the construction of a building fails to fix a time for payment, the law fixes the completion of the work as the time for payment.—Gurski v. Doscher (Sup.) 588.

An instrument construed, and *held* that a breach of an agreement whereby one of the first parties was to purchase stock from the second party gave a cause of action against all the first parties.—Walter v. Rafalsky (Sup.) 915.

**§ 3. Performance or breach.**

Where plaintiffs failed to substantially perform a contract, they were not entitled to recover the full contract price in the absence of a waiver of complete performance.—Buellesbach v. Henderson (Sup.) 36.

Under an agreement providing that plaintiff should inspect the electric installation in defendant's place of business, defendant to pay plaintiff's inspector $50 on presenting certificate of inspection, etc., plaintiff *held* only required to prove the inspection and presentation of the certificate to entitle him to demand payment.—Electrical Equipment & Inspecting Co. v. Scheelenberg (Sup.) 225.

A contractor for the mason work of a church *held* not entitled to abandon his contract be-

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cause of the church corporation's refusal to pay him for extra work.—Condon v. Church of St. Augustine (Sup.) 253; Miller v. Same, Id.

*Where digging of trench was included in estimate of price for doing certain work, the item should be deducted where the trench was not in fact dug.—Scanlon v. Muller (Sup.) 662.

Facts *held* not to establish plaintiff's breach of a contract by which testator agreed to pay plaintiff $500 a year for 15 years for peace, relieving testator from further performance.—Wakley v. King (Sup.) 957.

*The failure of a contractor to do a certain act *held* not as a matter of law a nonperformance of the contract sufficient to defeat a recovery.—Ramstedt v. Brooker (Sup.) 1044.

*A building contract substantially performed *held* to authorize a recovery thereon.—Ramstedt v. Brooker (Sup.) 1044.

**§ 4. Actions for breach.**

*A complaint in an action on a building contract alleging performance *held* sustained by proof of a substantial performance.—Rowe v. Gerry (Sup.) 380.

Burden of proof in action for breach of contract and damages for loss of money by cancellation of order caused thereby *held* to be on plaintiff to show certain facts.—Korin v. Rutz (Sup.) 845.

## CONTRADICTION.

Of witness, see "Witnesses," § 3.

## CONTRIBUTORY NEGLIGENCE.

See "Negligence," §§ 2, 3.
As defense to action for injuries to third person caused by wrongful act of servant, see "Master and Servant," § 11.
Of passenger, see "Carriers," § 3.
Of person injured by operation of street railroad, see "Street Railroads," § 2.
Of servant, see "Master and Servant," § 9.

## CONVERSION.

Wrongful conversion of personal property, see "Trover and Conversion."

*Under a deed creating a trust, the action of those entitled to the trust property in joining in an action for partition thereof *held* to justify the court in treating the property as real estate, though the trustee was directed to sell it at the termination of the trust.—Train v. Davis (Sup.) 816.

*Will construed, and *held* not to create an equitable conversion of real estate.—In re Bruchaeser's Estate (Sup.) 937.

## CONVEYANCES.

See "Boundaries."
Contracts to convey, see "Vendor and Purchaser," § 2.
In fraud of creditors, see "Fraudulent Conveyances."
In trust, see "Trusts," § 1.

*Conveyances by or to particular classes of parties.*

See "Religious Societies."

*Particular classes of conveyances.*

See "Assignments"; "Chattel Mortgages"; "Deeds"; "Mortgages."

## CORPORATION COUNSEL.

See "Municipal Corporations," § 1.

## CORPORATIONS.

Application by for bill of particulars, see "Pleading," § 6.
Construction of contract for purchase of corporate stock, see "Contracts," § 2.
Examination of officers before trial, see "Discovery," § 1.
Grants of rights in navigable waters, see "Navigable Waters," § 2.
Mandamus, see "Mandamus," § 1.
Pledge of corporate stock, see "Pledges."
Presumption as to constitutionality of statutes, see "Constitutional Law," § 1.
Reformation of contract for pledge of corporate stock, see "Reformation of Instruments," § 1.
Remarks and conduct of counsel in action against, see "Trial," § 3.
Restrictions on devises to, see "Wills," § 1.
Right of action for libel, see "Libel and Slander," § 3.
Specific performance of contract for formation of, see "Specific Performance," § 2.
Taxation of corporations and corporate property, see "Taxation," § 2.
Taxes on transfers of corporate stock, see "Taxation," § 4.
Trust in corporate stock, see "Trusts," § 5.

*Particular classes of corporations.*

See "Building and Loan Associations"; "Hospitals"; "Municipal Corporations"; "Religious Societies"; "Street Railroads," § 1.
Banks, see "Banks and Banking," § 1.
Electric companies, see "Electricity."
Insurance companies, see "Insurance."

**§ 1. Incorporation and organization.**

Certain causes of action, if existing, *held* to belong to an old corporation or to stockholders of a new corporation individually, and not to the new corporation.—Meyer v. Page (Sup.) 739.

**§ 2. Capital, stock, and dividends.**

Request for delivery of corporate stock *held* not in pursuance of option given by owner, so

*** Point annotated. See syllabus.**



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as to deprive him of dividends declared in the meantime by relating sale to date of option.—Rowe v. White (Sup.) 729.

*Seller of corporate stock *held* entitled to dividend declared after option for sale was given, but before sale was consummated.—Rowe v. White (Sup.) 729.

**§ 3. Officers and agents.**

*Trustees of insolvent and defunct manufacturing corporation *held* not liable for failure to file annual report required by Stock Corporation Law, Laws 1892, p. 1832, c. 688.—Costello v. Outterson (Sup.) 880.

**§ 4. Corporate powers and liabilities.**

An answer in an action by a corporation *held* not to raise a question of misnomer within Code Civ. Proc. § 1777.—Associate Presbyterian Congregation of Hebron v. Hanna (Sup.) 1082.

**§ 5. Foreign corporations.**

*A complaint in an action by a foreign corporation *held* not demurrable for failure to allege a compliance with Laws 1892, p. 1805, c. 687, § 15.—Ozark Cooperage Co. v. Quaker City Cooperage Co. (Sup.) 113.

*Service of summons on one having authority to sell goods of foreign corporation, but who is not an officer or agent, *held* not to give the court jurisdiction.—Hodge v. Acorn Brass Mfg. Co. (Sup.) 673.

*Laws 1901, p. 1326, c. 538, amending General Corporation Law, § 15, *held* not applicable to an action by an assignee of a foreign corporation suing on a contract made prior to the amendment.—McNamara v. Keene (Sup.) 860.

A contract of insurance insuring the property of a foreign corporation situated in the state of New York *held* not embraced within Corporation Law, Laws 1901, p. 1326, c. 538, § 15, relating to foreign corporations.—South Bay Co. v. Howey (Sup.) 909.

Under Code Civ. Proc. § 1779, and General Corporation Law, Laws 1901, p. 1326, c. 538, § 15, a complaint in an action by a foreign corporation *held* not bad for failing to allege that the corporation had obtained the certificate that it had complied with the requirements of law, authorizing it to do business in the state.—South Bay Co. v. Howey (Sup.) 909.

To entitle a defendant in an action by a foreign corporation to a dismissal of the complaint on the ground that it does not allege that the corporation has obtained the necessary certificate, it must appear that the corporation is a stock corporation.—South Bay Co. v. Howey (Sup.) 909.

## CORRECTION.

Of assessment of taxes, see "Taxation," § 2.

## COSTS.

Form of order for allowance, see "Motions."
Review of allowance, see "Appeal," § 10.
Right of corporation counsel, see "Municipal Corporations," § 1.

*In particular actions or proceedings.*

See "Injunction," § 3.
Accounting by administrator, see "Executors and Administrators," § 6.
Accounting by guardian, see "Guardian and Ward," § 2.
Accounting by trustee, see "Trusts," § 6.
Bastardy proceedings, see "Bastards," § 1.
Condemnation proceedings, see "Eminent Domain," §§ 1, 2.
To enforce lien, see "Mechanics' Liens," § 3.
To revoke liquor license, see "Intoxicating Liquors," § 1.
To set aside default judgment, see "Judgment," § 2.

**§ 1. Nature, grounds, and extent of right in general.**

*Where defendant tenders and pays money into court for the benefit of the plaintiff, and plaintiff fails to prove a cause of action for an amount more than the tender, judgment should be rendered for defendant for costs.—Lackner v. American Clothing Co. (Sup.) 376.

Under Code Civ. Proc. § 3228, subd. 5, and section 734, a plaintiff accepting payment of and withdrawing his first cause of action, thereby limiting his recovery to less than $250, *held* to have lost his right to costs in an action in the city court.—Hill v. Kahn (Sup.) 682.

In an action to restrain county supervisors from paying certain claims, defendants *held* not chargeable with costs, though the claims were illegally allowed.—Fitch v. Hay (Sup.) 1090.

**§ 2. Security for payment.**

On a motion by defendant for security for costs on the ground that plaintiff had been adjudged a bankrupt after issue joined, defendant was not obliged to show affirmatively diligence in discovering the bankruptcy.—Donnelly v. Third Ave. R. Co. (Sup.) 387.

**§ 3. Amount, rate, and items.**

Printed case *held* to show that motion for new trial was made on case made and settled, so as to entitle successful party to full costs.—Koeppel v. Koeppel (Sup.) 215.

*A suit *held* not an extraordinary one within Code Civ. Proc. § 3253, authorizing the granting of an extra allowance as costs.—City of New York v. A. T. Stewart Realty Co. (Sup.) 889.

*Extra allowance as costs, under Code Civ. Proc. § 3253, *held* unauthorized in view of the findings.—City of New York v. A. T. Stewart Realty Co. (Sup.) 889.

**§ 4. Taxation.**

Failure to assert the invalidity of taxation of costs before the taxing officer *held* not to affect right to move to vacate the taxation.—Hill v. Kahn (Sup.) 682.

**§ 5. On appeal and on new trial or motion therefor.**

*Where defendant insisted on misreading his answer, and thereby procured judgment in

*Point annotated. See syllabus.

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his favor, costs on appeal will be imposed against him absolutely.—Manhattan Leasing Co. v. Weill (Sup.) 686.

*A respondent *held* entitled to costs for procuring stenographer's minutes to enable him to propose amendments to appellant's proposed case.—Starkweather v. Sundstrom (Sup.) 1086.

On modification of a judgment enjoining county supervisors from paying certain claims, neither party *held* entitled to the costs of the appeal.—Fitch v. Hay (Sup.) 1090.

**§ 6. Payment and remedies for collection.**

Under Code Civ. Proc. § 779 *held* that judgment may not be entered for costs allowed on motion.—Hyde v. Anderson (Sup.) 62.

*Code Civ. Proc. § 779, staying proceedings until payment of costs by a party required to make payment, *held* to stay a party in default from taking affirmative proceedings, but not to stay a defendant from making his defense.—Goldberg v. Wood (Sup.) 200.

## COUNTERCLAIM.

See "Set-Off and Counterclaim."

## COUNTIES.

See "Municipal Corporations."
Costs in general in action to restrain payment of claims against, see "Costs," § 1.
Costs on appeal in proceeding to restrain payment of claims against, see "Costs," § 5.
Estoppel to assert invalidity of contract for county printing, see "Counties," § 1.
Mandamus to county board, see "Mandamus," § 1.
Persons entitled to appeal in injunction proceedings against county, see "Appeal," § 3.
Restraining payment of claims against county in general, see "Injunction," § 3.
Validity of requirement of union label on county printing as affected by public policy, see "Contracts," § 1.

**§ 1. Government and officers.**

County Law, Laws 1892, p. 1748, c. 686, § 17, relating to the entitling of all acts and resolutions of a board of supervisors, *held* without application to a resolution of the board providing for a change of the site of county buildings.—Stanton v. Board of Sup'rs of Essex County (Sup.) 1059.

**§ 2. Property, contracts, and liabilities.**

The absence of an illegal requirement from a bond tendered by a contractor for county printing *held* not to justify the board of supervisors in refusing to approve the bond.—People v. Edgcomb (Sup.) 965.

## COUNTY BOARD.

See "Counties," § 1.

## COUPONS.

See "Bonds," § 1.

## COURT OF CLAIMS.

See "States," § 1.
Review of decisions, see "Appeal," § 16.

## COURTS.

Court of claims, see "States," § 1.
Judges, see "Judges."
Judicial power, see "Constitutional Law," §§ 2, 3.
Justices' courts, see "Justices of the Peace."
Laws relating to municipal court denying due process of law, see "Constitutional Law," § 4.
Mandamus to inferior courts, see "Mandamus," § 1.
Prohibition to inferior courts, see "Prohibition," §§ 1, 2.
Review of decisions, see "Appeal."
Surrogate's courts, see "Executors and Administrators," § 6.

*Jurisdiction of particular actions, proceedings, or subjects.*

Accounting by executor, see "Executors and Administrators," § 6.
To discover assets of estate of decedent, see "Executors and Administrators," § 2.

**§ 1. Establishment, organization, and procedure in general.**

*A decision has no binding force as a precedent except in so far as it determines the questions then before the court.—Corn Exch. Bank v. Peabody (Sup.) 78.

**§ 2. Courts of limited or inferior jurisdiction.**

Under Municipal Court Act, Laws 1902, p. 1563, c. 580, § 254, Code Civ. Proc. § 724, and Laws 1902, p. 1496, c. 580, § 20, the Municipal Court has no jurisdiction to amend a judgment after the expiration of five days for an error consisting of the rendition of judgment in favor of plaintiff, but for less than the amount of a tender in court.—Lackner v. American Clothing Co. (Sup.) 376.

The Municipal Court *held* without jurisdiction to render a judgment by reason of lapse of time.—Stewart v. New York City Ry. Co. (Sup.) 617.

Under Municipal Court Act, Laws 1902, p. 1563, c. 580, § 254, a municipal court judge *held* not authorized to vacate a judgment on a motion not made within the time prescribed, notwithstanding section 1, subd. 19.—Quinn v. Schneider (Sup.) 657.

The Municipal Court, having no equity jurisdiction, *held* without power to hold invalid for ignorance of a city employé making application for leave of absence a clause therein waiving compensation.—Tepidino v. City of New York (Sup.) 693.



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Where a judge of the City Court of New York took the default in supplementary proceedings, he had jurisdiction to open the default.—Morrison v. Stember (Sup.) 850.

Under Code Civ. Proc. § 3057, an appeal from a judgment *held* the proper remedy where defendant shows by affidavit that summons was not served on it.—Mears v. North American Brewing Co. (Sup.) 1042.

## COVENANTS.

Restraining breach, see "Injunction," § 1.

**§ 1. Performance or breach.**

A six-story elevator apartment house of brick and limestone *held* not a "tenement house" within a restrictive covenant prohibiting the erection of a tenement house on the property.—Marx v. Brogan (Sup.) 88.

*Covenants against use of lots sold for restaurant and saloon enforced.—De Lima v. Mitchell (Sup.) 811.

## COVERTURE.

See "Husband and Wife."

## CREDIBILITY.

Of witness, see "Witnesses," § 3.

## CREDITORS.

See "Bankruptcy"; "Fraudulent Conveyances."
Of testator, see "Wills," § 7.
Subrogation to rights of creditor, see "Subrogation."

## CREDITORS' SUIT.

Remedies in cases of fraudulent conveyances, see "Fraudulent Conveyances," § 2.

## CRIMINAL LAW.

See "Witnesses."
Bail, see "Bail," § 1.
Indictment, information, or complaint, see "Indictment and Information."
Prohibition against proceeding in criminal prosecution, see "Criminal Law," § 1.

*Particular offenses.*

See "Homicide"; "Larceny"; "Rape"; "Receiving Stolen Goods"; "Threats."
Abandonment of wife, see "Husband and Wife," § 2.
Bastardy, see "Bastards," § 1.
Violation of municipal ordinances, see "Municipal Corporations," §§ 4, 5.

**§ 1. Nature and elements of crime and defenses in general.**

*The question whether an attempt to commit a crime has been made *held* determinable solely by the condition of the actor's mind and his conduct.—People v. Jaffe (Sup.) 486.

**§ 2. Preliminary complaint, affidavit warrant, examination, commitment, and summary trial.**

Under Code Civ. Proc. § 451, and Code Cr. Proc. § 152, an information relating to a charge of conspiracy filed before a magistrate referring to the defendants as John Doe and Richard Roe, without any further designation, *held* insufficient.—People v. Dunning (Sup.) 1067.

An information before a magistrate *held* not to designate the commission of a crime, required by Code Cr. Proc. §§ 145, 148, and insufficient to confer jurisdiction on the magistrate.—People v. Dunning (Sup.) 1067.

**§ 3. Trial.**

*Instruction as to presumption of innocence *held* not error.—People v. Dinser (Gen. Sess.) 314.

**§ 4. Motions for new trial and in arrest.**

*Under Code Cr. Proc. §§ 462, 463, 465, subds. 6, 7, and section 466, Court of General Sessions cannot grant a new trial after judgment in a criminal case except on the ground of newly discovered evidence.—People v. Court of General Sessions of the Peace (Sup.) 557.

**§ 5. Appeal and certiorari.**

A question of jurisdiction of a crime cannot be raised on conflicting evidence as to the place of its commission.—People v. Lipp (Sup.) [illegible]

*An appeal in a criminal case exists only by express authorization of the Legislature.—People v. Reardon (Sup.) 399.

*Certificate of reasonable doubt after conviction should be granted where any question of law is raised sufficient for the consideration on appeal.—People v. Hummel (Sup.) 713.

*Question of law *held* raised by instructions authorizing a certificate of reasonable doubt.—People v. Hummel (Sup.) 713.

*In a prosecution for murder, error, if any, in receiving certain evidence, *held* cured.—People v. Smith (Sup.) 905.

Under Code Cr. Proc. § 518, Appellate Division of Supreme Court *held* to have no jurisdiction of appeal by the people from an order dismissing an indictment.—People v. Dundon (Sup.) 1048.

## CROSS-EXAMINATION.

See "Witnesses," §§ 2, 3.

## CURTESY.

See "Dower."

## CUSTODY.

Of child, see "Divorce," § 3; "Guardian and Ward," § 1; "Parent and Child."



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## CUSTOMS AND USAGES.

In an action by a workman employed by a building contractor for injuries received while riding on a hod elevator rented to the contractor by a third person, evidence that it was customary for the workmen to ride on the elevator did not show a general custom binding upon the owner of the elevator.—McDonough v. Pelham Hod Elevator Co. (Sup.) 90.

*In an action by a factor to recover commissions on a sale of hops *held* not error to sustain an objection to a question to defendant as to the commercial custom in relation to commissions.—Horst v. Lovdal (Sup.) 996.

## DAMAGES.

Extra allowance of costs, see "Costs," § 3.
Presentation of objection to charge on damages for review, see "Appeal," § 4.
Reduction on appeal, see "Appeal," § 16.

*Damages for particular injuries.*

See "Death," § 1; "Nuisance," § 1.
Breach by seller of contract for sale of goods, see "Sales," § 6.
Breach by vendor of contract for sale of land, see "Vendor and Purchaser," § 3.
Breach of warranty of goods sold, see "Sales," § 6.
Injuries caused by public improvements, see "Municipal Corporations," § 3.

*Recovery in particular actions or proceedings.*

See "Trover and Conversion," § 2.
On injunction bond, see "Injunction," § 4.

**§ 1. Liquidated damages and penalties.**
*Provision in contract *held* one for liquidated damages, and not for penalty.—Federal Sign System Electric v. Epps (Sup.) 855.

**§ 2. Exemplary damages.**
In an action for being ejected from a theater, the court *held* not authorized to allow punitive damages.—Walsh v. Hyde & Behman Amusement Co. (Sup.) 960.

**§ 3. Measure of damages.**
*In an action for injuries to horse caused by operation of steam roller in highway, evidence of usable value of horse during period the owner was deprived of its use *held* admissible.—A. Buchanan's Sons v. Cranford Co. (Sup.) 378.

*In an action for injuries to a horse, the damages *held* limited to the depreciation in the value thereof.—Curtis Blaisdell Co. v. Ross (Sup.) 759.

**§ 4. Pleading, evidence, and assessment.**
*In an action for personal injuries *held* that, under a general allegation that by reason of the injuries plaintiff was afflicted with diseases, and that his physical and mental abilities were impaired, he was entitled to prove any impairment traceable to the injury.—Rudomin v. Interurban St. Ry. Co. (Sup.) 506.

In action for delay in delivery of a shipment of potatoes, evidence of sale after delivery *held* admissible on question of damages.—Isham v. Erie R. Co. (Sup.) 609.

## DEATH.

Caused by electricity, see "Electricity."
Caused by negligence in general, see "Negligence," §§ 2, 3.
Caused by negligence of landlord, see "Landlord and Tenant," § 4.
Caused by negligent use of street, see "Municipal Corporations," § 5.
Caused by operation of railroad, see "Railroads," § 1.
Caused by operation of street railroad, see "Street Railroads," § 2.
Competency of witnesses in action for, see "Witnesses," § 1.
Liability of carrier for death of passenger, see "Carriers," § 3.
Of employé, see "Master and Servant," § 5.
Res gestæ in action for wrongful death, see "Evidence," § 3.

**§ 1. Actions for causing death.**
*In an action for negligence causing death, a verdict for $40,000 *held* not excessive.—Morhard v. Richmond Light & R. Co. (Sup.) 124.

*The right to recover for the death of a human being is a right solely given by statute.—Duncan v. St. Luke's Hospital (Sup.) 867.

*Code Civ. Proc. § 1902 *held* not to give a husband a right of action for the death of his wife, resulting from an alleged breach of defendant hospital's failure to maintain a guard over her while in its hospital.—Duncan v. St. Luke's Hospital (Sup.) 867.

*In an action for negligence resulting in death, owing to the difficulty of proving freedom from contributory negligence, the rule with respect to the evidence of care is not so rigid as otherwise.—Charters v. Palmer (Sup.) 887.

*In an action for the death of one run over by a truck, the question of decedent's contributory negligence *held* one for the jury.—Charters v. Palmer (Sup.) 887.

## DEBTOR AND CREDITOR.

See "Bankruptcy"; "Fraudulent Conveyances."

## DECEDENTS.

Estates, see "Descent and Distribution"; "Executors and Administrators."
Testimony as to transactions with persons since deceased, see "Witnesses," § 1.

## DECEIT.

See "Fraud."

## DECLARATIONS.

As evidence in civil actions, see "Evidence," § 5.

***Point annotated. See syllabus.**

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## DEEDS.

See "Boundaries."
Acknowledgment of execution, see "Acknowledgment."
By or to religious society, see "Religious Societies."
Covenants in deeds, see "Covenants."
Equitable conversion, see "Conversion."
In fraud of creditors, see "Fraudulent Conveyances."
In trust, see "Trusts," § 1.
Of trust, see "Mortgages."
Parol or extrinsic evidence, see "Evidence," § 8.
Partition deed, see "Partition," § 1.
Reformation, see "Reformation of Instruments."

**§§ 1, 2, Construction and operation.**

*A reservation in a deed of standing timber *held* to give the grantor and his assigns a reasonable time only in which to remove the same.—Decker v. Hunt (Sup.) 174.

Grantee of land *held* not barred from objecting to removal of timber after expiration of time permitted by reservation in his deed.—Decker v. Hunt (Sup.) 174.

The word "children" in a deed creating a trust, and authorizing a distribution of the trust fund to children of one of the beneficiaries, *held* not to extend to grandchildren.—Train v. Davis (Sup.) 816.

Where a deed creating a trust established contingent remainders, and provided that at the time fixed for distribution of the trust fund the heirs of any deceased remainderman should take his share, the question of who were to be regarded as heirs was to be determined by the statute in force at the time of the distribution, and not those in force at the time the trust was created.—Train v. Davis (Sup.) 816.

A certain person *held* an heir within the meaning of a deed creating a trust and providing that on final distribution the heirs of any deceased remainderman should be entitled to his share.—Train v. Davis (Sup.) 816.

A deed creating a trust construed, and *held* to give contingent and not vested remainders in the trust property.—Train v. Davis (Sup.) 816.

## DE FACTO OFFICERS.

See "Officers," § 1.

## DEFAMATION.

See "Libel and Slander."

## DEFAULT.

Judgment by, see "Judgment," § 2.

## DEFICIENCY.

On foreclosure of mortgage, see "Mortgages," § 2.

## DELIVERY.

Of goods sold, see "Sales," § 3.

## DEMAND.

For production of books before proceedings for discovery, see "Discovery," § 1.
For reformation of instrument as condition precedent to action, see "Reformation of Instruments," § 1.

## DEMURRER.

For defect of parties, see "Parties," § 1.
In pleading, see "Pleading," §§ 1, 2, 4.

## DENIALS.

In pleading, see "Pleading," § 3.

## DEPOSITIONS.

See "Discovery"; "Witnesses."
Admissions in, see "Evidence," § 4.

Under Code Cr. Proc. § 8, subd. 3, and section 255, proof that witness giving deposition could not be found in state, made before grand jury, *held* sufficient to authorize reading of deposition before grand jury.—People v. Dundon (Sup.) 1048.

## DEPOSITS.

Of margins with broker, see "Brokers," § 2.
Security for rent, see "Landlord and Tenant," § 5.

## DESCENT AND DISTRIBUTION.

See "Dower"; "Executors and Administrators"; "Wills."
Inheritance and transfer taxes, see "Taxation," § 4.

**§ 1. Persons entitled and their respective shares.**

The term "heirs at law," when used with respect to personal property, may properly be regarded as meaning next of kin.—Train v. Davis (Sup.) 816.

*Under Code Civ. Proc. § 2732, subds. 5, 11, and subdivision 12, as amended by Laws 1888, p. 941, c. 319, grandnieces and nephews of an intestate leaving no widow *held* entitled to the share of deceased's personalty that their parent would have taken if living.—In re McGovern (Sur.) 304.

Second and third cousins are entitled to share with first cousins, receiving the shares which their respective parents would have received if living, per stirpes.—In re Fleming (Sur.) 306; In re Brown, Id.

*Grandnephews and grandnieces *held* to take by representation shares of intestate person-

*Point annotated. See syllabus.

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alty which their respective parents would take if living.—In re Fleming (Sur.) 306; In re Brown, Id.

## DESCRIPTION.

Of devisees or legatees in will, see "Wills," § 6.
Of property conveyed, see "Boundaries," § 1.

## DETINUE.

See "Replevin."

## DEVISES.

See "Wills."

## DILIGENCE.

Of party asking relief, see "Specific Performance," § 3.

## DIRECTING VERDICT.

In civil actions, see "Trial," § 4.
Presumptions on appeal where both parties move for directed verdict, see "Appeal," § 12.
Review of ruling on motion by both parties for directed verdict, see "Appeal," § 9.

## DISABILITIES.

Contributory negligence of persons under disability, see "Negligence," § 2.

## DISCHARGE.

From employment, see "Master and Servant," § 1.
From indebtedness, see "Bankruptcy," § 2; "Release."
From liability as guarantor, see "Guaranty," § 3.
From liability as surety, see "Principal and Surety," §§ 1, 2.

## DISCONTINUANCE.

Of action, see "Dismissal and Nonsuit," § 1.

## DISCOVERY.

Of assets of decedent's estate, see "Executors and Administrators," § 2.

**§ 1. Under statutory provisions.**
The order under Code Civ. Proc. § 873, for examination before trial of plaintiff in a personal injury case, with a physical examination of her, should not provide for examination of the physicians before the referee.—Potter v. Village of Hammondsport (Sup.) 186.

Under Code Civ. Proc. § 873 *held* that a physicial examination of a female plaintiff in a personal injury case is to be by physicians of her own sex.—Potter v. Village of Hammondsport (Sup.) 186.

*Statement as to how, under Code Civ. Proc. § 873, the examination under oath before trial of plaintiff in a personal injury case should be limited.—Potter v. Village of Hammondsport (Sup.) 186.

Where an order granting discovery limited the same to transactions had with one of the corporations proceeded against, such limitations were unavailable to enable its officers to refuse to disclose legitimate facts which might incidentally show a cause of action against the other corporation.—In re Sands (Sup.) 459.

In a proceeding for discovery to enable the applicant to file a complaint, it was error for the court to require the witness' answers to be in writing, verified before a notary public, and filed with the clerk of the court.—In re Sands (Sup.) 459.

A demand on a corporate defendant for copies of certain agreements and proceedings of defendant *held* not a condition precedent to plaintiff's right to an examination of defendant before trial.—Jacobs v. Mexican Sugar Refining Co. (Sup.) 541.

An order for the examination of a corporate defendant before trial *held* too broad.—Jacobs v. Mexican Sugar Refining Co. (Sup.) 541.

On the vacation of an order for the examination of a corporate defendant before trial, under Code Civ. Proc. §§ 871–873, *held* error to continue the order as to an officer of the corporation.—Jacobs v. Mexican Sugar Refining Co. (Sup.) 542.

*A defendant in an action on a note *held* entitled to an examination of plaintiff before answer.—Koppel v. Hatch (Sup.) 619.

## DISCRETION OF COURT.

Review in civil actions, see "Appeal," § 13.

## DISMISSAL AND NONSUIT.

Allowance of attorney's fees on dismissal, see "Attorney and Client," § 2.
At trial, see "Trial," § 4.
Dismissal of action to recover payments, see "Payment," § 2.
Presentation and reservation in lower court of grounds of review on order denying nonsuit, see "Appeal," § 4.
Presumptions on appeal, see "Appeal," § 12.

**§ 1. Voluntary.**
On plaintiff's motion for leave to discontinue, the entry of an order discontinuing the action and requiring plaintiff to pay full costs was error.—Hyde v. Anderson (Sup.) 62.

**§ 2. Involuntary.**
That defendant waited before moving for the dismissal of the case because of neglect to prosecute it until after plaintiff had noticed the action and put it on the calendar might be considered by the court in determining whether the



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motion should be granted.—Mladinich v. Livingston (Sup.) 46.

Showing made by plaintiff *held* not to show that his neglect to prosecute the case was reasonable, necessary, under General Rule of Practice 36, to prevent its dismissal on that ground.—Mladinich v. Livingston (Sup.) 46.

*A prima facie case of neglect to prosecute an action *held* established, under Code Civ. Proc. § 822, and General Rule of Practice 36, on a motion for its dismissal.—Mladinich v. Livingston (Sup.) 46.

*A complaint *held* erroneously dismissed for insufficiency of substance.—Landesman v. Hauser (Sup.) 663.

A defect of parties in a supplemental summons and complaint filed after the court had sustained a demurrer to the complaint for defect of parties *held* not a ground for the dismissal, but for demurrer, under Code Civ. Proc. § 488.—Smith v. Irvin (Sup.) 945.

The reservation, under authority of Code Civ. Proc. § 1187, of a decision on a question as to the character of a complaint with reference to different causes of action claimed to be therein stated, until after verdict, *held* not to preclude plaintiff from proving the cause of action which the court finally determined was the only one alleged, and on which decision it dismissed the complaint.—Zeiser v. Cohn (Sup.) 1078.

## DISSOLUTION.

Of partnership, see "Partnership," § 3.

## DISTRIBUTION.

Of assets of partnership on dissolution, see "Partnership," § 3.
Of estate of decedent, see "Descent and Distribution"; "Executors and Administrators," § 4.

## DISTRICT AND PROSECUTING ATTORNEYS.

Municipal attorney, see "Municipal Corporations," § 1.

## DIVIDENDS.

On corporate stock, see "Corporations," § 2.
On corporate stock held in trust, see "Trusts," § 5.

## DIVORCE.

Annulment of marriage, see "Marriage."
Release of dower, see "Dower," § 1.
Validity separation agreement as affected by legality of object or consideration, see "Contracts," § 1.

**§ 1. Jurisdiction, proceedings, and relief.**

A consent divorce decree held neither fraudulent, collusive, nor contrary to public policy.—Schlesinger v. Klinger (Sup.) 545.

**§ 2. Alimony, allowances, and disposition of property.**

Where a wife obtained judgment of separation awarding her alimony, in a subsequent action by her for absolute divorce, the court has no authority to grant her alimony pendente lite.—Schmalholz v. Schmalholz (Sup.) 510.

Where a wife obtained a judgment awarding her alimony, in a subsequent action by her against the husband for an absolute divorce she might be allowed a counsel fee.—Schmalholz v. Schmalholz (Sup.) 510.

An order should require a party to pay for the printing of the record on appeal, when the amount should have been ascertained and the record printed as settled by the court, under General Rules of Practice, Rule 34.—Sternberger v. Sternberger (Sup.) 946.

**§ 3. Custody and support of children.**

*The paramount consideration in awarding the custody of children to either parent in a divorce action is the welfare of the children.—People v. Lawson (Sup.) 130.

*The custody of children *held* properly awarded to the father, pending an action for divorce.—People v. Lawson (Sup.) 130.

## DOCKETS.

Of causes for trial, see "Trial," § 1.

## DOCUMENTS.

As evidence in civil actions, see "Evidence," § 7.
Production and inspection of writings, see "Discovery," § 1.

## DONATIONS.

See "Gifts."

## DOWER.

Legacy in lieu of, see "Wills," § 7.

**§ 1. Inchoate interest.**

Under Real Property Law, Laws 1896, p. 587, c. 547, § 186, a woman's release of dower in her husband's land under a divorce decree *held* to estop her from thereafter claiming dower in such lands as against a purchaser from her husband.—Schlesinger v. Klinger (Sup.) 545.

## DRAFT.

See "Bills and Notes."

## DUE PROCESS OF LAW.

See "Constitutional Law," § 5.



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## DUES.

Insurance dues, see "Insurance," § 10.

## DURESS.

Criminal duress, see "Threats."

## EASEMENTS.

See "Highways."
Dismissal at trial of action for interference with, see "Trial," § 4.

## ELECTION.

Between testamentary provisions and other rights, see "Wills," § 1.
To exercise right to dissolve partnership, see "Partnership," § 3.

## ELECTIONS.

**§ 1. Ballots.**

Under Village Law, Laws 1897, p. 438, c. 414, § 241, and section 60 (page 383), and Election Law, Laws 1896, p. 937, c. 909, § 82, a proposition submitted to the electors of a village as to the establishment of a lighting system *held* not to submit more than one proposition.—Everett v. Village of Potsdam (Sup.) 963.

## ELECTRICITY.

*An electric light company maintaining wires charged with a voltage so high as to be deadly is required to exercise a high degree of care to protect persons using the current for domestic lighting.—Morhard v. Richmond Light & R. Co. (Sup.) 124.

*In an action against an electric light company for the death of a person alleged to have been killed by coming in contact with a wire which defendant had negligently allowed to become charged with a dangerously high voltage, evidence *held* to justify submission to the jury of the question of defendant's negligence.—Morhard v. Richmond Light & R. Co. (Sup.) 124.

*In an action for the killing of a horse by electricity, whether the plaintiff was guilty of negligence was a question for the jury.—Jones v. Union Ry. Co. (Sup.) 757.

In action for the killing of a horse by electricity, evidence *held* insufficient to show the railway company guilty of negligence.—Jones v. Union Ry. Co. (Sup.) 757.

Provision in contract for lighting house *held* not to relieve electric company from liability for death caused by its negligence.—Witmer v. Buffalo & N. F. Electric Light & Power Co. (Sup.) 781.

In an action for death by electricity, evidence *held* to present question for jury whether electric company was sufficiently careful in maintaining its wires and system.—Witmer v. Buffalo & N. F. Electric Light & Power Co. (Sup.) 781.

In action for death by electricity, instruction that the electric company was required to use reasonable care in maintaining its system *held* sufficiently favorable to the company.—Witmer v. Buffalo & N. F. Electric Light & Power Co. (Sup.) 781.

*In an action for death caused by electricity, whether deceased was guilty of contributory negligence *held* a question for the jury.—Witmer v. Buffalo & N. F. Electric Light & Power Co. (Sup.) 781.

## ELEVATORS.

See "Master and Servant," § 11.

## EMINENT DOMAIN.

Conclusiveness of former judgment on issues arising in condemnation proceedings, see "Judgment," § 6.
Public improvements by municipalities, see "Municipal Corporations," § 3.

**§ 1. Proceedings to take property and assess compensation.**

In proceedings under Greater New York Charter to condemn land for streets, an offer made by an attorney without proof of authority to sell the land, after having filed notice of appearance for an adverse claimant of the land, *held* properly rejected.—In re Amsterdam Ave. (Sup.) 331; Baker v. City of New York, Id.; In re Amsterdam Ave. (Sup.) 334; Herb v. Same, Id.; Hay v. Same, Id.

An offer to sell land about to be condemned by the city of New York, made by one purporting to act as attorney for the owner, unaccompanied by proof of his authority, *held* not a compliance with Greater New York Charter, Laws 1901, p. 609, c. 466, § 1436c, entitling the owner, in case a larger amount is awarded, to costs, disbursements, and an extra allowance.—In re Amsterdam Ave. (Sup.) 331; Baker v. City of New York, Id.; In re Amsterdam Ave. (Sup.) 334; Herb v. Same, Id.; Hay v. Same, Id.

Under Laws 1891, p. 14, c. 4, § 23, the fact that the franchise granted to a rapid transit railroad company by the rapid transit board and the plans on which the franchise was granted did not include certain land *held* not necessarily to prevent the condemnation of such land for use by the company.—Hudson & M. R. Co. v. Wendel (Sup.) 341.

A petition by the city of New York to condemn lands, as authorized by Laws 1882, p. 1, c. 410, and amendments for the purpose of improving a water front, as authorized by Laws 1870, p. 366, c. 137, as amended by Laws 1871, p. 1231, c. 574, and amendments thereto, *held* to require the commissioners to determine the rights of a grantee under a grant of a right of wharfage.—In re Water Front of City



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of New York (Sup.) 1063; Appeal of American Ice Co., Id.

In proceedings to condemn land, a judgment confirming an award of damages without reference to a third person's rights in the land *held* erroneous.—In re Water Front of City of New York (Sup.) 1063; Appeal of American Ice Co., Id.

**§ 2. Remedies of owners of property.**
In an action for damages caused by the construction and operation of a railway in front of plaintiff's property, the error in the description of the property in the findings *held* immaterial.—Scallon v. Manhattan Ry. Co. (Sup.) 272.

## EMPLOYER'S LIABILITY INSURANCE.

See "Insurance," § 4.

## EMPLOYÉS.

See "Master and Servant."

## ENTRY.

Of judgment, see "Appeal," § 2.
Re-entry by landlord, see "Landlord and Tenant," § 6.

## EQUITABLE CONVERSION.

See "Conversion."

## EQUITABLE ESTOPPEL.

See "Estoppel," § 1.

## EQUITY.

Equitable conversion, see "Conversion."
Equitable estoppel, see "Estoppel," § 1.
Jurisdiction of municipal court, see "Courts," § 2.

*Particular subjects of equitable jurisdiction and equitable remedies.*

See "Account"; "Fraudulent Conveyances"; "Injunction"; "Partition," § 1; "Reformation of Instruments"; "Specific Performance"; "Trusts."

**§ 1. Jurisdiction, principles, and maxims.**
*A court of equity will not construe an instrument creating a void trust.—Gueutal v. Gueutal (Sup.) 1002.

## ESTABLISHMENT.

Of railroads, see 'Street Railroads," § 1.
Of will, see "Wills," § 5.

## ESTATES.

Created by deed, see "Deeds," § 2.
Decedents' estates, see "Descent and Distribution"; "Executors and Administrators."
Dower, see "Dower."
Estates for years, see "Landlord and Tenant."
Restrictions on creation of future estates, see "Perpetuities."
Trusts, see "Trusts," § 2.

## ESTOPPEL.

By judgment, see "Judgment," §§ 5, 6.
To allege discharge of surety, see "Principal and Surety," § 2.
To allege error, see "Appeal," § 11.
To avoid or forfeit insurance policy, see "Insurance," § 7.
To claim dower, see "Dower," § 1.

**§ 1. Equitable estoppel.**
A bidder for a contract for county printing *held* not estopped from asserting the illegality of a provision of the specifications.—People v. Edgcomb (Sup.) 965.

## EVIDENCE.

See "Depositions"; "Discovery"; "Witnesses."
Admissibility of acknowledged instrument in evidence, see "Acknowledgment," § 1.
Admissibility of evidence under pleading, see "Pleading," § 8.
Harmless error in admission or exclusion, see "Appeal," § 15; "Criminal Law," § 5.
Judicial notice on appeal, see "Appeal," § 7.
Presentation of objections to reception of evidence for review, see "Appeal," § 4.
Questions of fact for jury, see "Trial," § 4.
Reception at trial, see "Trial," § 2.
Review on appeal, see "Appeal," §§ 7, 14.

*As to particular facts or issues.*

See "Boundaries," § 2; "Champerty and Maintenance"; "Customs and Usages"; "Damages," § 4; "Fraudulent Conveyances," § 2; "Gifts"; "Marriage"; "Sales," § 1; "Usury," § 1.
Authority of broker, see "Brokers," § 1.
Defense of statute of limitations, see "Limitation of Actions," § 2.
Delivery of goods sold, see "Sales," § 3.
Release of guarantor, see "Guaranty," § 3.
Testamentary capacity, see "Wills," § 2.

*In actions by or against particular classes of parties.*

See "Attorney and Client," § 2; "Brokers," § 4; "Carriers," §§ 2, 3; "Landlord and Tenant," § 5; "Master and Servant," §§ 1, 10, 11; "Partnership," § 2; "Street Railroads," § 2.
Foreign corporation, see "Corporations," § 5.
Partners, see "Partnership," 3.

*In particular civil actions or proceedings.*

See "Account Stated"; "Malicious Prosecution," § 1; "Negligence," § 3; "Replevin," § 3; "Trover and Conversion," § 2; "Work and Labor."



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Accounting by administrator, see "Executors and Administrators," § 6.
For breach of contract to devise, see "Wills," § 3.
For causing death, see "Death," § 1.
For compensation of attorney, see "Attorney and Client," § 2.
For death caused by electricity, see "Electricity."
For enforcement of lien, see "Liens."
For injuries caused by operation of street railroad, see "Street Railroads" § 2.
For loss of or injury to goods shipped, see "Carriers," § 2.
For personal injuries, see "Animals"; "Carriers," § 3; "Master and Servant," §§ 10, 11; "Street Railroads," § 2.
For price of goods sold, see "Sales," § 5.
For rent, see "Landlord and Tenant," § 5.
For services of broker, see "Brokers," § 4.
For wrongful discharge of servant, see "Master and Servant," § 1.
On bond, see "Bonds," § 2.
On note, see "Bills and Notes," § 6.
Probate proceedings, see "Wills," § 5.
To dissolve partnership, see "Partnership," § 3.
To enforce lien, see "Mechanics' Liens," § 3.
To revoke liquor tax certificate, see "Intoxicating Liquors," § 1.
Trial of disputed claim against estate of decedent, see "Executors and Administrators," § 3.

*In criminal prosecutions.*

See "Homicide," § 1; "Rape," § 1.
For violation of municipal ordinances, see "Municipal Corporations," §§ 4, 5.

**§ 1. Judicial notice.**
*On appeal, the court will take judicial notice that a certain place is a city, and the county seat of a certain county in another state.—Phillips v. Lindley (Sup.) 423.

**§ 2. Presumptions.**
*The law of a foreign state is presumed to be the same as the common law of the state, and not the same as the common law of England.—Spencer v. Busch (Sup.) 690.

**§ 3. Relevancy, materiality, and competency in general.**
In an action on a partnership contract *held* error to sustain an objection to a question asked of defendant as calling for a conclusion.—Lefevre v. Silo (Sup.) 321.

*In action for death caused by electricity, statement of deceased just prior to accident causing his death *held* competent as part of res gestæ.—Witmer v. Buffalo & N. F. Electric Light & Power Co. (Sup.) 781.

**§ 4. Admissions.**
In an action by an administrator on a partnership contract, I. O. U.'s *held* admissible as an admission by deceased in support of a counterclaim.—Lefevre v. Silo (Sup.) 321.

In an action on a partnership contract between deceased, defendant, and B., it was error to permit the latter to testify that on the terms thereof he received a settlement from defendant on the basis that he (witness) was entitled to one-sixth of the profits, for the purpose of establishing the contract between defendant and deceased.—Lefevre v. Silo (Sup.) 321.

*Statements in depositions taken in judicial proceedings *held* admissible as admissions against the witness.—Phillips v. Lindley (Sup.) 423.

*In action for injuries by dog, evidence of statements of keeper of dog, showing his knowledge of its vicious character, *held* competent.—Soronen v. Von Pustau (Sup.) 431.

*In an action on a check by an alleged bona fide holder, evidence of statements alleged to have been made by the original payee to persons other than defendant, and not in his presence, was not admissible.—Maslon v. Sprickerhoff (Sup.) 618.

*Testimony as to statement of former superintendent of an employer *held*, in an action for death of an employé, inadmissible against defendant on the question of its negligence.—Gardner v. Schenectady Ry. Co. (Sup.) 1034.

**§ 5. Declarations.**
*The admissibility in evidence, on the issue of pedigree, of records of births and marriages, *held* to render admissible declarations of certain deceased persons.—Layton v. Kraft (Sup.) 72.

**§ 6. Hearsay.**
In an action for the price of coal, a declaration by a third person who ordered the coal, that the coal was delivered on behalf of defendant and another, *held* inadmissible.—M. D. Williamson Co. v. Cooper (Sup.) 842.

**§ 7. Documentary evidence.**
Mistakes in records of births *held* not to render the records inadmissible on the issue of pedigree.—Layton v. Kraft (Sup.) 72.

Certain records of births and marriages *held* admissible on the issue of pedigree.—Layton v. Kraft (Sup.) 72.

*Certain records of births and marriages *held* ancient documents and to prove themselves.—Layton v. Kraft (Sup.) 72.

*An instrument to be admissible in evidence as a record *held* required to be shown to have been produced from the possession of its lawful custodian.—Tully v. Lewitz (Sup.) 829.

**§ 8. Parol or extrinsic evidence affecting writings.**
*In action for rent, evidence of statement by landlord to tenant before execution of lease *held* inadmissible.—Bristol Hotel Co. v. Pegram (Sup.) 512.

*Evidence *held* admissible as showing a modification of a written contract by the acts of the parties.—Margolys v. Mollenick (Sup.) 849.

**§ 9. Opinion evidence.**
An answer of an expert witness *held* treated as his opinion, and a motion to strike it out properly denied.—Freemont v. Boston & M. R. R. (Sup.) 179.

*** Point annotated. See syllabus.**

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A witness *held* competent as an expert to testify as to the reasonableness of a rule regulating the method of doing the work in a railroad yard.—Freemont v. Boston & M. R. R. (Sup.) 179.

*On an issue of testamentary capacity, exclusion of a question addressed to testatrix's agent as to whether testatrix's acts which the agent remembered and testified to impressed him as rational or irrational *held* error.—In re Brower's Will (Sup.) 438.

*It was error to permit a witness to testify as to the value of certain work without having previously qualified himself as expert.—Manhattan Delivery Co. v. Simon (Sup.) 844.

**§ 10. Weight and sufficiency.**

*A party is concluded by the testimony of its own witness only where the matter brought out is collateral to the issue.—Alcolm Co. v. Brenack (Sup.) 199.

*Under Code Civ. Proc. § 838, testimony of defendant *held* not conclusive on plaintiff, though brought out by him.—Manhattan Leasing Co. v. Weill (Sup.) 686.

The question of the improbability of the testimony of a witness who could only be contradicted by a person who is dead must be taken into consideration in determining the credibility of the witness.—In re Bailey (Sup.) 725.

## EXAMINATION.

Of adverse party before trial, see "Discovery," § 1.
Of witnesses in general, see "Witnesses," § 2.

## EXCEPTIONS.

Necessity for purpose of review, see "Appeal," § 4.

## EXCESSIVE DAMAGES.

For wrongful death, see "Death," § 1.

## EXCISE.

Regulation of traffic in intoxicating liquors, see "Intoxicating Liquors."

## EXECUTION.

**§ 1. Supplementary proceedings.**

In a suit by a receiver in a proceeding supplementary to execution to recover from a city an award made by it for the taking of the judgment debtor's real estate for a public use, the judgment debtor is not a necessary party.—Fawcett v. City of New York (Sup.) 286.

In the absence of an allegation to the contrary, it will be presumed that a proceeding supplementary to execution was instituted within the time prescribed by Code Civ. Proc. § 2435.—Fawcett v. City of New York (Sup.) 286.

*Under Code Civ. Proc. § 2468, an award made by a city for the taking of a judgment debtor's property for a public use *held* to vest in the receiver previously appointed in proceeding supplementary to execution.—Fawcett v. City of New York (Sup.) 286.

Under Code Civ. Proc. §§ 2435, 2464, an order appointing a receiver in supplementary proceedings may be made after the expiration of 10 years after the docketing of the judgment.—Fawcett v. City of New York (Sup.) 286.

Under Code Civ. Proc. §§ 2464, 2468, property held by executors in their representative capacity *held* not to vest in a receiver appointed in supplemental proceedings under a judgment against the executors.—Jones v. Arkenburgh (Sup.) 532.

That an order to show cause why the default of the judgment debtor should not be opened in supplementary proceedings was made returnable before any justice of the court *held* not to have affected the validity of the proceedings.—Morrison v. Stember (Sup.) 850.

*In supplementary proceedings it is within the discretion of the judge to deny a motion to adjourn the examination.—Morrison v. Stember (Sup.) 850.

## EXECUTORS AND ADMINISTRATORS.

See "Descent and Distribution"; "Wills."
Action against decedent's estate for work and labor, see "Work and Labor."
Action by personal representative as preferred cause, see "Trial," § 1.
Contract to make devise in payment of services rendered, see "Wills," § 3.
Demurrer to pleading in action by or against, see "Pleading," § 4.
Right to assign action for false representations, see "Assignments," § 1.
Supplementary proceedings against, see "Execution," § 1.
Testamentary trustees, see "Trusts."
Testimony as to transactions with decedents, see "Witnesses," § 1.

**§ 1. Appointment, qualification, and tenure.**

That two of three executors refused to transact business pertaining to the estate in the presence of the personal attorney of the third *held* not ground for their removal; it not appearing that the estate was injured thereby.—In re Waterman's Estate (Sup.) 583.

**§ 2. Collection and management of estate.**

Two of three executors *held* not bound to transact business pertaining to the estate in the presence of the personal attorney of the third, who made himself obnoxious to them.—In re Waterman's Estate (Sup.) 583.

*Surrogates *held* to have power under Code Civ. Proc. §§ 2709, 2710, as amended by Laws 1903, p. 1195, c. 526, to examine a person pro-



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ceeded against under section 2707, notwithstanding interposition of answer alleging title to property in question.—Gick v. Stumpf (Sup.) 961.

*Proceedings brought to discover assets of estate are terminated, under Code Civ. Proc. § 2710, only when dispute arises after examination before the surrogate.—Gick v. Stumpf (Sur.) 299.

*Executor petitioning to examine a person alleged to hold property of the estate in his possession, brought under Code Civ. Proc. §§ 2706–2714, is entitled to order for examination, though the person examined denies that he has any such property.—Gick v. Stumpf (Sur.) 299.

**§ 3. Allowance and payment of claims.**

*A daughter *held* not entitled to recover on a quantum meruit for board furnished her father.—Conway v. Cooney (Sup.) 171.

In proceedings by a daughter to establish a claim against the estate of her deceased father for board furnished him, evidence *held* insufficient to show an express contract on his part to pay therefor.—Conway v. Cooney (Sup.) 171.

*An express contract binding a father to pay for board furnished by a daughter living in the house furnished by him *held* required to be proved by clear proof.—Conway v. Cooney (Sup.) 171.

A claimant presenting a claim for personal services rendered a decedent *held* not foreclosed from claiming compensation by reason of her acts in presenting a prior claim for money advanced.—Koebel v. Beetson (Sup.) 408.

*It is the duty of an executor to raise the question of the statute of limitations as to an alleged claim against the estate.—In re Milligan's Estate (Sup.) 480.

An objection to the payment by an administrator of a claim against a decedent's estate *held* not sustained.—In re Milligan's Estate (Sup.) 480.

*Evidence *held* sufficient to establish a claim against the estate of a decedent for services rendered by a member of the family.—In re Milligan's Estate (Sup.) 480.

*Evidence *held* insufficient to establish a claim against the estate of a decedent for services rendered by a member of the family.—In re Milligan's Estate (Sup.) 480.

*The burden of impeaching payments made by an administrator is on the contestant.—In re Milligan's Estate (Sup.) 480.

A certain payment *held* applicable to a balance on a claim against a decedent's estate.—In re Milligan's Estate (Sup.) 480.

**§ 4. Distribution of estate.**

*On distribution of surplus money on foreclosure paid into the surrogate's court, every person entitled to share in the proceeds must, under Code Civ. Proc. § 2799, be cited.—In re Schuessler's Estate (Sup.) 939.

**§ 5. Actions.**

Evidence *held* to show that claim against decedent's estate was barred by Code Civ. Proc. § 1822.—Hummel v. Hurd (Sup.) 801.

In an action on a claim against a decedent's estate, evidence *held* to sustain a finding that deceased had agreed to pay plaintiff $1,000 in addition to weekly wages for her services.—Hummel v. Hurd (Sup.) 801.

**§ 6. Accounting and settlement.**

*The executrix of a deceased executor *held* not to be personally charged with the costs of proceedings to compel her to account as to the estate of which her testate was executor.—In re Walton (Sup.) 42.

The estate of a deceased executor *held* not to be charged with the amounts of uncollected judgments, book accounts, and notes of testator.—In re Walton (Sup.) 42.

The executrix of a deceased executor, on an accounting under Code Civ. Proc. § 2606, may be required to pay over only money or property which came into her possession or under her control.—In re Walton (Sup.) 42.

An administrator of an alleged trustee and cestui que trust, having collected the trust fund as administrator of the trustee, *held* bound to account therefor to his successor, leaving the question of ownership for determination on final accounting, under Code Civ. Proc. § 2731.—In re Dwyer (Sup.) 329.

*One having a valid assignment of a portion of a legacy or distributive share may go into the surrogate's court and call the administrator or executor to account.—Citizens' Central Nat. Bank v. Toplitz (Sup.) 826.

*An actual or probable attack upon the validity of an assignment of a legacy or distributive share, concerning which the surrogate's court has no power to adjudicate, authorizes the Supreme Court to entertain an action against the executor or administrator for an accounting.—Citizens' Central Nat. Bank v. Toplitz (Sup.) 826.

In an action against an administrator, the complaint *held* dismissed because not framed for an accounting.—Citizen's Central Nat. Bank v. Toplitz (Sup.) 826.

*Surrogate in settlement of executor's accounts can pass on questions relating to realty and personalty.—In re Bruchaeser's Estate (Sup.) 937.

*Where an administrator has made payments on his personal and individual claims against the estate, the burden of proof is on him to show that the charges were proper.—In re Cozine (Sup.) 1041.

Persons representing the estate on questions litigated on the accounting by an administrator are entitled to costs, payable out of the estate.—In re Seigler's Estate (Sur.) 929.

*Commissions of an administrator *held* full compensation for services.—In re Seigler's Estate (Sur.) 929.

*** Point annotated. See syllabus.**

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## EXEMPLARY DAMAGES.

See "Damages," § 2.

## EXEMPTIONS.

From local assessments, see "Municipal Corporations," § 8.

## EXPERT TESTIMONY.

In civil actions, see "Evidence," § 9.

## EX POST FACTO LAWS.

Retroactive operation of statutes, see "Statutes," § 2.

## EXPRESS COMPANIES.

See "Carriers," § 2.

## EXTORTION.

See "Threats."

## FACTORIES.

See "Master and Servant."

## FACTORS.

See "Brokers."
Customs as to commissions, see "Customs and Usages."

Under a contract for the sale of goods by the consignee as the agent of consignor, the former *held* not required to give notice of inability to sell the goods.—Dowler v. Swift & Co. (Sup.) 983.

In an action by a consignee of merchandise to recover from the consignor under an agreement to reimburse him for any loss from the handling of the goods, evidence *held* to require submission to the jury of the question whether the consignee was negligent in not inspecting the goods upon their arrival.—Dowler v. Swift & Co. (Sup.) 983.

In an action for commissions on a sale of hops, plaintiff *held* not entitled to recover commissions on a greater number of bales than those delivered.—Horst v. Lovdal (Sup.) 996.

## FALSE IMPRISONMENT.

See "Malicious Prosecution."

## FEES.

In divorce suit, see "Divorce," § 2.
Of attorney, see "Attorney and Client," § 2.
Of guardian, see "Guardian and Ward," § 1.

## FELLOW SERVANTS.

See "Master and Servant," § 7.

## FINAL JUDGMENT.

Appealability, see "Appeal," § 2.

## FINDINGS.

Review on appeal, see "Appeal," § 14.

## FIRE DEPARTMENT.

See "Municipal Corporations," § 1.

## FIRE INSURANCE.

See "Insurance," §§ 6, 7.

## FIREWORKS.

Display of as nuisance, see "Nuisance," § 2.
Liability of city for negligent discharge in park, see "Municipal Corporations," § 6.

## FISH.

In an action to recover the penalty provided by the forest, fish, and game law for possessing certain fish contrary to the provisions of section 47 thereof, as amended by Laws 1905, p. 585, c. 314, the question of the resale of the fish by defendant *held* not involved.—People v. Wolf (Sup.) 381.

In an action to recover the penalty provided by the forest, fish and game law for possessing certain fish contrary to the provisions of section 47, as amended by Laws 1905, p. 585, c. 314, defendant *held* not bound to prove that the fish in his possession were taken without the state.—People v. Wolf (Sup.) 381.

## FOOD.

Licenses for sale, see "Licenses," § 1.

## FORCIBLE DEFILEMENT.

See "Rape."

## FORECLOSURE.

Of lien, see "Mechanics' Liens," § 3.
Of mortgage, see "Chattel Mortgages," § 2; "Mortgages," § 2.

## FOREIGN CORPORATIONS.

See "Corporations," § 5.
Insurance companies, see "Insurance," § 1.
Presumptions as to constitutionality of statutes, see "Constitutional Law," § 1.
Taxation of, see "Taxation," § 2.



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## FORGERY.

Of indorsements, see "Bills and Notes," § 3.

## FORMER ADJUDICATION.

See "Judgment," §§ 5, 6.

## FORMS OF ACTION.

See "Action," § 1; "Replevin"; "Trover and Conversion."

## FRANCHISES.

Of street railroad company, see "Street Railroads," § 1.
Taxation of, see "Taxation," § 2.

## FRAUD.

See "Fraudulent Conveyances."
Assignment of cause of action by administrator, see "Assignments," § 1.

**§ 1. Deception constituting fraud, and liability therefor.**
*A purchaser of bonds *held* entitled to an action for damages for false representations by the seller.—Wickham v. Roberts (Sup.) 1092.

## FRAUDS, STATUTE OF.

**§ 1. Promises to answer for debt, default, or miscarriage of another.**
*A promise to guaranty the indebtedness of another *held* within the statute of frauds.—Schroeder v. Helms (Sup.) 214.

**§ 2. Real property and estates and interests therein.**
*Sale of interest in contract for sale of land *held* not within the statute of frauds.—Hahn v. Brettler (Sup.) 607.

## FRAUDULENT CONVEYANCES.

By bankrupt, see "Bankruptcy," § 1.
Harmless error in action to set aside, see "Appeal," § 15.

**§ 1. Transfers and transactions invalid.**
*In a suit to set aside an alleged fraudulent conveyance, a judgment for plaintiff *held* invalid in the absence of a finding that the grantee accepted the deed with a fraudulent intent, or with knowledge of the fraudulent intent of the grantor.—Buongierno v. Schiller (Sup.) 464.

*A conveyance without substantial consideration *held* not fraudulent as to grantor's creditors, where after the conveyance he has sufficient property to meet his debts.—Pearsall v. Stewart (Sup.) 467.

**§ 2. Remedies of creditors and purchasers.**
*A voluntary conveyance by one indebted at the time is presumptively fraudulent.—Lawrence Bros. v. Heylman (Sup.) 121.

*Where a grantor conveys property with intent to defraud his creditors, it is presumed that the intent was shared by the grantee, and the burden is on him to show that he was not only a purchaser for value and in good faith, but that he had no knowledge of facts which would put him on inquiry.—Lawrence Bros. v. Heylman (Sup.) 121.

In an action to set aside a deed as fraudulent against creditors *held* that there was no error in the admission of certain evidence as to the value of the property.—Lawrence Bros. v. Heylman (Sup.) 121.

*Fraud, in a suit to set aside a conveyance as fraudulent, as well as the fact of notice or knowledge, need not be established by direct evidence, but may be inferred from the circumstances.—Lawrence Bros. v. Heylman (Sup.) 121.

*Under Personal Property Law, Laws 1897, p. 509, c. 417, a personal representative of a deceased insolvent debtor *held* not a necessary party to an action to set aside a fraudulent conveyance by deceased.—Johnston v. Gundberg (Sup.) 1015.

## GAME.

See "Fish."

## GAS.

As nuisance, see "Nuisance," § 1.

## GIFTS.

Transfer taxes, see "Taxation," § 4.

**§ 1. Inter vivos.**
In an action by an executor for an accounting, evidence *held* insufficient to impeach the validity of certain gifts inter vivos on the ground of fraud or undue influence.—Cole v. Sweet (Sup.) 625.

*Evidence *held* insufficient to show gift of savings bank deposit.—In re Seigler's Estate (Sur.) 929.

**§ 2. Causa mortis.**
*A donee under a gift causa mortis *held* required to prove the gift by clear and convincing proof.—In re Bailey (Sup.) 725.

A finding that a decedent made a gift causa mortis *held* unauthorized.—In re Bailey (Sup.) 725.

## GOOD FAITH.

Of party asking equitable relief, see "Specific Performance," § 3.
Of purchaser, see "Bills and Notes," § 3; "Bonds," § 1.



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## GRAND JURY.

See "Indictment and Information."
Use of depositions before, see "Depositions."

## GRANTS.

Of public lands, see "Public Lands."

## GUARANTY.

See "Indemnity"; "Principal and Surety."
Requirements of statute of frauds, see "Frauds, Statute of," § 1.

**§ 1. Requisites and validity.**
Defendant *held* not liable on a guaranty conditioned on his receiving a chattel mortgage on the debtor's fixtures which he never obtained.—Schroeder v. Helms (Sup.) 214.

*Guarantors were entitled to recall the guaranty any time before its acceptance.—Kamber v. Rosen (Sup.) 839.

**§ 2. Construction and operation.**
In an action by the holder of a note against one who had guarantied the collection thereof *held* that defendant had waived any formal demand for the services of defendant.—Phillips v. Lindley (Sup.) 423.

*A guaranty of the payment of all moneys to become due from a merchant for merchandise did not extend to the liability of a firm composed of the merchant and one whom he subsequently took into partnership with him.—Coan v. Partridge (Sup.) 570.

**§ 3. Discharge of guarantor.**
An instrument executed by a dealer in commercial paper on the sale of a note *held* to have been a guaranty of collection, rendering it necessary for the purchaser to show due diligence against the principal debtor before he could hold the dealer.—Phillips v. Lindley (Sup.) 423.

*In an action against one who had guarantied the collection of a note, *held* that the insolvency of the principal was no excuse for the holder's failure to endeavor to collect from him.—Phillips v. Lindley (Sup.) 423.

In an action against one who had guarantied the collection of a note purchased by plaintiff, evidence considered, and *held* that defendant was not relieved from liability on the ground of lack of diligence on the part of plaintiff in endeavoring to recover from the principal.—Phillips v. Lindley (Sup.) 423.

In an action on a guaranty of a note defendant *held* not entitled to a credit for a sum paid plaintiff's attorney in an action on the note.—Phillips v. Lindley (Sup.) 423.

One who had guarantied the collection of a note *held* liable on his contract, notwithstanding an extension of time for payment.—Phillips v. Lindley (Sup.) 423.

*A guarantor *held* to have been released by an extension of the term of credit.—Schulman v. Buchler (Sup.) 651.

## GUARDIAN AD LITEM.

Of infant, see "Infants," § 1.

## GUARDIAN AND WARD.

Delegation of power of guardian to receive payment of mortgage, see "Mortgages," § 1.
Guardian ad litem of infant, see "Infants," § 1.

**§ 1. Custody and care of ward's person and estate.**
A vendee's objection to title on the ground that a satisfaction of a mortgage was invalid *held* untenable.—Forbes v. Reynard (Sup.) 710.

A guardian *held* chargeable with interest on moneys received with which he had failed to charge himself on his account.—In re Ward (Sur.) 923.

*Account of guardian *held* surcharged with amount of loan made to him out of ward's estate by the guardian to whom he succeeded.—In re Ward (Sur.) 923.

**§ 2. Accounting and settlement.**
A guardian, on an accounting, is entitled to such a credit for board and maintenance of the ward as would have been authorized on an application made in advance.—In re Ward (Sur.) 923.

Where the facts show a disposition on the part of a guardian to deplete the funds of the ward, he is not entitled to commissions, and is chargeable with costs of accounting.—In re Ward (Sur.) 923.

## HABEAS CORPUS.

Determination of custody of child, see "Parent and Child."
Maintenance of proceeding by Indian, see "Indians."

## HARMLESS ERROR.

In criminal prosecutions, see "Criminal Law," § 5.
In civil actions, see "Appeal," § 15.

## HAWKERS AND PEDDLERS.

Validity of license ordinances, see "Municipal Corporations," § 4.

## HEALTH.

Licenses for sale of food products, see "Licenses," § 1.

## HEARING.

On appeal, see "Appeal," § 8.



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## HEARSAY EVIDENCE.

In civil actions, see "Evidence," § 6.

## HEIRS.

See "Descent and Distribution."
Construction of word as used in deed, see "Deeds," § 2.

## HIGHWAYS.

Streets, see "Municipal Corporations," §§ 3, 5, 6.

**§ 1. Regulation and use for travel.**
*Under Highway Law, Laws 1890, p. 1205, c. 568, § 155 as amended, operator of steam roller, who failed to send person in advance to warn others of its approach, *held* guilty of negligence.—A. Buchanan's Sons v. Cranford Co. (Sup.) 378.

## HOMICIDE.

Harmless error in general, see "Criminal Law," § 5.

**§ 1. Evidence.**
In a prosecution for murder, evidence *held* to support a conviction.—People v. Smith (Sup.) 905.

*On trial for murder, evidence of ill feeling on the part of the defendant toward the deceased is admissible.—People v. Dinser (Gen. Sess.) 314.

## HOSPITALS.

Bequest to corporation for benefit and use of the Blessed Virgin Mary Purgatorial Fund of a hospital, no such fund being in existence, *held* invalid.—Johnston v. Sisters of the Poor of St. Francis (Sup.) 525.

A hospital *held* not liable for the negligence of its ambulance driver while responding to a call from the police department of a city.—Noble v. Hahnemann Hospital of Rochester (Sup.) 605.

## HUSBAND AND WIFE.

See "Divorce"; "Dower"; "Marriage."
Actions for wrongful death, see "Death," § 1.
Antenuptial agreements as to legacies, see "Wills," § 3.
Competency of witness in action on bond for support of wife, see "Witnesses," § 1.
Effect of adoption of child by, see "Adoption."
Effect of discharge in bankruptcy on liability for goods purchased for wife, see "Bankruptcy," § 2.
Liability of husband as manager for wife for injuries to third persons, see "Master and Servant," § 11.
Unauthorized contract of husband with agent for sale of wife's lands, see "Principal and Agent," § 2.
Validity of separation agreement as affected by legality of object or consideration, see "Contracts," § 1.

**§ 1. Mutual rights, duties, and liabilities.**
*In an action for work done on a house, the facts *held* to show that plaintiff had not contracted with defendant but with his wife.—McClelland v. Lynch (Sup.) 640.

*Where there is no open separation, presumption of wife's agency to pledge husband's credit for necessaries still exists.—Ball v. Lovett (Sup.) 815.

**§ 2. Abandonment.**
A bond required by Laws 1897, p. 239, c. 378, § 686, *held*, under Statutory Construction Law, Laws 1892, p. 1488, c. 677, § 16, valid, though having no seal.—Tully v. Lewitz (Sup.) 829.

Misdescription in a bond of the official payee *held* cured by the statute designating the officer to receive payments.—Tully v. Lewitz (Sup.) 829.

Plaintiff, in an action on a bond taken by a police magistrate in a proceeding against one for abandoning his wife without adequate support, *held* not required to aver or prove the facts authorizing the magistrate to act.—Tully v. Lewitz (Sup.) 829.

## ILLEGITIMATE CHILDREN.

See "Bastards."

## IMPAIRING OBLIGATION OF CONTRACT.

See "Constitutional Law," § 3.

## IMPLIED CONTRACTS.

See "Account Stated"; "Money Received"; "Work and Labor."

## IMPRISONMENT.

See "Bail."

## IMPROVEMENTS.

Compensation for on partition of land, see "Partition," § 1.
Liens, see "Mechanics' Liens."
Public improvements, see "Municipal Corporations," § 3.

## IMPUTED NEGLIGENCE.

See "Negligence," § 2.

## INCOME.

Rights of devisees as to income on trust property, see "Wills," § 7.

*** Point annotated. See syllabus.**



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## INCORPORATION.

See "Corporations," § 1.

## INCUMBRANCES.

On property devised or bequeathed, see "Wills," § 7.

## INDEBTEDNESS.

Of fraudulent grantor, see "Fraudulent Conveyances," § 1.
Of testator, see "Wills," § 7.

## INDEMNITY.

See "Guaranty"; "Principal and Surety."

A broker *held* not entitled to sue a wife, to whom land was conveyed, on the husband's guaranty to indemnify the vendor against the broker's claims for commissions.—Kayser v. Silverberg (Sup.) 222.

## INDEPENDENT CONTRACTORS.

See "Master and Servant," § 11.

## INDIANS.

Indian marriages, see "Indians."

Under Domestic Relations Law, Laws 1896, p. 222, c. 272, § 40, habeas corpus proceedings *held* maintainable by Indian woman living on reservation apart from her husband without being divorced.—People v. Rubin (Sup.) 787.

## INDICTMENT AND INFORMATION.

Appeal from order dismissing, see "Criminal Law," § 5.
Preliminary information, see "Criminal Law," § 2.

**§ 1. Requisites and sufficiency of accusation.**

*An indictment containing several counts, some of which are abandoned, is sufficient, under Code Cr. Proc. §§ 285, 542, 684, if the count on which the trial proceeds fully sets out the facts constituting the crime, either directly or by reference.—People v. Lewis (Sup.) 83.

**§ 2. Waiver of defects and objections, and aider by verdict.**

Where, after the first two counts of an indictment were dismissed, defendant made no objection to the third until after conviction; he thereby consented that the first two counts be retained to incorporate by reference essential allegations of time and place in the third count.—People v. Lewis (Sup.) 83.

## INDORSEMENT.

Of bill of exchange or promissory note, see "Bills and Notes," § 3.

## INFANTS.

See "Adoption"; "Guardian and Ward"; "Parent and Child."
Contributory negligence on part of children, see "Negligence," § 2.
Custody and support on divorce of parents, see "Divorce," § 3.

**§ 1. Actions.**

An injunction *held* to lie to restrain breach of contract by infant.—Mutual Milk & Cream Co. v. Prigge (Sup.) 458.

Where, under the terms of a trust deed, an infant was entitled to share in the proceeds of trust property which the trustees were authorized to sell, the guardian ad litem and testamentary guardian of the infant had power, with the approval of the court, to file for the infant, and the election to join in an action for partition to treat the property as real estate.—Train v. Davis (Sup.) 816.

## INFERIOR COURTS.

See "Courts," § 2.

## INHERITANCE.

See "Descent and Distribution."

## INHERITANCE TAX.

See "Taxation," § 4.

## INJUNCTION.

Costs in general in injunction proceedings, see "Costs," § 1.
Costs on appeal in injunction suit, see "Costs," § 5.
Persons entitled to appeal in injunction proceedings, see "Appeal," § 3.
Restraining breach of contract by infant, see "Infants," § 1.

**§ 1. Subjects of protection and relief.**

Equity cannot enjoin police officers from maintaining a surveillance over plaintiff's property in which it was believed a poolroom was being conducted in violation of Pen. Code, § 351.—Stevens v. McAdoo (Sup.) 553.

Where plaintiff's place of business was kept under surveillance by police officers, his remedy was by a proceeding against the officers for abuse of power, under Pen. Code, § 556, or by an action at law for damages.—Stevens v. McAdoo (Sup.) 553.

*Where lots are sold by a common owner with conditions restrictive of their use for business purposes or for saloons, a purchaser of one lot is entitled to restrain the use of a neighboring lot as a saloon as against the interest of a subsequent mortgagee of such lot.—De Lima v. Mitchell (Sup.) 811.

Infrequent violations of covenants against use of property for saloons *held* not to prevent ex-

*Point annotated. See syllabus.

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forcement of such covenant by plaintiff, a landowner.—De Lima v. Mitchell (Sup.) 811.

**§ 2. Preliminary and interlocutory injunctions.**
Refusal of a temporary injunction on a hearing on conflicting affidavits *held* proper.—Grimm v. Krahmer (Sup.) 523.

**§ 3. Permanent injunction and other relief.**
On modification of a judgment enjoining county supervisors from paying certain claims, neither party *held* entitled to the costs of the appeal.—Fitch v. Hay (Sup.) 1090.

**§ 4. Liabilities on bonds or undertakings.**
The costs of opposing a motion on order to show cause why an injunction pendente lite should not be granted, where the temporary restraining order is limited to expire on the hearing of the motion, are not recoverable as damages because of the preliminary injunction.—Sargent v. St. Mary's Orphan Boys' Asylum (Sup.) 632.

*After the final dismissal of the complaint, it was proper to direct a reference to ascertain the damages sustained by defendant by reason of a temporary restraining order.—Sargent v. St. Mary's Orphan Boys' Asylum (Sup.) 632.

## INNUENDO.

See "Libel and Slander," § 8.

## IN PAIS.

Estoppel, see "Estoppel," § 1.

## INQUEST.

On default judgment, see "Judgment," § 2.

## INSOLVENCY.

See "Bankruptcy."
Of building and loan association, see "Building and Loan Associations."
Of fraudulent grantor, see "Fraudulent Conveyances," § 1.
Of principal as affecting discharge of guarantor by failure to proceed against principal, see "Guaranty," § 3.

## INSPECTION.

Of writings, see "Discovery," § 1.

## INSTRUCTIONS.

In civil actions, see "Trial," § 5.
In criminal prosecutions, see "Criminal Law," § 3.

## INSURANCE.

Former adjudication as conclusive in action on policy, see "Judgment," § 6.
Insurance of property of foreign corporation, see "Corporations," § 5.
Remarks of court and counsel in action for personal injuries as to liability insurance, see "Trial," § 3.

**§ 1. Control and regulation in general.**
A policy of insurance *held* not made in the state by the insurer within the statute relating to foreign stock corporations doing business in the state.—South Bay Co. v. Howey (Sup.) 909.

**§ 2. Insurance companies.**
In an action against a corporate insurance society by a stockholder and policy holder for the benefit of the corporation against directors for mismanagement and loss of the society's funds, it was no objection that she sued both in her capacity as a stockholder and policy holder.—Young v. Hyde (Sup.) 1052.

In an action by a stockholder and policy holder of a corporate insurance society against directors to recover losses, the complaint *held* not demurrable for improper joinder of several causes of action.—Young v. Hyde (Sup.) 1052.

A stockholder and policy holder in a corporate insurance society *held* not bound to demand that suit against directors to recover losses for mismanagement be brought by the society as a condition precedent to her right to bring the same, where the directors to be sued constituted all of the directors of the society.—Young v. Hyde (Sup.) 1052.

An action by a stockholder and policy holder of a corporate insurance society against directors for mismanagement, brought for the benefit of the society, *held* not within Insurance Law, Laws 1892, p. 1958, c. 690, § 56.—Young v. Hyde (Sup.) 1052.

**§ 3. Insurance agents and brokers.**
Under Insurance Law, Laws 1892, p. 1972, c. 690, § 91, and Pen. Code, § 577c, complaint in action on a contract of employment of plaintiff to solicit life insurance *held* not defective for failure to allege that plaintiff procured from state superintendent of insurance a certificate of authority.—Wyatt v. McNamee (Sup.) 749.

**§ 4. The contract in general.**
*Facts *held* to show that an employer's liability for injuries to a servant was not covered by an employer's liability policy.—Bradley v. Standard Life & Accident Ins. Co. (Sup.) 797.

**§ 5. Premiums, dues, and assessments.**
Under Insurance Law, Laws 1892, p. 1958, c. 690, § 56, a policy holder *held* not entitled to an accounting to determine his share in the surplus not distributed by the insurer.—Buford v. Equitable Life Assur. Soc. (Sup.) 152.

In an action by a policy holder to compel the insurer to credit him with his share in the surplus, the officers of the insurer *held*



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not proper parties.—Buford v. Equitable Life Assur. Soc. (Sup.) 152.

A holder of a life policy *held* not entitled as a matter of right to his equitable share of the surplus over the legal reserve provided for by Insurance Law, Laws 1892, p. 1968, c. 690, §§ 84, 86.—Buford v. Equitable Life Assur. Soc. (Sup.) 152.

**§ 6. Cancellation, surrender, abandonment, or rescission of policy.**

*Return by insured of fire policy in accordance with notice of cancellation by insurer *held* not a cancellation by agreement.—Buckley v. Citizens' Ins. Co. (Sup.) 622.

*Under provision of fire policy, insurer *held* not entitled to effect cancellation without return or tender of unearned premium.—Buckley v. Citizens' Ins. Co. (Sup.) 622.

*Insurance premium paid by note *held* actually paid within meaning of provision of policy relating to its cancellation.—Buckley v. Citizens' Ins. Co. (Sup.) 622.

**§ 7. Estoppel, waiver, or agreements affecting right to avoid or forfeit policy.**

Insurer *held* estopped to deny liability on a policy on the ground that insured's interest had not been truly stated.—Wisotzkey v. Niagara Fire Ins. Co. (Sup.) 760.

*Certain general insurance agents *held* not agents of defendant insurance company, from which they obtained a policy, so as to bind defendant by their knowledge of a misstatement of plaintiff's interest in the property insured.—Wisotzkey v. Hartford Fire Ins. Co. (Sup.) 763.

**§ 8. Notice and proof of loss.**

*A statement of loss *held* not a compliance with the requirements of a fire policy.—Glazer v. Home Ins. Co. (Sup.) 979.

*Evidence *held* not to show a waiver of the requirements of a fire policy as to proofs of loss.—Glazer v. Home Ins. Co. (Sup.) 979.

**§ 9. Actions on policies.**

*Evidence *held* insufficient to show a waiver of a provision of life insurance policy that action thereon should be brought within six months after the death of the insured.—Curry v. Empire Life Ins. Co. (Sup.) 6.

In an action on a fire policy, a certain allegation *held* not a sufficient allegation that proofs of loss had been waived.—Glazer v. Home Ins. Co. (Sup.) 979.

In an action on a life policy, the insurer *held* entitled to set up in a supplemental answer certain facts.—Gleason v. Northwestern Mut. Life Ins. Co. (Sup.) 991.

**§ 10. Mutual benefit insurance.**

A rule of a mutual benefit association providing for the deduction of dues and assessments from the benefits of an incapacitated member *held* not to refer only to special assessments made by a local or subordinate lodge.—Rewitzer v. Switchmen's Union of North America (Sup.) 974.

The conduct of a mutual benefit association in retaining assessments *held* to amount to a waiver of strict performance on the part of a member.—Rewitzer v. Switchmen's Union of North America (Sup.) 974.

Under the rules of mutual benefit association, and in view of the conduct of its officer, *held*, that it was only where there was a member being delinquent in payment of dues for a month that any application for reinstatement was required in order to regain his former standing.—Rewitzer v. Switchmen's Union of North America (Sup.) 974.

## INTENT.

Fraudulent, see "Fraudulent Conveyances," § 1.

## INTEREST.

See "Usury."

Negotiability of interest coupons on bonds, see "Bonds," § 1.

*On particular classes of liabilities.*

Funds of ward, see "Guardian and Ward," § 1.
Legacies, see "Wills," § 7.
Margins deposited with broker, see "Brokers," § 2.
Shares in corporation, see "Corporations," § 2.

*Pecuniary interest in particular subjects.*

Effect as to credibility of witness, see "Witnesses," § 3.

## INTERLOCUTORY INJUNCTION.

See "Injunction," § 2.

## INTERLOCUTORY JUDGMENT.

Appealability, see "Appeal," § 2.
Review on appeal, see "Appeal," § 10.

## INTERPLEADER.

Intervention in replevin suit, see "Replevin," § 2.

## INTERROGATORIES.

To witnesses, see "Depositions."

## INTESTACY.

See "Descent and Distribution."

## INTOXICATING LIQUORS.

Covenants against use of property for saloon, see "Covenants," § 1.
Restraining use of property for saloon, see "Injunction," § 1.

*Point annotated. See syllabus.

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**§ 1. Licenses and taxes.**
In proceedings for revocation of liquor tax certificate, evidence *held* to show that consent of the owners of buildings had not been filed, as required by Laws 1896, p. 59, c. 112, § 17.—In re Bullard (Sup.) 1011; Appeal of Cunningham, Id.

Consent to sale of liquor, signed by husband of owner of residence without her authority, *held* not valid under Laws 1896, p. 59, c. 112, § 17.—In re Bullard (Sup.) 1011; Appeal of Cunningham, Id.

Under the circumstances, costs *held* not to be awarded against seller of liquors on revocation of his license for insufficiency of consents of adjacent residence owners.—In re Bullard (Sup.) 1011; Appeal of Cunningham, Id.

## INVENTION.

See "Patents."

## ISSUES.

In civil actions, see "Pleading," § 8.
Presented for review on appeal, see "Appeal," § 4.

## JOINDER.

Of causes of action, see "Action," § 2.

## JOINT-STOCK COMPANIES.

Negotiability of bonds of, see "Bonds," § 1.

The issues of bonds and coupons by a joint-stock association secured by its assets, even with a stipulation against personal liability of the shareholders, is legitimate, and contravenes no statute or rule of public policy.—Hibbs v. Brown (Sup.) 353.

*The stockholders of a joint-stock association are partners, and may be ultimately held liable as such for the debts and obligations of the association.—Hibbs v. Brown (Sup.) 353.

## JOINT TORT FEASORS.

See "Torts."

## JUDGES.

See "Courts"; "Justices of the Peace."
Examination of witnesses by, see "Witnesses," § 2.
Mandamus to judge, see "Mandamus," § 1.

**§ 1. Appointment, qualification, and tenure.**
*Under Const. art. 6, § 17, and Laws 1895, p. 1283, c. 601, the Supreme Court of the county of New York has power to remove a justice of the Court of Special Sessions for cause.—In re Deuel (Sup.) 297.

**§ 2. Rights, powers, duties, and liabilities.**
Municipal Court Act, Laws 1902, p. 1494, c. 580, § 12 (7), as amended by Laws 1904, p. 1429, c. 598, providing for holding of court by judges in districts other than those they were elected for, *held* authorized by Const. art. 6, § 17.—Sakolski v. Schenkel (Sup.) 190.

*Laws 1895, p. 1294, c. 601, § 25, prohibiting justices of the Court of Special Sessions from engaging in other business, *held* constitutional.—In re Deuel (Sup.) 297.

## JUDGMENT.

Decisions of courts in general, see "Courts," § 1.
In municipal court, see "Courts," § 2.
Review, see "Appeal."

*In particular civil actions or proceedings.*

See "Divorce," § 1; "Partition," § 1.
For possession of demised premises, see "Landlord and Tenant," § 6.
On appeal, see "Appeal," § 16.
Personal judgment for deficiency on foreclosure, see "Mortgages," § 2.
To enforce lien, see "Mechanics' Liens," § 3.

**§ 1. Nature and essentials in general.**
In the absence of any evidence as the amount of damages *held* that a judgment for defendant on a counterclaim for improper work cannot be sustained.—Simon v. Danziger (Sup.) 674.

A judgment *held* not sustainable because proceeding on inconsistent theories.—Meyer v. Page (Sup.) 739.

**§ 2. By default.**
An inquest because of defendant's failure to pay the costs of a motion could not be justified by the absence of an affidavit of merits where the answer was verified.—Goldberg v. Wood (Sup.) 200.

A party's remedy as against an unwarranted inquest *held* a motion to set it aside.—Goldberg v. Wood (Sup.) 200.

Papers presented on an application to vacate a default *held* insufficient.—Clews v. Peper (Sup.) 404.

On motion to open default judgment, where testimony taken at inquest was insufficient to show cause of action, judgment will not stand.—Costello v. Forty Second St., M. & St. N. Ave. Ry. Co. (Sup.) 648.

That an amended complaint was served on one defendant three days prior to the severance of the action, and not on the other defendant, is no ground for setting aside a default judgment against the latter on the original complaint.—Fuller Buggy Co. v. Ramsey (Sup.) 1085.

*Defendant, who was not entitled to have default judgment against him set aside, *held* not entitled to complain of imposition of costs on him on setting aside the judgment.—Fuller Buggy Co. v. Ramsey (Sup.) 1085.

**§ 3. On trial of issues.**
In an action for rent for May, where defendant pleaded payment of rent to May 1st, it was

***Point annotated. See syllabus.**

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insufficient to justify a judgment in his favor.—Manhattan Leasing Co. v. Weill (Sup.) 686.

Where, in an action for services, the only question was the authority of the defendant's engineer to employ plaintiff, and the court found for plaintiff thereon, it was error to give him judgment for only half of his claim.—Ross v. New Endicott Co. (Sup.) 758.

**§ 4. Collateral attack.**

On a petition for revocation of letters of administration, and for the appointment of petitioner as administratrix on the ground that she was the widow of deceased, it appearing that a judgment had been rendered annulling the marriage, the surrogate had jurisdiction to consider whether in entering the judgment annulling the marriage the Supreme Court had acquired jurisdiction of the person of the petitioner for revocation by sufficient service of process.—In re McGarren's Estate (Sup.) 415.

Under the evidence *held* that an attack on a judgment annulling a marriage on the ground that the court had no jurisdiction for want of proper service of process was insufficient (Code Civ. Proc. § 1754).—In re McGarren's Estate (Sup.) 415.

**§ 5. Merger and bar of causes of action and defenses.**

*Entry of judgment against one joint tortfeasor *held* not to preclude plaintiff from afterwards proceeding against the other.—Parks v. City of New York (Sup.) 94.

*Action for installment of rent due August 28th, commenced while action for installments due August 14th and 21st was pending, *held* not to bar subsequent action for those installments.—Kieley v. Kahn (Sup.) 774.

Where defendant, in action on note, fails to file counterclaim for services rendered, the claim being unliquidated, he is not precluded from thereafter suing therefor under Code Civ. Proc. §§ 2947, 2948.—White v. Curtis (Co. Ct.) 319.

**§ 6. Conclusiveness of adjudication.**

*An order in favor of a tenant in proceedings to dispossess *held* res judicata in a subsequent proceeding.—Kosower v. Sandler (Sup.) 65.

Beneficiaries of trust indorsing notes to secure loan by trustees *held* not entitled to assert that judgment on the notes included an amount for which they were not liable.—Blair v. Hampton (Sup.) 109.

By the express provisions of Code Civ. Proc. § 1933, a judgment against joint debtors is as against one not summoned conclusive evidence of the extent of plaintiff's demand.—Hofferberth v. Nash (Sup.) 684.

In an action on an accident policy, a judgment in an action wherein plaintiff was defendant *held* not res adjudicata on the question of plaintiff's copartnership with his codefendants in such action.—Gutfreund v. Standard Life & Accident Ins. Co. (Sup.) 699.

In an action on an accident policy, a judgment in a former action against plaintiff and others *held* not res adjudicata on question of ownership of certain horses.—Gutfreund v. Standard Life & Accident Ins. Co. (Sup.) 699.

*A judgment in mandamus to compel the mayor and clerk of a city to execute a contract *held* binding on the city in view of Laws 1885, pp. 40, 41, c. 26, tit. 5, §§ 33–40, and Laws 1898, p. 379, c. 182, § 47.—Lighton v. City of Syracuse (Sup.) 792.

*A judgment *held* not a bar to a recovery for easements in lands sought to be taken under condemnation proceedings.—In re Water Front of City of New York (Sup.) 1063; Appeal of American Ice Co., Id.

**§ 7. Lien.**

An award made by a city for the taking of a judgment debtor's real estate for a public use, is personal property, and the 10 years' limitation as to liens on real estate has no application.—Fawcett v. City of New York (Sup.) 286.

**§ 8. Actions on judgments.**

The failure of the clerk to make the required entry as to a joint debtor not served in an action, *held* no bar to an action against him under Code Civ. Proc. §§ 1936, 1937.—Hofferberth v. Nash (Sup.) 684.

## JUDICIAL NOTICE.

In civil actions, see "Evidence," § 1.

## JUDICIAL POWER.

See "Constitutional Law," §§ 2, 3.

## JURISDICTION.

Effect of appearance, see "Appearance."

*Jurisdiction of particular actions or proceedings*

See "Prohibition," § 2.
Accounting by executor, see "Executors and Administrators," § 6.
To discover assets of decedent's estate, see "Executors and Administrators," § 2.

*Special jurisdictions.*

See "Equity," § 1.
Appellate jurisdiction, see "Criminal Law," § 5.
Particular courts, see "Courts."

## JURY.

Grounds for reference instead of trial by jury, see "Reference," § 1.
Harmless error in selection, see "Appeal and Error," § 15.
Instructions in civil actions, see "Trial," § 5.
Instructions in criminal prosecutions, see "Criminal Law," § 8.



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Questions for jury in civil actions, see "Trial," § 4.
Taking case or question from jury at trial, see "Trial," § 4.

## JUSTICES OF THE PEACE.

Prohibition against inquisition in justice's court, see "Prohibition," § 1.

**§ 1. Procedure in civil cases.**

A complaint before a justice for false representations in the sale of a horse *held* not sustained by evidence of a breach of warranty.—Vandervort v. Mink (Sup.) 772.

**§ 2. Review of proceedings.**

*Where, in a suit for false representations in the sale of a horse before a justice, defendant properly filed a counterclaim for price of the horse, unpaid, he was entitled to a new trial on the merits in the county court on appeal, under Code Civ. Proc. § 3068.—Vandervort v. Mink (Sup.) 772.

## KNOWLEDGE.

By grantee of fraud in conveyance, see "Fraudulent Conveyances," § 1.

## LANDLORD AND TENANT.

Action by principal for rents, see "Principal and Agent," § 2.
Conclusiveness of judgment in proceedings to dispossess tenant, see "Judgment," § 6.
Conformity of judgment to pleadings in action for rent, see "Judgment," § 3.
Former adjudication in action for rent as bar, see "Judgment," § 5.
Negligence of lessee in general, see "Negligence," § 1.
Parol evidence as to lease, see "Evidence," § 8.
Removal of property from demised premises as conversion, see "Trover and Conversion," § 1.
Right of lessee to compensation for improvements on partition of demised premises, see "Partition," § 1.

**§ 1. Creation and existence of the relation.**

*A contract construed, and *held* a lease.—Pocher v. Hall (Sup.) 754.

**§ 2. Leases and agreements in general.**

In lease of apartments, the words "known as Bristol Apartment Hotel" *held* merely descriptive of the character of the hotel.—Bristol Hotel Co. v. Pegram (Sup.) 512.

**§ 3. Terms for years.**

Use of building as hotel for transients *held* not eviction of tenant of apartments.—Bristol Hotel Co. v. Pegram (Sup.) 512.

A finding that a landlord accepted a surrender before the expiration of the lease *held* not authorized.—Diker v. Hutchinson (Sup.) 616.

A provision in a lease *held* merely to authorize a cancellation for the tenant's default at the option of the landlords.—O'Brien v. Levine (Sup.) 636.

**§ 4. Premises, and enjoyment and use thereof.**

Evidence that a water tank had been watertight prior to the taking off of a manhole cover, and that it leaked around the edges of the cover immediately after it was replaced by defendant, *held* of itself evidence of negligence.—Eugene C. Lewis Co. v. Metropolitan Realty Co. (Sup.) 391.

*An exemption clause in a lease *held* not to exempt the landlord from liability for injuries to the goods of his tenant by the negligence of the landlord's servants in defectively adjusting a manhole cover to a water tank.—Eugene C. Lewis Co. v. Metropolitan Realty Co. (Sup.) 391.

A tenant cannot sue for the death of his infant child, occasioned by the landlord's failure to supply heat to the premises as required by his agreement.—Dancy v. Walz (Sup.) 407.

Under covenant in lease, lessee *held* liable for his proportion of the amount of water used in the building, though the city authorities refuse to render separate bill therefor.—Myers v. Reade (Sup.) 620.

**§ 5. Rent and advances.**

*The obligation of a tenant to pay rent after the beginning of the term does not depend on his possession of the demised premises.—Smith v. Barber (Sup.) 365.

*A lessee, excluded at the beginning of the term from possession of demised premises by one claiming possession under title paramount to that of the lessor, is not liable for rent.—Smith v. Barber (Sup.) 365.

Lease construed, and *held* to entitle the landlords to retain a deposit made to secure performance until termination of the lease.—O'Brien v. Levine (Sup.) 636.

Tender of a check for the amount of the rent of certain premises less a bill for repairs, which was immediately returned by the landlords, the tenant being required to make the repairs, *held* not a payment of the rent.—O'Brien v. Levine (Sup.) 636.

In an action for rent against a tenant holding over, a finding of a verbal agreement for the termination of the tenancy *held* unauthorized.—Latham v. Woodward (Sup.) 639.

*A mortgagee of a lease can pay the rent due by his mortgagor at any time before the issuance of a final order against the mortgagor in summary proceedings.—Rubenstein v. Rosenthal (Sup.) 681.

**§ 6. Re-entry and recovery of possession by landlord.**

Illegal sale of liquor on premises by a subtenant six months before *held* ground for removal, under Code Civ. Proc. § 2231 (5).—Conforti v. Romano (Sup.) 194.

Under Code Civ. Proc. § 2247, a final order for dispossession for nonpayment of taxes *held*



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properly issued in summary proceedings to recover possession of real property.—Peabody v. Long Acre Square Bldg. Co. (Sup.) 242.

In summary proceedings to recover possession of real property, proof of service of notice for demand of rent *held* sufficient.—Peabody v. Long Acre Square Bldg. Co. (Sup.) 242.

In summary proceedings to recover possession of real property, certain testimony *held* sufficient as an admission of due service of notice and demand to pay rent or vacate.—Peabody v. Long Acre Square Bldg. Co. (Sup.) 242.

In summary proceedings to recover possession of real property, allegations of petition *held* sufficient to confer jurisdiction on the Municipal Court.—Peabody v. Long Acre Square Bldg. Co. (Sup.) 242.

After a final order in favor of the landlord in summary proceedings, it will not be set aside to permit a mortgagee of the lease to defend.—Rubenstein v. Rosenthal (Sup.) 681.

Under Municipal Court Act, Laws 1902, p. 1488, c. 580, § 1, subd. 12, and Code Civ. Proc. c. 17, tit. 2, §§ 2249, 2260, an appeal in summary proceedings by a landlord against a tenant prior to the making of a final order *held* prematurely taken and dismissible.—Dickinson v. Brown (Sup.) 694.

Under Municipal Court Act, Laws 1902, p. 1488, c. 580, § 1, subd. 12, and Code Civ. Proc. c. 17, tit. 2, §§ 2249, 2260, a record on appeal from the judgment in summary proceedings by a landlord to obtain possession of leased premises *held* not to show a final order, as provided by said section 2249.—Dickinson v. Brown (Sup.) 694.

In summary proceedings by a landlord to dispossess a tenant claiming under assignments, the landlord *held* not entitled to recover more rent than that reserved in the original lease.—Shalet v. Rauch (Sup.) 883.

## LANDS.

See "Public Lands."

## LARCENY.

See "Receiving Stolen Goods."

**§ 1. Prosecution and punishment.**

On a prosecution under Penal Code, § 529, for larceny, refusal of certain instructions *held* error.—People v. Lipp (Sup.) 86.

## LEASES.

See "Landlord and Tenant."

## LEGACIES.

See "Wills."

## LEGACY TAX.

See "Taxation," § 4.

## LEGISLATIVE POWER.

See "Constitutional Law," §§ 2, 3.

## LETTERS PATENT.

For inventions, see "Patents."

## LIBEL AND SLANDER.

Demurrer to pleading, see "Pleading," § 4.

**§ 1. Words and acts actionable, and liability therefor.**

A newspaper publication *held* libelous per se.—McDonald v. Sun Printing & Publishing Ass'n (Sup.) 116.

A publication *held* not libelous per se.—Reporter's Ass'n of America v. Sun Printing & Publishing Co. (Sup.) 294.

*A newspaper dispatch stating that plaintiff's brother had arrived in San Francisco from New York and stated in court that he would see that plaintiff returned to New York, whereupon the judge ordered plaintiff released. *held* not libelous per se.—Rees v. New York Herald Co. (Sup.) 548.

*A statement that plaintiff allowed her picture to be taken and used as an advertisement, when repulsive to look at, *held* libelous per se.—Hart v. John H. Woodbury Dermatological Institute (Sup.) 1000.

*An article ascribing to one a letter stating that the writer of the letter was an object of scorn and pity because of the condition in which smallpox left her face *held* libelous per se.—Hart v. John Woodbury Dermatological Institute (Sup.) 1000.

**§ 2. Privileged communications, and malice therein.**

*A publication *held* libelous per se.—McDonald v. Sun Printing & Publishing Ass'n (Sup.) 118.

**§ 3. Actions.**

*A complaint in libel which alleges a publication libelous per se need not allege special damages.—McDonald v. Sun Printing & Publishing Ass'n (Sup.) 116.

*A corporation may maintain an action for libel.—Reporters' Ass'n of America v. Sun Printing & Publishing Co. (Sup.) 294.

Language used concerning a corporation which is defamatory in itself, directly affects its credit, and necessarily occasions pecuniary injury, is libelous per se.—Reporters' Ass'n of America v. Sun Printing & Publishing Co. (Sup.) 294.

*In an action for libel, plaintiff *held* to have sufficiently pleaded special damages.—Reporters' Ass'n of America v. Sun Printing & Publishing Co. (Sup.) 294.

***Point annotated. See syllabus.**

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*When words published are not libelous per se, special damages must be alleged and proven.—Reporters' Ass'n of America v. Sun Printing & Publishing Co. (Sup.) 294.

*Innuendoes in a complaint for libel *held* not to limit plaintiff to the meaning thereby ascribed to the publication complained of.—Hart v. John H. Woodbury Dermatological Institute (Sup.) 1000.

## LICENSES.

For sale of intoxicating liquors, see "Intoxicating Liquors," § 1.
Injuries to licensees by operation of railroad, see "Railroads," § 1.

**§ 1. For occupations and privileges.**

*Basis for assessment of license fee against foreign corporation, under section 181 of the Tax Law, Heydecker's Gen. Laws, p. 1918, c. 24, *held* the capital, not the capital stock, employed in the state.—People v. Miller (Sup.) 751.

*A city ordinance forbidding bill posting and distribution of sample packages of merchandise without a license *held* class legislation.—City of Watertown v. Rodenbaugh (Sup.) 885.

Under Consolidation Act, Laws 1882, p. 159, c. 410, § 576, as amended, and New York City Charter, Laws 1901, p. 497, c. 466, § 1169, a permit to sell milk, issued pursuant to the sanitary code, continued in force by section 575 of the consolidation act (page 158) and section 1172, c. 466, p. 499, Laws 1901, as amended by Laws 1904, p. 491, c. 628, § 3, *held* revocable on the licensee selling adulterated milk.—Metropolitan Milk & Cream Co. v. City of New York (Sup.) 894.

## LIENS.

*Liens acquired by particular remedies or proceedings.*

See "Judgment," § 7.
Municipal improvements, see "Municipal Corporations," § 3.

*Particular classes of liens.*

See "Mechanics' Liens."
Attorney's liens, see "Attorney and Client," § 2.
Of corporation counsel, see "Municipal Corporations," § 1.
Pledge, see "Pledges."

Under Laws 1897, p. 532, c. 418, § 70, where several articles are manufactured under an entire contract, the artisan's lien is not lost by a delivery of part of the articles.—Solomon v. Bok (Sup.) 838.

Where an artisan sought to enforce his lien on certain articles for the manufacture of those and others which had been delivered, the burden was on him to show that the contract to manufacture was entire.—Solomon v. Bok (Sup.) 838.

Where an artisan, after delivering certain articles, claimed a lien on those retained for the cost of manufacture of the whole number *held* that the evidence was insufficient to show that the articles were manufactured under an entire contract.—Solomon v. Bok (Sup.) 838.

## LIFE ESTATES.

See "Dower."
Rights of life tenant as to income on trust created by will, see "Wills," § 7.
Rights of life tenants in trust property, see "Trusts," § 5.

## LIFE INSURANCE.

See "Insurance," § 9.

## LIMITATION OF ACTIONS.

See "Adverse Possession."
Bar of claims against estate of decedent, see "Executors and Administrators," § 3.

*Particular actions or proceedings.*

See "Appeal," § 5.
On contract to devise, see "Wills," § 3.
On insurance policy, see "Insurance," § 9.

**§ 1. Statutes of limitation.**

An action under Code Civ. Proc. § 1937, *held* not barred by limitations. Id. § 388.—Hofferberth v. Nash (Sup.) 684.

**§ 2. Pleading, evidence, trial, and review.**

*Where, on a plea of limitations, there is evidence to show that when the cause of action accrued defendant was without the state, the burden of showing the time of his residence in the state *held* upon him (Code Civ. Proc. § 401).—Phillips v. Lindley (Sup.) 423.

*Under Code Civ. Proc. § 381, an answer to a complaint setting up a cause of action on an instrument under seal *held* insufficient.—Burstein v. Levy (Sup.) 853.

## LIMITATION OF LIABILITY.

Of carrier, see "Carriers," § 2.

## LIQUIDATED DAMAGES.

See "Damages," § 1.

## LIQUOR SELLING.

See "Intoxicating Liquors."

## LIS PENDENS.

Under Code Civ. Proc. § 1670, and section 1671, as amended by Laws 1905, p. 71, c. 60, the court *held* not entitled on motion to cancel



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lis pendens to examine the complaint as on demurrer.—McCrum v. Lex Realty Co. (Sup.) 1021.

## LITTORAL RIGHTS.

See "Navigable Waters," § 3.

## LOAN ASSOCIATIONS.

See "Building and Loan Associations."

## LOANS.

By bank, see "Banks and Banking," § 2.

## LOCAL ACTIONS.

See "Venue," § 1.

## LOGS AND LOGGING.

Cutting timber as element of adverse possession, see "Adverse Possession," § 1.

## MACHINERY.

Liability of employer for defects, see "Master and Servant," § 4.
Production and use of electricity, see "Electricity."

## MAINTENANCE.

See "Champerty and Maintenance."

## MALICE.

See "Libel and Slander," § 2.

## MALICIOUS PROSECUTION.

**§ 1. Actions.**
In an action for malicious prosecution, evidence *held* to show as a matter of law that defendant had probable cause for charging plaintiff with crime.—Malich v. Josephson (Sup.) 671.

## MANDAMUS.

Conclusiveness of judgment, see "Judgment," § 6.

**§ 1. Subjects and purposes of relief.**
Mandamus *held* not to lie to compel the payment of an order for paving work.—People v. Grout (Sup.) 185.

Under Laws 1896, p. 874, c. 908, § 230, requiring a surrogate to designate persons to appraise property subject to a transfer tax, mandamus *held* the proper remedy to compel the surrogate to act.—Kelsey v. Church (Sup.) 535.

*A city *held* entitled to compel a street railroad to change the location of its tracks preliminary to the improvement of a street by mandamus.—People v. Geneva, W., S. F. & C. L. Traction Co. (Sup.) 719.

Where a county board of supervisors wrongfully refused to approve the bond of a successful bidder for county printing, mandamus was the proper remedy to require them to approve the bond.—People v. Edgcomb (Sup.) 965.

**§ 2. Jurisdiction, proceedings, and relief.**
Person appointed to fill position from which relator was removed *held* not necessary party to mandamus to compel reinstatement.—People v. Ahearn (Sup.) 492.

## MANDATE.

See "Mandamus."

## MANUFACTURES.

Lien of manufacturer, see "Liens."

## MARGINS.

Deposit of with broker, see "Brokers," § 2.

## MARRIAGE.

See "Divorce"; "Husband and Wife."
Collateral attack on judgment annulling, see "Judgment," § 4.
Retroactive or prospective operation of statutes, see "Statutes," § 2.
Validity of contracts in derogation of, see "Contracts," § 1.

A marriage between uncle and niece at a time when it was not prohibited by statute *held* not subject to vacation on the sole ground that such marriage was subsequently prohibited by Laws 1893, p. 1387, c. 601, as amended by Laws 1896, p. 215, c. 272.—Weisberg v. Weisberg (Sup.) 260.

*A marriage between parties of statutory age, neither of whom is disqualified by statute, cannot be deemed incestuous, either in the administration of the civil or criminal law.—Weisberg v. Weisberg (Sup.) 260.

In a suit to establish a common-law marriage, evidence *held* insufficient to sustain a verdict in favor of plaintiff.—Herrmann v. Herrmann (Sup.) 654.

In a suit to establish a common-law marriage, the trial court had jurisdiction to set aside a verdict for plaintiff and hear and determine the case on the merits.—Herrmann v. Herrmann (Sup.) 655.

*Under Laws 1892, p. 1574, c. 679, § 3, members of Onondaga Nation married according to its custom *held* lawfully married.—People v. Rubin (Sup.) 787.



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## MARRIED WOMEN.

See "Husband and Wife."

## MASTER AND SERVANT.

See "Work and Labor."
Admissions by employé, see "Evidence," § 4.
Bill of particulars in action for wrongful discharge of servant, see "Pleading," § 6.
Conformity of judgment to issues in action for services, see "Judgment," § 3.
Contract of employment distinguished from partnership, see "Partnership," § 1.
Employers' liability insurance, see "Insurance," § 4.
Employés of municipal corporations, see "Municipal Corporations," § 1.
Instructions in general in action for injuries to servant, see "Trial," § 5.
Liability of charitable organization for negligence of servant, see "Charities," § 1.
Remarks of court and counsel in action for injuries to servant as to liability insurance, see "Trial," § 3.
Tender of wages due, see "Tender."

**§ 1. The relation.**

*A hiring at will may be terminated at any time by either party.—Summers v. Phenix Ins. Co. (Sup.) 226.

In an action for wrongful discharge under a contract of employment, evidence *held* to show an abandonment of the original contract.—Summers v. Phenix Ins. Co. (Sup.) 226.

*A hiring at so much a year, no time being specified, is a hiring at will.—Summers v. Phenix Ins. Co. (Sup.) 226.

*Where there is a hiring for one year, and the servant continues in the employment after the expiration of the year with the consent of the master, this effects a hiring for another year.—Treffinger v. M. Groh's Sons (Sup.) 291.

In an action by a servant for wrongful discharge, the complaint *held* to sufficiently allege the renewal of a contract of employment by the year.—Treffinger v. M. Groh's Sons (Sup.) 291.

In action by a servant for wrongful discharge, the complaint *held* to sufficiently allege the making of a yearly contract.—Treffinger v. M. Groh's Sons (Sup.) 291.

In an action for alleged breach of a contract of employment, evidence *held* insufficient to sustain a finding that defendant had agreed to employ plaintiff for a specified term or longer than from week to week.—Zahler v. Arkin (Sup.) 544.

A contract of employment *held* terminated by the acts of the parties.—Messenio v. Atchison, T. & S. F. Ry. Co. (Sup.) 647.

**§ 2. Services and compensation.**

*A promise or prediction of the amount of sales one would be able to make *held* not to constitute fraud.—Steinbach v. La Roche (Sup.) 672.

Contract of employment *held* to confer on master right to determine how much and what should be regarded as profit of the business, so that as long as that was done in good faith defendants were bound by stipulations.—Jones v. Roberts (Sup.) 873.

**§ 3. Master's liability for injuries to servant—Nature and extent in general.**

A contractor constructing a scaffold for his employé *held* not liable for injuries sustained in consequence of a co-employé, working above the employé, falling on him.—Madin v. Norcross Bros. Co. (Sup.) 223.

Employment of a female child under 16 years of age to operate a tin-stamping machine *held* evidence of negligence on the part of the master, in an action for injuries received while operating the machine.—Regling v. Lehmaier (Sup.) 642.

**§ 4. —— Tools, machinery, appliances, and places for work.**

A master *held* not liable to an employé engaged in using a wheelbarrow, though it is so constructed as to be top-heavy when loaded, and tips over and injures him.—Cunningham v. Peirce (Sup.) 60.

*Statement of when a master has performed his duty under the labor law as to furnishing scaffoldings.—Cunningham v. Peirce (Sup.) 60.

*A scaffolding for erection of a temporary partition in a room *held* not within Labor Law, Laws 1897, p. 467, c. 415, § 18, requiring a master employing one to labor in "the erection, repairing, altering, or painting of a house" to furnish a suitable scaffolding.—Sutherland v. Ammann (Sup.) 574.

*An employé injured in consequence of defective appliances *held* not required to prove that the employer had personal knowledge of the defect.—Johnson v. Onondaga Paper Co. (Sup.) 602.

**§ 5. —— Methods of work, rules, and orders.**

*In an action against a railway company for the death of a brakeman while coupling cars in a yard, the jury *held* authorized to find that rule regulating the work was proper.—Freemont v. Boston & M. R. R. (Sup.) 179.

*In an action against a railway company for the death of a brakeman while coupling cars in a yard, evidence *held* to justify a finding of negligence because of the failure to promulgate a rule regulating the work.—Freemont v. Boston & M. R. R. (Sup.) 179.

**§ 6. —— Warning and instructing servant.**

In an action for injuries to a servant, the negligence of a foreman respecting the manner of doing the work *held* not to concern a duty devolving on the master.—Lynch v. Shanley Co. (Sup.) 406.

*In an action for injuries to a mangle operator, defendant *held* not guilty of negligence in failing to warn plaintiff of dangers of



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which she was aware.—Lynch v. Shanley Co. (Sup.) 406.

The proximate cause of an injury to a member of a crew engaged in repairing railroad bridges *held* not the failure of the foreman to warn the employé of an approaching train.—Bannon v. New York Cent. & H. R. R. Co. (Sup.) 770.

**§ 7. —— Fellow servants.**

*Where the owner of a hod elevator furnished it, in charge of his own engineer, to a building contractor for an agreed price, the engineer was not a fellow servant of a workman employed by the building contractor.—McDonough v. Pelham Hod Elevator Co. (Sup.) 90.

*Labor Law, Laws 1897, p. 467, c. 415, §§ 18, 19, *held* not to render a master liable for injuries to a servant caused by a defective scaffold, consisting merely of planks laid across horses, used for washing the walls of a building.—Stokes v. New York Life Ins. Co. (Sup.) 135.

"Pusher" in charge of gang of structural iron workers *held* not superintendent within the employers' liability act.—Abrahamson v. General Supply & Construction Co. (Sup.) 596.

A foreman of a crew employed in repairing railroad bridges *held* a co-employé of the members thereof, under Employers' Liability Act, Laws 1902, p. 1748, c. 600.—Bannon v. New York Cent. & H. R. R. Co. (Sup.) 770.

Where a master is negligent in placing his servant in an unsafe place, the dangers of which are unknown to and hidden from the servant, the master cannot shield himself from liability for the servant's injuries because the act of a fellow servant brought about the injury.—Cadigan v. Glens Falls Gas & Electric Light Co. (Sup.) 954.

*That a master employed a general superintendent did not relieve him from responsibility under the employers' liability act for the negligence of a foreman in charge of the work.—Carlson v. United Engineering & Contracting Co. (Sup.) 1036.

*The act of a foreman in ordering an engine started *held* to have been an act of superintendence within the employers' liability act.—Carlson v. United Engineering & Contracting Co. (Sup.) 1036.

*It was the duty of a foreman superintending repairs of an engine before he directed it to be started to exercise reasonable care to see that workmen repairing it were in places of safety.—Carlson v. United Engineering & Contracting Co. (Sup.) 1036.

**§ 8. —— Assumption of risk.**

*The danger of an employé receiving an electric shock while clearing snow from an elevated railroad track *held* not an obvious danger.—Smith v. Manhattan Ry. Co. (Sup.) 1.

*Master *held* not liable for negligence of foreman in using defective rope in hanging skid from vessel.—Agresta v. Stevenson (Sup.) 594.

**§ 9. —— Contributory negligence of servant.**

*Contributory negligence *held* to have precluded recovery by a servant for injuries.—Fink v. Hartog & Beinhauer Candy Co. (Sup.) 393.

**§ 10. —— Actions.**

The question of the contributory negligence of an employé *held* for the jury.—Smith v. Manhattan Ry. Co. (Sup.) 1.

Whether an employé assumed a risk *held* for the jury.—Smith v. Manhattan Ry. Co. (Sup.) 1.

*In an action by an employé for injuries received, the question of the employer's negligence in failing to provide safe appliances or give warnings *held* for the jury.—Smith v. Manhattan Ry. Co. (Sup.) 1.

*In an action under the employers' liability act for the death of a brakeman while coupling a defective car, the question whether decedent assumed the risk is for the jury.—Freemont v. Boston & M. R. R. (Sup.) 179.

*In an action under the employer's liability act for the death of a brakeman while coupling cars in a yard, defendant has the burden of proving that the risk was obvious to decedent, so that he assumed the risk.—Freemont v. Boston & M. R. R. (Sup.) 179.

In an action for injuries to a servant, under the employers' liability act, occasioned by the alleged negligence of a superintendent, an instruction that defendant owed plaintiff the duty of reasonable care to see that a certain elevator was safe *held* not objectionable as rendering defendant liable for the negligence of fellow servants.—Harris v. Baltimore Machine & Elevator Works (Sup.) 440.

*In an action for injuries to a servant by the fall of an elevator, whether plaintiff's superintendent was guilty of negligence in failing to babbitt certain cables and in directing plaintiff to use the elevator before the cables were babbitted, and whether plaintiff was guilty of negligence in so doing, *held* for the jury.—Harris v. Baltimore Machine & Elevator Works (Sup.) 440.

In an action for injuries to a servant through the negligence of a superintendent, under Employers' Liability Act, Laws 1902, p. 1748, c. 600, it was sufficient that the complaint alleged that the negligence was that of the master.—Harris v. Baltimore Machine & Elevator Works (Sup.) 440.

In an action for injuries to a servant, where the negligence claimed was in violation of Labor Law, Laws 1897, p. 477, c. 415, § 70, an instruction as to certain testimony of plaintiff *held* reversible error.—Herbst v. Kellogg Mfg. Co. (Sup.) 444.

Whether it is practicable to guard a belt and pulley, as required by Labor Law, Laws 1892, p. 1375, c. 673, § 8, *held* for the jury.—Johnson v. Onondaga Paper Co. (Sup.) 602.

*In an action for injuries to a female servant wrongfully employed to operate a dangerous

*Point annotated. See syllabus.

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machine in violation of Laws 1899, p. 353, c. 192, § 81, the fact that the master had provided adequate means, if used, to have prevented the accident, *held* not to relieve him from liability as a matter of law.—Regling v. Lehmaier (Sup.) 642.

In an action for injuries to a servant, plaintiff's story *held* not so improbable that a verdict in her favor would be disregarded as against the weight of evidence.—Regling v. Lehmaier (Sup.) 642.

*A servant's obedience to the direction of her foreman to use her hand to unclog a machine, instead of a stick provided by the master, *held* a circumstance bearing on the absence of a contributory negligence as a matter of fact.—Regling v. Lehmaier (Sup.) 642.

In an action for the death of a servant *held* that there was no evidence of defectiveness of a scaffold upon which he was at work.—Andrews v. Reiners (Sup.) 658.

In an action by a servant for injuries caused by a defectively insulated electric wire, evidence *held* insufficient to justify submission of the issue of defendant's negligence.—Carey v. Manhattan Ry. Co. (Sup.) 668.

In an action by a servant for injuries caused by being struck by a switch engine while working upon a track, evidence *held* insufficient to support a verdict for plaintiff.—Rich v. Pennsylvania R. Co. (Sup.) 678.

In an action for injuries to a servant under Employers' Liability Act, Laws 1902, p. 1748, c. 600, the question of plaintiff's assumption of risk *held* for the jury.—Cadigan v. Glens Falls Gas & Electric Light Co. (Sup.) 954.

*In an action for injuries to a servant by a gas explosion while he was assisting in attaching a valve on a six-inch gas pipe Y, whether plaintiff knew that the work was being done while the gas was on *held* for the jury.—Cadigan v. Glens Falls Gas & Electric Light Co. (Sup.) 954.

*In an action for injuries to a servant, whether defendant was guilty of negligence in failing to provide plaintiff with a reasonably safe place in which to work *held* a question for the jury.—Cadigan v. Glens Falls Gas & Electric Light Co. (Sup.) 954.

In an action for injuries to a servant by an explosion of gas, a nonsuit *held* not sustainable on the theory that the explosion was caused by a spark from a chisel held by plaintiff's fellow servant.—Cadigan v. Glens Falls Gas & Electric Light Co. (Sup.) 954.

Evidence in an action for death of an employé *held* insufficient to sustain a verdict against the employer.—Gardner v. Schenectady Ry. Co. (Sup.) 1034.

*In an action for injuries to a servant *held* that the question of contributory negligence was one for the jury.—Carlson v. United Engineering & Contracting Co. (Sup.) 1036.

*Under the employers' liability act, the question, in an action by a servant for personal injuries received through negligence of the master, as to plaintiff's assumption of certain risks, *held* one for the jury.—Wynkoop v. Ludlow Valve Mfg. Co. (Sup.) 1076.

**§ 11. Liabilities for injuries to third persons.**

In an action for injuries to a workman while riding on a hod elevator which was installed for the purpose of carrying building materials and not passengers, it was presumable that the workman was riding on the elevator without the consent of the owner thereof.—McDonough v. Pelham Hod Elevator Co. (Sup.) 90.

In an action for injuries sustained by a workman, employed in constructing a building, while riding on a hod elevator furnished to the building contractor by a third person, the owner of the elevator *held* not estopped to deny that the engineer in charge of the elevator had authority to allow the workmen to ride.—McDonough v. Pelham Hod Elevator Co. (Sup.) 90.

Where the owner of a hod elevator rented it together with an engine and engineer to a building contractor for the purpose of elevating materials, the engineer had no implied authority to permit workmen employed by the building contractor to ride on the elevator.—McDonough v. Pelham Hod Elevator Co. (Sup.) 90.

*Consent of an engineer in charge of a hod elevator rented to a building contractor to the acts of employés of the contractor in riding thereon *held* to give them no right so to do unless the engineer was acting within the scope of his authority in giving such consent.—McDonough v. Pelham Hod Elevator Co. (Sup.) 90.

Duty to use due care in erecting and maintaining temporary shed over sidewalk cannot be evaded by employment of independent contractor.—Scheller v. Silbermintz (Sup.) 230.

Where roof of shed over sidewalk fell after completion, principle of delegating work to independent contractor *held* not to apply.—Scheller v. Silbermintz (Sup.) 230.

Husband acting as manager for wife *held* liable with her only for actual misfeasance or tort, not for mere neglect.—Scheller v. Silbermintz (Sup.) 230.

*Contributory negligence *held* no defense in an action for injury to a third person by a servant in ejecting such person, a trespasser, from the master's sleigh.—Dealy v. Coble (Sup.) 452.

*A master *held* liable for injury to a third person by his servant, if, as warranted by the evidence, it was done in the scope of his employment, in using greater force than necessary in ejecting such person, a trespasser.—Dealy v. Coble (Sup.) 452.

*Under Labor Law, Laws 1897, p. 467, c. 415, § 18, the owner of a building in process of erection *held* not liable for injuries to a servant

*** Point annotated. See syllabus.**

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of an independent contractor.—Antes v. Watkins (Sup.) 519.

## MATERIALITY.

Of alteration of written instrument, see "Alteration of Instruments."

## MEASURE OF DAMAGES.

See "Damages," § 3; "Trover and Conversion," § 2.

## MECHANICS' LIENS.

**§ 1. Right to lien.**

Facts *held* not to show a contractor entitled to mechanics' lien.—Thompson-Starrett Co. v. Brooklyn Heights Realty Co. (Sup.) 128.

In action to foreclose a mechanic's lien, facts *held* to show that there was nothing due plaintiff at the time his lien was filed, and that he was therefore not entitled to foreclose the same.—Condon v. Church of St. Augustine (Sup.) 253; Miller v. Same, Id.

Money due by principal contractor undertaking on default of a subcontractor to complete the work *held* liable to the lien of a materialman furnishing materials to the subcontractor.—Martin v. Flahive (Sup.) 577.

The lien of a materialman furnishing materials to a subcontractor making a default *held* not affected by the fact that the owner completed the work on the failure of the contractor to do so.—Martin v. Flahive (Sup.) 577.

**§ 2. Proceedings to perfect.**

*A notice of a materialman's lien against a subcontractor *held* sufficient.—Martin v. Flahive (Sup.) 577.

**§ 3. Enforcement.**

Where a building contract required an architect's certificate as a condition precedent to the contractor's right to a payment, in an action to enforce a mechanic's lien, the contractor could not recover a personal judgment, under Code Civ. Proc. § 3412, where he had not proved that he had obtained the required certificate.—Thompson-Starrett Co. v. Brooklyn Heights Realty Co. (Sup.) 128.

Where no valid lien is acquired, a personal judgment is not authorized, in an action to enforce a mechanic's lien, by Code Civ. Proc. § 3412.—Thompson-Starrett Co. v. Brooklyn Heights Realty Co. (Sup.) 128.

Taxation of all the costs and disbursements of an action to foreclose the lien of a contractor and certain subcontractors to the latter, under Code Civ. Proc. § 3411, *held* an abuse of discretion.—Condon v. Church of St. Augustine (Sup.) 253; Miller v. Same, Id.

A complaint in an action to enforce a mechanic's lien *held* sufficient because the essential fact to allege was the completion of the work.—Martin v. Flahive (Sup.) 577.

*A materialman seeking to enforce a lien for materials furnished a subcontractor *held* required to prove the actual cost of the completion of the work by the principal contractor and owner on the default of the subcontractor.—Martin v. Flahive (Sup.) 577.

A principal contractor undertaking to perform a subcontractor's contract on his default *held* not personally liable to a materialman furnishing materials to the subcontractor.—Martin v. Flahive (Sup.) 577.

## MERGER.

Of cause of action in judgment, see "Judgment," § 5.

## MINORS.

See "Infants."

## MISREPRESENTATION.

See "Fraud."

## MISTAKE.

As affecting validity of assignment, see "Assignments," § 1.

## MODIFICATION.

Of bill of exchange or promissory note, see "Bills and Notes," § 2.
Of contract by parol, see "Evidence," § 8.
Of judgment, see "Appeal," § 16.

## MONEY RECEIVED.

Action as for money received or tort, see "Action," § 1.
Recovery of payment in general, see "Payment," § 2.
Recovery of tax paid, see "Taxation," § 3.

Where plaintiff's assignors deposited certain funds with defendant to be paid to a brewing company to be later used in fitting up a place of business, and the brewing company repaid the amount to defendant, who never used the same as intended, defendant *held* liable for the amount so paid, in an action for money had and received.—Lefkowitz v. Reich (Sup.) 695.

In an action for money received, the complaint *held* insufficient to show a cause of action.—Lawyers' Title Ins. & Trust Co. v. Jones (Sup.) 871.

## MORTGAGES.

By or to guardian or ward, see "Guardian and Ward," § 1.
Distribution of surplus on foreclosure in surrogate's court, see "Executors and Administrators," § 4.
Personal property, see "Chattel Mortgages."
Process in general in foreclosure suit, see "Process," § 1.

*Point annotated. See syllabus.

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**§ 1. Payment or performance of condition, release, and satisfaction.**
Payment of mortgage to one authorized to receive it under power of attorney from guardian *held* valid, and that mortgagor is not bound to see that proper application of the payment was made, under Real Property Law, Laws 1896, p. 559, c. 547, § 88.—Forbes v. Reynard (Sup.) 708.

**§ 2. Foreclosure by action.**
*Though a deficiency judgment in mortgage foreclosure was not docketed for 10 years after the filing of the judgment roll, the lapse of time was no ground for a cancellation of the docket.—Brown v. Faile (Sup.) 420.

## MOTIONS.

Change of venue in civil actions, see "Venue," § 2.
Direction of verdict in civil actions, see "Trial," § 4.
Dismissal or nonsuit on trial, see "Trial," § 4.
New trial in civil actions, see "New Trial," § 1.
New trial in criminal prosecutions, see "Criminal Law," § 4.
Opening or setting aside default judgment, see "Judgment," § 2.
Presentation of objections for review, see "Appeal," § 4.
Relating to pleadings, see "Pleading," § 7.
Security for costs, see "Costs," § 2.
Striking out evidence, see "Trial," § 2.
Vacation of taxation of costs, see "Costs," § 4.

An order granting an extra allowance of costs appearing on the clerk's minutes, without a formal order signed by the trial judge, is valid.—Harris v. Baltimore Machine & Elevator Works (Sup.) 440.

## MUNICIPAL CORPORATIONS.

See "Counties"; "Schools and School Districts," § 1.
Certiorari as remedy to review removal of policeman or municipal employé, see "Certiorari," §§ 1, 2.
Charter provisions denying due process of law, see "Constitutional Law," § 5.
Conclusiveness of judgment affecting, see "Judgment," § 6.
Exercise of power of eminent domain, see "Eminent Domain," §§ 1, 2.
Judicial notice of, see "Evidence," § 1.
Judicial power to review rules of civil service commission, see "Constitutional Law," §§ 2, 3.
Laws requiring notice of injuries as condition precedent to action against city for negligence as denying due process of law, see "Constitutional Law," § 5.
Lien of award by city in proceedings to take property for public use, see "Judgment," § 7.
Mandamus, see "Mandamus," § 1.
Municipal and city courts, see "Courts," § 2.
Regulations as to licenses, see "Licenses," § 1.
Street railroads, see "Street Railroads."
Streets as boundaries, see "Boundaries."
Submission to voters of question of establishment of lighting system, see "Elections," § 1.

**§ 1. Officers, agents, and employés.**
Under New York City Charter, Laws 1901, p. 331, c. 466, § 790, the burden of proof *held* to be on the fire commissioner, on allowing a pension of less than one-half the salary of a retired fireman, to show that the condition of the fund was such as to prevent the allowance of the full amount.—Ramsay v. Hayes (Sup.) 394.

To entitle head of bureau to protection of Laws 1901, p. 636, c. 466, § 1543, alternative writ of mandamus to compel reinstatement must allege that bureau was created by charter or by official given authority to create bureaus.—People v. Ahearn (Sup.) 492.

A rule of a municipal civil service commission requiring applicants for examination for promotion to have served for not less than six months in the next lower grade is reasonable and proper.—In re Ricketts (Sup.) 502.

Under the Civil Service Law, Laws 1899, p. 803, c. 370, § 13, subd. 6, a municipal civil service corporation has power to require applicants for examination for promotion to have served a stated period in the next lower grade.—In re Ricketts (Sup.) 502.

A rule of the civil service commission of New York City requiring applicants for examination for promotion in the fire department to have served a stated period in the next lower grade does not violate Laws 1899, p. 805, c. 370, § 15, in view of the further provisions of the section, and New York City Charter, Laws 1901, p. 306, c. 468, § 728.—In re Ricketts (Sup.) 502.

A rule of a municipal civil service commission, requiring a specified period of service in the next lower grade before examination for promotion, does not violate Const. art. 5, § 9, relating to promotions in the civil service.—In re Ricketts (Sup.) 502.

A member of the uniformed force of the street cleaning department of New York City *held* estopped by his application for leave of absence without pay to claim compensation for the time of his absence.—Tepidino v. City of New York (Sup.) 693.

Corporation counsel of city of second class *held* to have no lien on judgment in favor of city for costs accruing to him under Laws 1898, p. 435, c. 182, § 418.—Sutherland v. City of Rochester (Sup.) 970.

Right of corporation counsel of city of second class to certain costs accruing to him under Laws 1898, p. 435, c. 182, § 418, *held* not established.—Sutherland v. City of Rochester (Sup.) 970.

Under Laws 1898, p. 435, c. 182, § 418, providing for payment to corporation's counsel of cities of the second class of certain costs and allowances, such officer *held* required to establish not only that city was successful,



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but that the costs had been paid, before he is entitled to recover therefor from city.—Sutherland v. City of Rochester (Sup.) 970.

**§ 2. Contracts in general.**

*Under ordinance authorizing contract for 10 years, commissioner of public works *held* not authorized to enter into a new contract for 10 years at expiration of first contract 2 years after it was entered into.—Buffalo Clean Street Co. v. City of Buffalo (Sup.) 784.

**§ 3. Public improvements.**

Under Laws 1897, p. 517, c. 418, § 20, subd. 5, as amended by Laws 1898, p. 318, c. 169, and Laws 1897, pp. 515, 525, c. 418, §§ 2, 22, an undertaking signed by the assignee of a contractor *held* sufficient for the discharge of a lien against the amount due from a municipal corporation for the construction of a public improvement.—In re Hudson Waterworks (Sup.) 33.

*Under Laws 1879, p. 397, c. 310, land used for cemetery *held* not subject to assessment for improvement, though the improvement is authorized by special act. Laws 1900, p. 1178, c. 497.—In re White Plains Presbyterian Church (Sup.) 63.

A property owner seeking to set aside an assessment for a public improvement *held* required to establish affirmatively the fact that he has been wronged by the assessment.—Untermyer v. City of Yonkers (Sup.) 563.

Mere formal defects *held* not proper grounds for the setting aside of an assessment for the cost of a public improvement.—Untermyer v. City of Yonkers (Sup.) 563.

A municipal corporation constructing a public improvement, *held* limited in its authority, so that the benefited property shall not be called on to pay more than the legitimate cost of the improvement.—Untermyer v. City of Yonkers (Sup.) 563.

Equity *held* not authorized to set aside assessments for benefits for a public improvement on the ground that the contracts therefor contained the restriction prescribed by Laws 1899, p. 1172, c. 567, relating to the eight-hour day.—Untermyer v. City of Yonkers (Sup.) 563.

An assessment of benefits for the construction of a sewer *held* not subject to be set aside on the ground that the land on which it was assessed was not benefited by the sewer.—Untermyer v. City of Yonkers (Sup.) 563.

Assessments for benefits for the construction of a sewer *held* not vitiated because of the claim that the city had a mere license to construct the sewer under the tracks of a railroad company.—Untermyer v. City of Yonkers (Sup.) 563.

*The village of Attica *held* not bound to take proceedings under title 6, § 1 of its charter, as amended by Laws 1890, p. 1006, c. 560, before proceeding to change the grade of a street.—Rogers v. Village of Attica (Sup.) 665.

A village authorized to change the grade of a street *held* not bound to first pay damages to an abutting owner; such damages being recoverable by an action under Laws 1897, p. 420, c. 414, § 159.—Rogers v. Village of Attica (Sup.) 665.

**§ 4. Police power and regulations.**

*A provision in an ordinance licensing peddlers as authorized by Buffalo City Charter, tit. 2, § 17, Laws 1891, p. 137, c. 105, *held* invalid.—City of Buffalo v. Linsman (Sup.) 737.

In a prosecution for violation of a city ordinance forbidding the distributing of samples packages of merchandise without a license, evidence *held* not to support a conviction.—City of Watertown v. Rodenbaugh (Sup.) 885.

**§ 5. Use and regulation of public places, property, and works.**

*Defendant *held* liable where plaintiff's intestate was run over in street by a rapidly moving truck belonging to defendant.—Charters v. Palmer (Sup.) 887.

**§ 6. Torts.**

*In an action against a city for death alleged to have been caused by the defective condition of a bridge temporarily erected over an excavation under the sidewalk, evidence *held* sufficient to justify submission to the jury of the question of defendant's negligence.—Parks v. City of New York (Sup.) 94.

Falling of roof of temporary shed over street *held* to raise presumption of negligence of owner.—Scheller v. Silbermintz (Sup.) 230.

A city *held* not liable for injuries owing to the negligent discharge of fireworks in a city park.—De Agramonte v. City of Mount Vernon (Sup.) 454.

*Company covering hole in street with plank four inches thick *held* not negligent so as to render it liable for injury to pedestrian from stubbing toe on plank.—Derby v. Degnon-McLean Contracting Co. (Sup.) 592.

## MUNICIPAL COURTS.

See "Courts," § 2; "Judges," § 2.

Laws relating to denying due process of law, see "Constitutional Law," § 4.

## MURDER.

See "Homicide," § 1.

## MUTUAL BENEFIT INSURANCE.

See "Insurance," § 10.

## NAVIGABLE WATERS.

As boundaries, see "Boundaries."

Enactment of statutes relating to, see "Statutes," § 1.

Grants of land under water, see "Public Lands," § 1.



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**§ 1. Rights of public.**
State *held* to have no property in the waters of Niagara river within Const. art. 3, § 20, prohibiting appropriation of public property to private use without the assent of two-thirds of the members of the Legislature.—Niagara County Irrigation & Water Supply Co. v. College Heights Land Co. (Sup.) 4.

**§ 2. Lands under water.**
Laws 1891, p. 483, c. 259, creating a corporation to maintain a public waterway from a point in the Niagara river, gives the corporation no right to use any property of the state in the bed of the stream.—Niagara County Irrigation & Water Supply Co. v. College Heights Land Co. (Sup.) 4.

**§ 3. Riparian and littoral rights.**
The grant of a right of wharfage at a wharf adjoining land under water belonging to the grantor carries with it, as a necessary incident and appurtenance, a right of way to the wharf for vessels over the grantor's adjacent land under water.—In re Water Front of City of New York (Sup.) 1063; Appeal of American Ice Co., Id.

## NECESSARIES.

Of wife, see "Husband and Wife," § 1.

## NEGLIGENCE.

Causing death, see "Death," § 1.
Presentation and reservation in lower court of grounds of review in action for personal injuries, see "Appeal," § 4.

*By particular classes of parties.*

See "Carriers," §§ 2, 3; "Municipal Corporations," §§ 5, 6.
Employé of charitable organization, see "Charities," § 1.
Employers, see "Master and Servant," §§ 3–10.
Hospital employé, see "Hospitals."
Owner of animal, see "Animals."
Railroad companies, see "Railroads," § 1.

*Condition or use of particular species of property, works, or machinery.*

See "Electricity"; "Highways," § 1; "Railroads," § 1; "Street Railroads," § 2.
Demised premises, see "Landlord and Tenant," § 4.
Streets, see "Municipal Corporations," § 5.

*Contributory negligence.*

Of passenger, see "Carriers," § 3.
Of person injured by operation of street railroad, see "Street Railroads," § 2.
Of person injured by wrongful act of servant, see "Master and Servant," § 11.
Of servant, see "Master and Servant," § 9.

**§ 1. Acts or omissions constituting negligence.**
*Lessee of a signboard on a building *held* liable to one injured by the fall of the signboard.—San Filippo v. American Bill Posting Co. (Sup.) 661.

**§ 2. Contributory negligence.**
*In case of a bright child five years old, allowed in the street by its parents, struck by a street car while running in front of it, *held* the question of its negligence or that of its parents should be submitted to the jury.—Wabnich v. Drydock, E. B. & B. R. Co. (Sup.) 38.

*Contributory negligence of person in charge of plaintiff's intestate, an infant, *held* to release defendant railroad from liability for negligently causing the death of intestate.—Paige v. New York Cent. & H. R. R. Co. (Sup.) 183.

**§ 3. Actions.**
*In an action for death by wrongful act, plaintiff must show with reasonable certainty that the injury was inflicted as the result of defendant's negligence.—Morhard v. Richmond Light & R. Co. (Sup.) 124.

*In an action for the wrongful death of plaintiff's intestate, an infant, evidence *held* to show contributory negligence on the part of person in charge of intestate.—Paige v. New York Cent. & H. R. R. Co. (Sup.) 183.

*Where there is any evidence from which defendant's negligence or plaintiff's freedom from contributory negligence can be inferred, the questions are for the jury.—Robbins v. New York City Ry. Co. (Sup.) 198.

*Evidence *held* insufficient to show negligence of proprietor of swimming pool causing injury to plaintiff by glass left in room.—Jones v. Levy (Sup.) 206.

## NEGOTIABLE INSTRUMENTS.

See "Bills and Notes"; "Bonds," § 1.

## NEWSPAPERS.

Libelous publications, see "Libel and Slander."

## NEW TRIAL.

In criminal prosecutions, see "Criminal Law," § 4.
Review of rulings on motion for, see "Appeal," § 13.

**§ 1. Proceedings to procure new trial.**
*New trial *held* not to be directed except on motion at term and before justice who held it, as prescribed by Code Civ. Proc. § 999, or on case and exceptions, as prescribed by section 997.—Wilcox v. Fox (Sup.) 769.

## NEXT OF KIN.

See "Descent and Distribution."

## NONSUIT.

Before trial, see "Dismissal and Nonsuit."
On trial, see "Trial," § 4.

***Point annotated. See syllabus.**



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## NOTES.

Promissory notes, see "Bills and Notes."

## NOTICE.

Laws requiring notice of personal injuries as condition precedent to action, as denying due process of law, see "Constitutional Law," § 5.

*Of particular facts, acts, or proceedings.*

See "Lis Pendens"; "Mechanics' Liens," § 2.
Action or process, see "Process," § 1.
Loss insured against, see "Insurance," § 8.
Nonpayment or protest of bill or note, see "Bills and Notes," § 4.

*To particular classes of parties.*

Purchaser of note, see "Bills and Notes," § 3.

## NUISANCE.

**§ 1. Private nuisances.**
In an action for damages caused by the escape of poisonous gases from defendant's factory, evidence *held* to justify a finding that plaintiff was damaged in the sum of $4,000.—Rock v. Acker Process Co. (Sup.) 977.

**§ 2. Public nuisances.**
*The display of fireworks in a city park is not a nuisance per se.—De Agramonte v. City of Mount Vernon (Sup.) 454.

## NUNC PRO TUNC.

Order allowing amendment of pleading, see "Pleading," § 5.
Order amending process, see "Process," § 2.

## OBLIGATION OF CONTRACT.

Laws impairing, see "Constitutional Law," § 3.

## OFFER.

Proposals for contract, see "Contracts," § 1.

## OFFICERS.

Injunctions affecting, see "Injunction," § 1.
Mandamus, see "Mandamus," § 1.

*Particular classes of officers.*

See "Judges"; "Justices of the Peace."
Corporate officers, see "Corporations," § 3.
Municipal officers, see "Municipal Corporations," § 1.

**§ 1. Rights, powers, duties, and liabilities.**
*In an action required to be brought by a certain officer *held* it is enough to prove that he is such officer de facto.—Tully v. Lewitz (Sup.) 829.

## OPENING.

Judgment, see "Judgment," § 2.

## OPINION EVIDENCE.

In civil actions, see "Evidence," § 9.

## OPINIONS.

Of courts, see "Courts," § 1.

## ORDERS.

For discontinuance, see "Dismissal and Nonsuit," § 1.
For discovery, see "Discovery," § 1.
Of court, see "Motions."
Review of appealable orders, see "Appeal."

## ORDINANCES.

Municipal ordinances, see "Licenses," § 1; "Municipal Corporations," §§ 4, 5.

## PARENT AND CHILD.

See "Adoption"; "Bastards"; "Guardian and Ward"; "Infants."
Contributory negligence of, see "Negligence," § 2.
Contributory negligence of child or parents of child injured by operation of street railroad, see "Street Railroads," § 2.
Custody of children on divorce, see "Divorce," § 3.
Declarations as to birth or pedigree, see "Evidence," § 5.

In habeas corpus proceedings, evidence *held* to show that best welfare of child will be promoted by leaving it in custody of respondent.—People v. Rubin (Sup.) 787.

*A mother who for eight years never made any claim to the custody of her child, who resided during that time with its grandmother and aunt, forfeited her legal right to its custody.—People v. Rubin (Sup.) 787.

*Leaving aside the question of child's welfare, the mother *held* entitled to its custody in preference to an aunt.—People v. Rubin (Sup.) 787.

Under Pen. Code, § 287, a father's leaving his children, two and three years of age, respectively, with their own mother, *held* not such a desertion and abandonment as the section intends to punish.—People v. Joyce (Sup.) 863.

## PAROL EVIDENCE.

In civil actions, see "Evidence," § 8.

## PARTICULARS.

Bill of, see "Pleading," § 6.

* Point annotated. See syllabus.

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## PARTIES.

Defects ground for abatement, see "Abatement and Revival," § 1.
Dismissal for defects, see "Dismissal and Nonsuit," § 2.
Entitled to allege error, see "Appeal," § 11.
Examination before trial, see "Discovery," § 1.
Persons concluded by judgment, see "Judgment," § 6.

*In actions by or against particular classes of parties.*

See "Corporations," § 4.
Insurance officers, see "Insurance," § 5.
Receiver in supplementary proceedings, see "Execution," § 1.

*In particular actions or proceedings.*

See "Mandamus," § 2; "Replevin," § 2.
On appeal, see "Appeal," § 3.
Suits to set aside fraudulent conveyances, see "Fraudulent Conveyances," § 2.
To compel distribution of surplus by insurance company, see "Insurance," § 5.

*To particular classes of conveyances, contracts, or transactions.*

See "Contracts," § 2.

**§ 1. Defects, objections, and amendment.**

*The failure to join a third person as a party defendant *held* required to be raised by demurrer to the complaint.—Fawcett v. City of New York (Sup.) 286.

*Where a complaint showed on its face a defect of parties defendant, if a third person was a necessary party, the failure to make such person a party was waived, under Code Civ. Proc. §§ 488, 498, unless the same was raised by demurrer.—Fawcett v. City of New York (Sup.) 286.

*In an action against defendants as trustees, the court can turn the action into one against them individually.—Southack v. Gleason (Sup.) 859.

## PARTITION.

Of property of infant, see "Infants," § 1.

**§ 1. Actions for partition.**

*Under Code Civ. Proc. §§ 1557, 1577, a judgment in partition *held* to give the purchaser at the sale a good title, although there might thereafter be unborn children who have an interest in a part of the estate held as executor and trustee by a party to the suit.—Dwight v. Lawrence (Sup.) 76.

A lessee from one having no title to the premises *held* not entitled to be compensated for improvements.—Train v. Davis (Sup.) 816.

Certain action of a trustee appointed in partition proceedings *held* not to amount to an assumption of the obligations of a lease previously executed by a person having no authority to do so.—Train v. Davis (Sup.) 816.

Referee's deed on sale in partition *held* not to transfer right to collect from tenant unpaid water rents.—Lyons v. Dorf (Sup.) 843.

## PARTNERSHIP.

See "Joint Stock Companies."
Conclusiveness of judgment on issue of partnership, see "Judgment," § 6.
Presentation and reservation in lower court of grounds for review in action to establish liability of partner, see "Appeal," § 4.

**§ 1. The relation.**

The failure of a partner to pay to the partnership a specified sum in consideration of his becoming a partner *held* waived by the copartners.—Brady v. Powers (Sup.) 237.

*An agreement to establish a business *held* to constitute a partnership between the parties, and not a contract of employment.—Lefevre v. Silo (Sup.) 321.

*A contract by which plaintiff advanced money to the owner of certain lumber, the latter agreeing, in addition to repaying the advancements, etc., to pay plaintiff one-third of the net profits of the enterprise, did not make plaintiff a partner in the business.—Wisotzkey v. Niagara Fire Ins. Co. (Sup.) 760.

**§ 2. Rights and liabilities as to third persons.**

Under Code Civ. Proc. §§ 1913, 1937, *held* that, in an action to establish the liability of joint debtor not served in the original action, certain defenses were immaterial.—Hofferberth v. Nash (Sup.) 684.

In an action under Code Civ. Proc. § 1937 to establish the liability of defendant, as a partner not served with summons in a former action against partners, certain evidence *held* prima facie evidence of the identity of defendant and the partner not served.—Hofferberth v. Nash (Sup.) 684.

**§ 3. Dissolution, settlement, and accounting.**

*The fact that partners after serving on their copartner a notice for the dissolution of the partnership continued in the business *held* not to make them liable to account to the copartner for the profits made after the giving of the notice.—Brady v. Powers (Sup.) 237.

Answer by defendants in a suit for the dissolution of a partnership *held* to constitute an election to exercise their right to dissolve the partnership.—Brady v. Powers (Sup.) 237.

In order to effect a dissolution of a partnership at will there must be either a mutual agreement to dissolve, or a notice by a partner desiring a dissolution of his election to terminate the partnership.—Brady v. Powers (Sup.) 237.

A partner *held* not entitled to profits made by his copartners subsequent to their exercising their right to terminate the partnership.—Brady v. Powers (Sup.) 237.

*** Point annotated. See syllabus.**

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The bringing of an action for the dissolution of a partnership and for an accounting *held* not to constitute an election on the part of plaintiff to exercise his right to dissolve the partnership. —Brady v. Powers (Sup.) 237.

In a suit for the dissolution of a firm, a settlement of a prior suit involving another partnership *held* not to constitute a bar to the action. —Brady v. Powers (Sup.) 237.

## PARTY WALLS.

As incumbrances, see "Vendor and Purchaser," § 2.

## PASSENGERS.

See "Carriers," § 3.

## PATENTS.

Accounting by lessee of patented article, see "Account," § 1.
For public lands, see "Public Lands," § 1.

**§ 1. Title, conveyances, and contracts.**
A complaint for breach of a contract for the manufacture of patented articles *held* to state no cause of action.—Moore v. Coyne & Delaney Mfg. Co. (Sup.) 892.

## PAYMENT.

See "Tender."
Subrogation on payment, see "Subrogation."

*Of particular classes of obligations or liabilities.*

See "Bills and Notes," § 5; "Costs," § 6; "Mortgages," § 1.
Claims against estate of decedent, see "Executors and Administrators," § 3.
Insurance premiums, see "Insurance," § 6.
Rent, see "Landlord and Tenant," § 5.
Taxes, see "Taxation," § 3.

**§ 1. Application.**
*Where neither the debtor nor creditor has made application of payment on a general account, the court may do so.—In re Milligan's Estate (Sup.) 480.

**§ 2. Recovery of payments.**
In an action to recover payment, defendant *held* put to his proof to deny facts as to alleged misrepresentations, so that it was error to dismiss complaint.—Rosenblum v. Liener (Sup.) 836.

## PEDIGREE.

Declarations as evidence, see "Evidence," § 5.
Record evidence see "Evidence," § 7.

## PENALTIES.

Under contracts, see "Damages," § 1.
Violation of fish laws, see "Fish."
Violation of regulations by carrier, see "Carriers," § 1.

## PENDENCY OF ACTION.

Effect as to property involved, see "Lis Pendens."

## PENSIONS.

Police pensions, see "Municipal Corporations," § 1.

## PERPETUITIES.

Certain provisions of a will *held* not violative of Personal Property Law, Laws 1897, p. 507, c. 417, § 2, forbidding the suspension of the ownership of personal property over two lives in being.—In re Roberts' Will (Sup.) 809.

*Provision in will *held* void as against the statute of perpetuities.—In re Bruchaeser's Estate (Sup.) 937.

*A trust considered as an active trust *held* void as creating a perpetuity in violation of Laws 1896, p. 565, c. 547, § 32.—Gueutal v. Gueutal (Sup.) 1002.

## PERSONAL INJURIES.

See "Negligence."
Caused by animals, see "Animals."
Caused by operation of street railroad, see "Street Railroads," § 2.
Evidence of custom, see "Customs and Usages."
Instructions in general in action for, see "Trial," § 5.
Laws relating to notice of as condition precedent to action as denying due process of law, see "Constitutional Law," § 5.
Physical examination before trial, see "Discovery," § 1.
Pleading damages, see "Damages," § 4.
Presentation and reservation in lower court of grounds of review in action for, see "Appeal," § 4.
Reduction of damages on appeal, see "Appeal," § 16.
Remarks and conduct of counsel in action for, see "Trial," § 3.
To employé, see "Master and Servant," §§ 3-10.
To passenger, see "Carriers," § 3.
To person on or near railroad tracks, see "Railroads," § 1.
To traveler on highway, see "Municipal Corporations," § 6.

## PLEADING.

Appeal from order denying leave to serve supplemental answer, see "Appeal," § 10.
Applicability of instructions to pleadings, see "Trial," § 5.
Conformity of judgment to pleadings, see "Judgment," § 3.
Dismissal for defects in, see "Dismissal and Nonsuit," § 2.
Harmless error in rulings on, see "Appeal," § 15.
In justices' court, see "Justices of the Peace," § 1.

*** Point annotated. See syllabus.**

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*Allegations as to particular facts, acts, or transactions.*

See "Damages," § 4.
Statute of limitations, see "Limitation of Actions," § 2.

*In actions by or against particular classes of parties.*

See "Brokers," § 4; "Carriers," §§ 2, 3; "Corporations," §§ 4, 5; "Landlord and Tenant," § 6; "Master and Servant," §§ 1, 10.
Devisees, see "Wills," § 7.
Foreign corporation, see "Corporations," § 5.
Insurance agent, see "Insurance," § 3.
Insurance company, see "Insurance," § 2.

*In particular actions or proceedings.*

See "Libel and Slander," § 3; "Money Received"; "Trover and Conversion," § 2; "Work and Labor."
For breach of contract, see "Contracts," § 4.
For breach of contract to manufacture patented article, see "Patents," § 1.
For loss of or injury to goods shipped, see "Carriers," § 2.
For mismanagement by insurance officers, see "Insurance," § 2.
For personal injuries, see "Carriers," § 3; "Master and Servant," § 10.
For price of goods sold, see "Sales," § 5.
For services of broker, see "Brokers," § 4.
For wrongful discharge from service, see "Master and Servant," § 1.
Indictment or criminal information or complaint, see "Indictment and Information."
On bond, see "Bonds," § 2.
On insurance policy, see "Insurance," § 9.
On note, see "Bills and Notes," § 6.
To enforce lien, see "Mechanics' Liens," § 3.
To recover demised premises, see "Landlord and Tenant," § 6.

**§ 1. Form and allegations in general.**

As against a demurrer, a pleading will be deemed to allege whatever may be implied by fair and reasonable intendment, and the demurrer cannot be sustained simply because the facts are imperfectly averred.—Treffinger v. M. Groh's Sons (Sup.) 291.

*A clerical error in a pleading, using the word "plaintiff" for "defendant," *held* not to affect the sufficiency of the pleading.—Burstein v. Levy (Sup.) 853.

Under Code Civ. Proc. § 723, a complaint *held* not demurrable because of a clerical error therein.—King v. Mail & Express Co. (Sup.) 891.

**§ 2. Declaration, complaint, petition, or statement.**

*Where facts were alleged sufficient to constitute a cause of action, the complaint was not demurrable for want of facts because both legal and equitable relief were demanded, and plaintiff was entitled to legal relief only.—Doyle v. Delaney (Sup.) 468.

*Where a complaint stated a cause of action for the recovery of money, that it demanded alternative relief for the recovery of the amount sued for, or an accounting, did not condemn the entire pleading.—Doyle v. Delaney (Sup.) 468.

*Where a complaint prayed an accounting, or, in the alternative, for a money judgment for $3,500, the demand for a money judgment was equivalent to a demand for a legal remedy.—Doyle v. Delaney (Sup.) 468.

**§ 3. Plea or answer, cross complaint, and affidavit of defense.**

*General denial, though carelessly drawn, *held* to be in compliance with Code Civ. Proc. § 500.—Bodine v. White (Sup.) 232.

**§ 4. Demurrer or exception.**

*On a demurrer to an answer, the sufficiency of the complaint is to be examined.—Gansevoort Bank v. Empire State Surety Co. (Sup.) 382.

*On the sustaining of a demurrer to a complaint for libel because it did not plead a publication libelous per se, plaintiff should have been granted leave to serve an amended complaint.—Rees v. New York Herald Co. (Sup.) 548.

*Where an executor is sued both individually and as executor, the complaint is good as against demurrer, even though the court has no jurisdiction against defendant purely in his representative capacity.—Burstein v. Levy (Sup.) 853.

*The fact that a defendant who sets up a counterclaim cannot, on the facts pleaded, recover the damages which he demands, or that the rule of damages is not as he asserts it to be, is not ground for demurrer to the counterclaim, if the facts stated show a good cause of action.—Isbell-Porter Co. v. Heineman (Sup.) 1018.

Under Code Civ. Proc. §§ 494, 495, the sufficiency of a demurrer to a pleading entitled a "defense, counterclaim, and set-off," is to be tested by determining whether the pleading is good as either.—Isbell-Porter Co. v. Heineman (Sup.) 1018.

**§ 5. Amended and supplemental pleadings and repleader.**

Under Code Civ. Proc. §§ 539, 540, 542–544, 546, 723, *held* error to permit the filing of an "amended and supplemental complaint."—Horowitz v. Goodman (Sup.) 53.

*Under Code Civ. Proc. §§ 542, 798, defendant serving answer by mail *held* entitled to amend it as of course within 40 days.—Schlesinger v. Borough Bank of Brooklyn (Sup.) 136.

On remand from appellate court, amendment to pleading *held* properly allowed on affidavit of counsel for plaintiff instead of plaintiff.—Mossein v. Empire State Surety Co. (Sup.) 144.

An order authorizing an amendment of the summons and the service of an "amended and supplemental complaint" is irregular; no such pleading being known to the Code.—Luckey v. Mockridge (Sup.) 335, 337.

*** Point annotated. See syllabus.**

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An order allowing an amendment of the summons and complaint without notice to defendants who had appeared cannot be confirmed nunc pro tunc.—Luckey v. Mockridge (Sup.) 335, 337.

An order allowing an amendment of a summons and complaint is irregular where a copy of the amended pleading is not annexed.—Luckey v. Mockridge (Sup.) 335, 337.

After defendants have appeared and filed and served their answers, no amendment of the complaint can be granted except upon notice to defendants.—Luckey v. Mockridge (Sup.) 335, 337.

*The trial judge has power to amend a complaint at the end of the trial to conform to the evidence.—Martin v. Flahive (Sup.) 577.

**§ 6. Bill of particulars and copy of account.**

Where defendants had served one bill of particulars, they should only be required in a further bill to set out matter not sufficiently alleged in the bill furnished.—Reichardt v. Plaut (Sup.) 195.

*Under Code Civ. Proc. § 531, an order precluding defendants from giving evidence of their "defenses" in case of their failure to file a bill of particulars *held* error.—Reichardt v. Plaut (Sup.) 195.

In an action for a servant's wrongful discharge, defendants *held* not bound to file a bill of particulars alleging the addresses of persons claimed to have been improvidently employed by plaintiff.—Reichardt v. Plaut (Sup.) 195.

In an action for a servant's wrongful discharge, an order requiring defendants to state in detail the names and addresses of patrons who returned goods shipped to them by reason of plaintiff's negligence modified.—Reichardt v. Plaut (Sup.) 195.

In an action for a servant's alleged wrongful discharge, defendants *held* not bound to furnish a bill of particulars alleging the names and addresses of persons from whom plaintiff could have secured other employment, etc.—Reichardt v. Plaut (Sup.) 195.

In an action for a servant's alleged wrongful discharge, an order requiring defendants to set out the amount of their loss because of plaintiff's alleged negligence *held* improper.—Reichardt v. Plaut (Sup.) 195.

*In an action for alleged wrongful discharge of a servant, defendants *held* not bound to file a bill of particulars stating wherein plaintiff had been inattentive and negligent.—Reichardt v. Plaut (Sup.) 195.

In an action for conversion of certificates of stock *held* a bill of particulars as to when plaintiff parted with their possession should not be required.—Farwell v. Boody (Sup.) 385.

*An application for a bill of particulars, though made by a corporation, must be made on the affidavit of the party.—St. Regis Paper Co. v. Santa Clara Lumber Co. (Sup.) 572.

That the officers of defendant corporation were not within the county when an affidavit in support of an application for a bill of particulars was filed was not ground for dispensing with an affidavit verified by one of such officers.—St. Regis Paper Co. v. Santa Clara Lumber Co. (Sup.) 572.

An affidavit of the attorney of a corporation in support of an application for a bill of particulars, the attorney not assuming to have personal knowledge of the facts, *held* insufficient.—St. Regis Paper Co. v. Santa Clara Lumber Co. (Sup.) 572.

*Under the pleadings and an affidavit by one of defendants *held* that a bill of particulars setting forth certain facts should have been required.—Rhodes v. Rice (Sup.) 913.

**§ 7. Motions.**

*Where demurrer is not so plainly bad as to require no argument to show it so *held* that it cannot be disposed of as frivolous.—Hildreth v. Mercantile Trust Co. (Sup.) 582.

**§ 8. Issues, proof, and variance.**

*A variance *held* merely partial, and not to authorize the discontinuance of the complaint.—Horst v. Lovdal (Sup.) 996.

**§ 9. Defects and objections, waiver, and aider by verdict or judgment.**

Where, after the denial of a motion for judgment on a counterclaim for want of a reply, defendant did not rest on his exception, but offered proof of the facts, he was not entitled to rely on such exception on appeal.—Flynn v. Smith (Sup.) 56.

## PLEDGES.

Conversion of, see "Trover and Conversion," § 2.
Reformation of contract for pledge, see "Reformation of Instruments," § 1.

*A pledge of corporate stock may be made by a written transfer thereof independent of delivery of the scrip.—First Nat. Bank v. Bacon (Sup.) 717.

*Possession of corporate stock certificates by an original pledgee *held* the possession of a subsequent pledgee taking subject to the lien of the original pledge.—First Nat. Bank v. Bacon (Sup.) 717.

## POLICE.

See "Municipal Corporations," § 1.
Certiorari to review removal of policeman, see "Certiorari," § 2.
Restraining surveillance by, see "Injunction," § 1.

## POLICE POWER.

Of municipality, see "Municipal Corporations," §§ 4, 5.
Regulation of street railroads, see "Street Railroads," § 1.



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## POLICY.

Of insurance, see "Insurance."

## POLITICAL RIGHTS.

Suffrage, see "Elections."

## POOL ROOMS.

Restraining police surveillance of, see "Injunction," § 1.

## POSSESSION.

See "Adverse Possession."
Of demised premises, see "Landlord and Tenant," § 6.

## POWERS.

Of sale in trust, see "Trusts," § 5.

## PRACTICE.

*In particular civil actions or proceedings.*

See "Account," § 1; "Mandamus," § 2; "Prohibition"; "Replevin"; "Trover and Conversion," § 2.
Accounting by executor or administrator, see "Executors and Administrators," § 6.
Condemnation proceedings, see "Eminent Domain," §§ 1, 2.

*Particular proceedings in actions.*

See "Abatement and Revival"; "Appearance"; "Costs"; "Damages," § 4; "Depositions"; "Dismissal and Nonsuit"; "Divorce," § 1; "Evidence"; "Execution"; "Judgment"; "Limitation of Actions"; "Motions"; "Parties"; "Pleading"; "Process"; "Reference"; "Trial"; "Venue."
Nonsuit, see "Trial," § 4.

*Particular remedies in or incident to actions.*

See "Discovery"; "Injunction"; "Tender."

*Procedure in criminal prosecutions.*

See "Bail," § 1; "Criminal Law."
Bastardy proceedings, see "Bastards," § 1.

*Procedure in exercise of special jurisdictions.*

In equity, see "Equity."
In justices' courts, see "Justices of the Peace," § 1.
Particular courts, see "Courts."

*Procedure on review.*

See "Appeal"; "Certiorari," § 2; "Justices of the Peace," § 2; "New Trial."

## PRECEDENTS.

Former decisions, see "Courts," § 1.

## PREFERENCES.

Effect of proceedings in bankruptcy, see "Bankruptcy," § 1.

## PREFERRED CAUSES.

See "Trial," § 1.

## PREJUDICE.

Ground for reversal in civil actions, see "Appeal," § 15.

## PRELIMINARY INJUNCTION.

See "Injunction," § 2.

## PREMIUMS.

For insurance, see "Insurance," §§ 5, 6.

## PRESCRIPTION.

Acquisition of rights, see "Adverse Possession," § 1.

## PRESENTMENT.

Of claims against estate of decedent, see "Executors and Administrators," § 3.

## PRESUMPTIONS.

In civil actions, see "Evidence," § 2.
On appeal, see "Appeal," § 12.

## PRINCIPAL AND AGENT.

See "Attorney and Client"; "Brokers"; "Factors."
Admissions by agent, see "Evidence," § 4.
Agency of wife for husband, see "Husband and Wife," § 1.
Effect of agents' knowledge of character of animal on liability of principal, see "Animals."
Insurance agents, see "Insurance," § 3.
Payment of mortgage to agent, see "Mortgages," § 1.

**§ 1. Mutual rights, duties, and liabilities.**

*An agent for the sale of property has no implied authority to exchange the same for other property.—Jones v. Richards (Sup.) 698.

**§ 2. Rights and liabilities as to third persons.**

In replevin, evidence *held* to show that defendant had knowledge of lack of authority on the part of plaintiff's agent to trade certain property.—Jones v. Richards (Sup.) 698.

*An agent who makes an unauthorized contract *held* liable to the person dealing with him.—Bloodgood v. Short (Sup.) 775.


*** Point annotated. See syllabus.**

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A husband employing without authority a broker to procure a purchaser of his wife's land *held* not liable to the broker when his authority was not given in writing, as required by Laws 1901, p. 312, c. 128.—Bloodgood v. Short (Sup.) 775.

The owner of premises *held* entitled to sue on the lease to recover rents.—Cochran v. MacRae (Sup.) 852.

## PRINCIPAL AND SURETY.

See "Bail"; "Bonds"; "Guaranty"; "Indemnity."

Liabilities of sureties on bonds in legal proceedings, see "Injunction," § 4.

Subrogation of surety to rights against principal, see "Subrogation."

**§ 1. Creation and existence of relation.**

Under Code Civ. Proc. § 812 *held* that a surety of a fiduciary is entitled to discharge by the court during the year for which it has been paid for being a surety.—In re United States Fidelity & Guaranty Co. (Sup.) 217.

*A bond prepared to be signed by principal and surety, as required by Laws 1897, p. 239, c. 378, § 686, but in fact signed only by the surety, *held* not binding on him in the absence of evidence that it was so intended.—Tully v. Lewitz (Sup.) 829.

**§ 2. Discharge of surety.**

*Surety on a building contractor's bond *held* estopped from asserting that certain parol modifications of the contract discharged it from liability.—Hellman v. City Trust, Safe Deposit & Surety Co. of Philadelphia (Sup.) 51.

Refusal of plaintiff to go on with its contract to furnish the C. company gold to manufacture into watch cases, after an accounting showed a shortage which the C. company refused to make good, *held* not to discharge defendant surety on the bond of the C. company.—Keene v. Newark Watch Case Material Co. (Sup.) 68.

## PRIVATE NUISANCE.

See "Nuisance," § 1.

## PRIVILEGED COMMUNICATIONS.

Defamatory communications, see "Libel and Slander," § 2.

## PROBATE.

Of will, see "Wills," § 5.

## PROCESS.

Effect of appearance, see "Appearance."

*In actions against particular classes of parties.*

Foreign corporation, see "Corporations," § 5.

*In particular actions or proceedings.*

Criminal prosecutions, see "Criminal Law," § 2.

To recover demised premises, see "Landlord and Tenant," § 6.

*Particular forms of writs or other process.*

See "Execution"; "Injunction"; "Mandamus"; "Prohibition"; "Replevin."

**§ 1. Service.**

Summons in an action of foreclosure *held* sufficient to support the decree of foreclosure, and that the title based on such decree was marketable as between a vendor and purchaser. Code Civ. Proc. §§ 440, 721-723, 3345.—Mishkind-Feinberg Realty Co. v. Sidorsky (Sup.) 486.

**§ 2. Defects, objections, and amendment.**

An order allowing an amendment of the summons and complaint without notice to defendants who had appeared cannot be confirmed nunc pro tunc.—Luckey v. Mockridge (Sup.) 335, 337.

Where an action is prosecuted against defendants as trustees, but is turned into one against them individually, the summons should be amended as well as the complaint.—Southack v. Gleason (Sup.) 859.

## PROHIBITION.

**§ 1. Nature and grounds.**

Writ of prohibition will not issue to Court of General Sessions to prohibit it from considering motion for new trial after conviction, not made before judgment, as required by Code Cr. Proc. § 466.—People v. Goff (Sup.) 66.

As under Code Cr. Proc. § 518, the people have no right of appeal from an order granting a new trial in a criminal case, the writ of prohibition was properly asked where the court in a criminal case improperly granted a motion for a new trial made after judgment.—People v. Court of General Sessions of the Peace (Sup.) 557.

*A writ of prohibition is the appropriate remedy when a court is about to exercise a power it does not possess.—People v. Court of General Sessions of the Peace (Sup.) 557.

Where an information was insufficient to confer jurisdiction on a justice to conduct an inquisition, a person subpœnaed to appear and answer before the justice *held* entitled to restrain such proceedings by a writ of prohibition.—People v. Dunning (Sup.) 1067.

**§ 2. Jurisdiction, proceedings, and relief.**

Under the express provisions of Code Civ. Proc. § 2092, the Special Term of the Supreme Court has power to issue an alternative writ of prohibition to the Court of General Sessions.—People v. Court of General Sessions of the Peace (Sup.) 557.

## PROMISSORY NOTES.

See "Bills and Notes."

## PROOF.

Of loss insured against, see "Insurance," § 8.



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## PROPERTY.

See "Animals"; "Fish."
Adverse possession, see "Adverse Possession."
Taking for public use, see "Eminent Domain."

## PROTEST.

Of bill or note, see "Bills and Notes," § 4.

## PUBLICATION.

Service of process, see "Process," § 1.

## PUBLIC IMPROVEMENTS.

By municipalities, see "Municipal Corporations," § 3.

## PUBLIC LANDS.

Lands under water, see "Navigable Waters," § 2.

**§ 1. Colonial and proprietary grants.**
History of and patents to the town of Hempstead, Long Island, *held* insufficient to convey to the town of North Hempstead land under water in Long Island Sound, lying south of Saddle Rock in the east part of Matthew Garretson's Bay.—Town of North Hempstead v. Eldridge (Sup.) 157.

A claimant of land under a gratuitous grant from the sovereign is bound to show that the land in question is clearly within the language of his grant.—Town of North Hempstead v. Eldridge (Sup.) 157.

The Kieft patent of 1664 to the town of Hempstead on Long Island *held* to convey a body of land stretching across the island partly bounded by high-water mark in Hempstead and Matthew Garretson's Bays, but did not include land under water in either of such bays.—Town of North Hempstead v. Eldridge (Sup.) 157.

## PUBLIC NUISANCE.

See "Nuisance," § 2.

## PUBLIC POLICY.

Affecting validity of contract, see "Contracts," § 1.

## PUBLIC SCHOOLS.

See "Schools and School Districts," § 1.

## PUBLIC USE.

Taking property for public use, see "Eminent Domain."

## PUNITIVE DAMAGES.

See "Damages," § 2.

## QUANTUM MERUIT.

See "Work and Labor."

## QUESTIONS FOR JURY.

In civil actions, see "Trial," § 4.

## RAILROADS.

See "Street Railroads."
As employer, see "Master and Servant."
Carriage of goods and passengers, see "Carriers."
Exercise of power of eminent domain, see "Eminent Domain," §§ 1, 2.
Negligence of in general, see "Negligence," § 2.

**§ 1. Operation.**
*A railroad owes no duty to licensee on track other than not to intentionally, wantonly, or recklessly injure him.—Rosenthal v. New York, S. & W. R. Co. (Sup.) 476.

*A railroad owes no duty to a trespasser on its track other than not to intentionally, wantonly, or recklessly injure him.—Rosenthal v. New York, S. & W. R. Co. (Sup.) 476.

In an action against a railroad for wrongful death, defendant *held* not negligent as a matter of law.—Rosenthal v. New York, S. & W. R. Co. (Sup.) 476.

## RAPE.

**§ 1. Prosecution and punishment.**
On a trial for rape, evidence *held* to support a conviction.—People v. Biglizen (Sup.) 361.

*Failure to charge that a conviction for rape cannot be had on the testimony of the female unless corroborated is not reversible error where no request therefor is made.—People v. Biglizen (Sup.) 361.

Pen. Code, § 283, *held* not to require the court on a trial for rape to charge that a conviction cannot be had on the testimony of the female unless corroborated.—People v. Biglizen (Sup.) 361.

## REAL ESTATE AGENTS.

See "Brokers."

## RECEIPTS.

As contract for sale of land, see "Vendor and Purchaser," § 1.

## RECEIVERS.

In supplementary proceedings, see "Execution," § 1.

## RECEIVING STOLEN GOODS.

Under Pen. Code, §§ 34, 550, one *held* properly convicted of an attempt to commit the offense




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of receiving stolen goods.—People v. Jaffe (Sup.) 486.

*The prosecution on a trial for receiving stolen property in violation of Pen. Code, § 550, *held* required to prove that the property was stolen and that defendant received the same with knowledge of that fact.—People v. Jaffe (Sup.) 486.

## RECORDS.

On appeal in proceedings to dispossess tenant, see "Landlord and Tenant," § 6.
Presumptions on appeal as affected by record, see "Appeal," § 12.
Transcript on appeal, see "Appeal," § 7.

## REFERENCE.

See "Arbitration and Award."
In action on injunction bond, see "Injunction," § 4.
In proceedings for removal of trustee, see "Trusts," § 3.

**§ 1. Nature, grounds, and order of reference.**

*Under Code Civ. Proc. §§ 827, 1013, 1015, *held* that interlocutory judgment directing a compulsory reference was erroneous.—Russell Hardware & Implement Mfg. Co. v. Utica Drop Forge & Tool Co. (Sup.) 777.

## REFORMATION OF INSTRUMENTS.

Harmless error in admission of evidence, see "Appeal," § 15.

**§ 1. Right of action and defenses.**

*A contract for the pledge of corporate stock *held* subject to reformation in equity by the insertion of certain words omitted by mutual mistake.—First Nat. Bank v. Bacon (Sup.) 717.

A demand for the reformation of a contract of pledge *held* not required to be made of the bankrupt pledgor or his trustee prior to the institution of a suit for such relief.—First Nat. Bank v. Bacon (Sup.) 717.

That a pledgor became a bankrupt prior to the institution of a suit to reform the pledge contract against the bankrupt and his trustee *held* no bar to the granting of such relief.—First Nat. Bank v. Bacon (Sup.) 717.

## REHEARING.

See "New Trial."

## RELEASE.

See "Payment."
Of guaranty, see "Guaranty," § 3.

**§ 1. Pleading, evidence, trial, and review.**

Under evidence, instruction that, if release was procured by fraud, imposition, or undue influence, it would not bar recovery, *held* erroneous.—Blair v. Utica & M. V. R. Co. (Sup.) 614.

## RELEVANCY.

Of evidence in civil actions, see "Evidence," § 3.

## RELIGIOUS SOCIETIES.

Trusts in general for use of, see "Trusts," § 1.

Evidence *held* sufficient to show the assent of a religious corporation to work done by plaintiff in the construction of a church edifice under contract with the rector.—Condon v. Church of St. Augustine (Sup.) 253; Miller v. Same, Id.

The provisions in a judgment in an action by a religious corporation to recover its real estate conveyed in violation of Religious Corporation Law, Laws 1895, c. 723, § 11, as amended by Laws 1896, c. 336, *held* not prejudicial to defendant.—Associate Presbyterian Congregation of Hebron v. Hanna (Sup.) 1082.

The court *held* authorized to adjudge that a conveyance by a religious corporation of its real estate without obtaining leave, as required by Religious Corporation Law, Laws 1895, c. 723, § 11, as amended by Laws 1896, c. 336, was invalid.—Associate Presbyterian Congregation of Hebron v. Hanna (Sup.) 1082.

Under Code Civ. Proc. §§ 3391, 3393, and Religious Corporation Law, Laws 1895, p. 277, c. 723, § 11, as amended by Laws 1896, c. 336, court *held* authorized to direct the sale by a religious corporation only when the interests of the corporation will be promoted thereby.—Associate Presbyterian Congregation of Hebron v. Hanna (Sup.) 1082.

## REMAINDERS.

Creation by deed, see "Deeds," § 2.
Creation by will, see "Wills," § 6.
Rights of remaindermen in trust property, see "Trusts," § 5.

## REMOVAL.

Of executors, see "Executors and Administrators," § 1.
Of judge, see "Judges," § 1.
Of municipal officers, see "Municipal Corporations," § 1.
Of trustee, see "Trusts," § 3.

## REMOVAL OF CAUSES.

Change of venue or place of trial, see "Venue," § 2.

## RENEWAL.

Of bill of exchange or promissory note, see "Bills and Notes," § 2.

*** Point annotated. See syllabus.**

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## RENT.

e "Landlord and Tenant," § 5.

## REPLEVIN.

esentation of objections to evidence in action of replevin, see "Appeal," § 4.

**1. Right of action and defenses.**
*The dismissal of a complaint in replevin ainst a defendant, shown on the trial to have rted with possession of the property in suit, *ld* error.—Jones v. Richards (Sup.) 698.

**2. Jurisdiction, venue, and parties.**
One *held* to show a right, under Code Civ. oc. § 452, to intervene as defendant in a plevin action.—Freidman v. Schreiber (Sup.) 5.

**3. Pleading and evidence.**
In replevin, evidence *held* sufficient to show at a third person was entitled to the property. Chandless v. Globe Storage & Carpet Cleang Co. (Sup.) 511.

## REPORTS.

f corporations, see "Corporations," § 3.

## REQUESTS.

'or instructions in civil actions, see "Trial," §. 5.

## RESCISSION.

f contract for sale of goods, see "Sales," § 2.
f insurance policy, see "Insurance," § 6.

## RESERVATIONS.

n deeds, see "Deeds," § 2.

## RES GESTÆ.

n civil actions, see "Evidence," § 3.

## RES IPSA LOQUITUR.

Application of doctrine to action for injuries to passenger, see "Carriers," § 3.

## RES JUDICATA.

See "Judgment," §§ 5, 6.

## RETAINER.

Of attorney, see "Attorney and Client," § 1.

## RETROSPECTIVE LAWS.

See "Statutes," § 2.

## REVENUE.

See "Taxation."

## REVIEW.

See "Appeal"; "Certiorari"; "Criminal Law," § 5; "Justices of the Peace," § 2.

## REVOCATION.

Of devise, see "Wills," § 6.
Of license, see "Licenses," § 1.
Of liquor tax certificate, see "Intoxicating Liquors," § 1.
Of will, see "Wills," § 4.

## RIPARIAN RIGHTS.

See "Navigable Waters," § 3.

## RISKS.

Assumed by employé, see "Master and Servant," § 8.

## ROADS.

See "Highways."
Streets in cities, see "Municipal Corporations." § 6.

## RULES.

For government of employés, see "Master and Servant," § 5.
Of civil service commission, see "Municipal Corporations," § 1.

## RULES OF COURT.

Orders, see "Motions."

## SALES.

By factors, see "Factors."
Hearsay in action for price, see "Evidence," § 6.
In fraud of creditors, see "Fraudulent Conveyances."
Of corporate stock, see "Corporations," § 2.
Of intoxicating liquors, see "Intoxicating Liquors."
Of realty, see "Vendor and Purchaser."
Of trust property, see "Trusts," § 5.
Partition sales, see "Partition," § 1.

**§ 1. Requisites and validity of contract.**
In an action on a contract, evidence *held* to show that certain goods were consigned to be sold by plaintiff as defendant's agent, and not purchased absolutely by plaintiff.—Dowler v. Swift & Co. (Sup.) 983.

**§ 2. Modification or rescission of contract.**
Contract whereby certified check was given for accounts due a firm *held* rescinded by a

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member of the firm, so that the holder or his transferee was not entitled to collect check from bank.—Silverman v. National Butchers' & Drovers' Bank (Sup.) 209.

Where the buyer and seller were mistaken as to the identity of the car of merchandise sold by sample, after discovery of the mistake the buyer could recover the money paid under the contract.—De Wolff v. Howe (Sup.) 262.

*The failure of a seller of a machine to fulfill a promise to put it in good working order would not justify a rescission of the sale and recovery of the price, but merely of damages.—McSwegan v. Gatti-McQuade Co. (Sup.) 692.

**§ 3. Performance of contract.**
A seller *held* not entitled to recover for breach of contract to purchase on his violating a condition in the contract.—Wilmerding v. Feldman (Sup.) 688.

In an action for the price of goods sold, evidence *held* insufficient to show delivery.—Dinsmore v. Butler (Sup.) 835.

**§ 4. Warranties.**
*Vendees of logs *held* to have waived vendor's alleged breach of warranty as to size.—Diechmann v. Boyd (Sup.) 202.

*Agreement of seller to set up machine and put it in good working order *held* not a warranty of the machine.—McSwegan v. Gatti-McQuade Co. (Sup.) 692.

**§ 5. Remedies of seller.**
In an action for goods sold by sample, a verdict for plaintiff *held* unauthorized in the absence of proof showing delivery of goods equal to sample.—Rosenstein v. Casein Mfg. Co. (Sup.) 645.

*In an action for goods sold by sample, the seller *held* required to prove that the goods delivered were equal to the sample.—Rosenstein v. Casein Mfg. Co. (Sup.) 645.

*In an action for the value of a refrigerating plant erected by plaintiff for defendant, a portion of the answer *held* to state a defense.—Isbell-Porter Co. v. Heineman (Sup.) 1018.

**§ 6. Remedies of buyer.**
*Extension of time for performance of contract of sale of corporate stock *held* no defense to action for breach of contract where certificates were never delivered.—Fuller v. Christian (Sup.) 638.

*Where a refrigerating plant erected by plaintiff for defendant under a contract failed to meet an express warranty, defendant had a right to retain it and recover or offset as damages the difference between the value of the plant as erected and the value if it had been as required by the contract.—Isbell-Porter Co. v. Heineman (Sup.) 1018.

*A buyer of machinery *held* not entitled to recover from the seller for the increased cost of operating the machinery, caused by its failure to comply with an express warranty.—Isbell-Porter Co. v. Heineman (Sup.) 1018.

**§ 7. Conditional sales.**
*A seller on the buyer's cancellation of conditional contract of sale and refusal to accept the goods tendered *held* entitled to recover the contract price.—Cambridge Soc. v. Elliot (Sup.) 232.

## SATISFACTION.

See "Payment"; "Release."
Of mortgage, see "Mortgages," § 1.

## SCAFFOLDS.

See "Master and Servant," 4.

## SCHOOLS AND SCHOOL DISTRICTS.

**§ 1. Public schools.**
Labor Law, Laws 1897, p. 463, c. 415, § 3, as amended by Laws 1899, p. 1172, c. 567, and Laws 1900, p. 638, c. 298, *held* not applicable to janitor appointed by board of education under Greater New York Charter, Laws 1897, p. 384, c. 378.—Farrell v. Board of Education of City of New York (Sup.) 1046.

Present Greater New York Charter, Laws 1901, p. 32, c. 466, § 56, relating to compensation of employés of board of education, *held* to include janitors.—Farrell v. Board of Education of City of New York (Sup.) 1046.

## SERVICE.

Of process, see "Process," § 1.

## SERVICES.

See "Master and Servant," § 2; "Work and Labor."

## SET-OFF AND COUNTERCLAIM.

Demurrer to counterclaim, see "Pleading," § 4.
For breach of warranty of goods sold, see "Sales," § 6.
Former adjudication as bar to counterclaim, see "Judgment," § 5.
Judgment on counterclaim in general, see "Judgment," § 1.
Reception of evidence relating to, see "Trial," § 2.

**§ 1. Subject-matter.**
*In an action for fraudulent representations on the sale of a horse, a counterclaim to recover the price of the horse, unpaid, *held* to arise out of the same transaction, and properly pleaded under Code Civ. Proc. §§ 501, 502, 2945.—Vandervort v. Mink (Sup.) 772.



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## SETTLEMENT.

e "Account Stated"; "Payment"; "Release."
executor or administrator, see "Executors and Administrators," § 6.
guardian of infant, see "Guardian and Ward," § 2.
partners, see "Partnership," § 3.

## SHIPPING.

juries to employés, see "Master and Servant," § 8.

## SIGNATURES.

y principal and surety, see "Principal and Surety," § 1.

## SLANDER.

ee "Libel and Slander."

## SPECIFIC PERFORMANCE.

See "Vendor and Purchaser," § 2.
Review, see "Appeal," § 16.

**§ 1. Nature and grounds of remedy in general.**

*Where there are insuperable objections to a decree of performance, and plaintiff is in default, no such decree will be allowed.—Pratt v. Clark (Sup.) 700.

**§ 2. Contracts enforceable.**

A contract for the formation of corporation *held* not specifically enforceable.—Rudiger v. Coleman (Sup.) 461.

**§ 3. Good faith and diligence.**

*A title to land *held* sufficiently free from doubt to justify the enforcement of specific performance of a contract for conveyance of the land.—Davidson v. Jones (Sup.) 265.

*Vendor of land *held* not entitled to specific performance, where deed under which he held title reserved right to adjoining owner to keep windows open in house on adjoining lot.—Remsen v. Wingert (Sup.) 388.

## SPIRITUOUS LIQUORS.

See "Intoxicating Liquors."

## STARE DECISIS.

See "Courts," § 1.

## STATEMENT.

Of case or facts for purpose of review, see "Appeal," § 7.

## STATES.

Courts, see "Courts."
Legislative power, see "Constitutional Law," §§ 2, 3.
Pesumptions as to laws of other states, see "Evidence," § 2.
Right to increase amount of recovery on appeal from court of claims, see "Appeal," § 16.

**§ 1. Claims against state.**

*On appeal from a judgment of the court of claims, the court *held* to have had no authority to increase the recovery.—Crowley v. State (Sup.) 1094.

## STATUTES.

Laws impairing obligation of contract, see "Constitutional Law," § 3.
Presumptions as to constitutionality, see "Constitutional Law," § 1.

*Provisions relating to particular subjects.*

See "Alteration of Instruments"; "Appeal," § 2; "Bastards," § 1; "Bonds," § 1; "Carriers," § 1; "Corporations," § 5; "Costs," §§ 1, 6; "Counties," § 1; "Courts," § 2; "Death," § 1; "Descent and Distribution"; "Discovery," § 1; "Highways," § 1; "Indians"; "Insurance," § 2; "Intoxicating Liquors"; "Judges," §§ 1, 2; "Limitation of Actions"; "Mechanics' Liens"; "Navigable Waters," § 2; "New Trial," § 1; "Partnership," § 2; "Perpetuities"; "Pleading," § 5; "Prohibition," § 2; "Reference," § 1; "Religious Societies"; "Schools and School Districts," § 1; "Taxation"; "Trusts," §§ 1, 2, 6; "Wills," § 4.
Fellow servants, see "Master and Servant," § 7.
New trial in criminal prosecution, see "Criminal Law," § 4.
Preliminary information in criminal prosecution, see "Criminal Law," § 2.
Statute of frauds, see "Frauds, Statute of."

**§ 1. Enactment, requisites, and validity in general.**

Laws 1891, p. 483, c. 259, creating a corporation to maintain public waterway from the Niagara river, *held* not an appropriation of any property of the state, so as to require the assent of two-thirds of the members of the Legislature, under Const. art. 3, § 20.—Niagara County Irrigation & Water Supply Co. v. College Heights Land Co. (Sup.) 4.

**§ 2. Construction and operation.**

Laws 1893, p. 1387, c. 601, as amended by Laws 1896, p. 215, c. 272, prohibiting marriage between uncles and nieces, *held* not retroactive.—Weisberg v. Weisberg (Sup.) 260.

*** Point annotated. See syllabus.**

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## STAY.

Of proceedings for nonpayment of costs, see "Costs," § 6.
Pending Appeal, see "Appeal," § 6.

## STOCK.

Corporate stock, see "Corporations," § 2.

## STOCKHOLDERS.

Of banks, see "Banks and Banking," § 1.
Of unincorporated associations, see "Joint-Stock Companies."

## STOLEN GOODS.

See "Receiving Stolen Goods."

## STREET RAILROADS.

Carriage of passengers, see "Carriers," § 3.
Mandamus, see "Mandamus," § 1.

**§ 1. Establishment, construction, and maintenance.**

An entire track abutting on a street, though extending back to another street, *held* to be considered, under Railroad Law, Heydecker's Gen. Laws, p. 3308, c. 39, § 91, in obtaining the consent of one-half in value of the property bounded on the first street, for construction of a railroad thereon.—Fox v. New York City Interborough Ry. (Sup.) 338.

*A street railway franchise *held* subject to the police power of the city to regulate the manner in which the streets of the city should be used.—People v. Geneva, W. S. F. & C. L. Traction Co. (Sup.) 719.

**§ 2. Regulation and operation.**

*In case of a bright child five years old, allowed in the street by its parents, struck by a street car while running in front of it, *held* the question of its negligence or that of its parents should be submitted to the jury.—Wabnich v. Dry Dock, E. B. & B. R. Co (Sup.) 38.

*Evidence *held* to show the driver of a coach struck by a street car to have been negligent in trying to cross in front of it.—Norton v. Interurban St. Ry. Co. (Sup.) 216.

In an action for injuries from a collision between defendant's car and plaintiff's wagon, evidence *held* to show contributory negligence on the part of the driver of the wagon.—American Ice Co. v. New York City Ry. Co. (Sup.) 219.

In an action for injuries from a collision between defendant's car and plaintiff's wagon, the admission of certain evidence *held* erroneous.—American Ice Co. v. New York City Ry. Co. (Sup.) 219.

That street car at the time of a collision with plaintiff's wagon was running at a speed of from 15 to 20 miles an hour, in a sparsely settled locality, *held* not negligence as a matter of law.—American Ice Co. v. New York City Ry. Co. (Sup.) 219.

*Evidence *held* insufficient to show freedom from contributory negligence in the collision of a street car with a team.—Fisher v. New York City Ry. Co. (Sup.) 221.

Evidence in an action against a street railway company for injuries received by a pedestrian *held* not to show freedom from contributory negligence necessary to recovery.—Lipis v. Metropolitan St. Ry. Co. (Sup.) 259.

In an action against a street railway company for injuries to a pedestrian crossing the street, evidence *held* to authorize submission of the question of contributory negligence.—Mathers v. Interurban St. Ry. Co. (Sup.) 433.

Deceased *held* not guilty of contributory negligence as a matter of law for failing to look and listen before driving on street railroad tracks.—Palmer v. Larchmont Horse Ry. Co. (Sup.) 577.

*Plaintiff *held* not entitled to recover for injuries by being struck by a street car.—Costello v. Forty-Second St., M. & St. N. Ave. Ry. Co. (Sup.) 648.

In an action against a street railway company for death caused by a collision between a car and cyclist at a street crossing, evidence *held* to require submission of the question of deceased's contributory negligence.—Brooks v. International Ry. Co. (Sup.) 765.

*Failure of a cyclist to wait for an approaching car to pass before attempting to cross a street car track *held* not negligence per se.—Brooks v. International Ry. Co. (Sup.) 765.

In an action for injuries sustained by plaintiff's truck in a collision with one of defendant's cars, evidence that plaintiff looked for approaching cars before crossing a track *held* to be incredible as a matter of law, as being in contradiction of matters of common knowledge.—Golden v. Metropolitan St. Ry. Co. (Sup.) 848.

*A pedestrian struck by a street car *held* guilty of contributory negligence as a matter of law.—McGreevy v. New York City Ry. Co. (Sup.) 1024.

## STREETS.

See "Highways"; "Municipal Corporations," §§ 3, 5, 6.

## SUBROGATION.

*A surety on an appeal bond, having paid the judgment appealed from, *held* subrogated to the rights of the plaintiff as against the judgment debtors, and entitled to enforce all remedies against them that plaintiff could have enforced.—State Bank v. Kahn (Sup.) 858.

## SUIT.

See "Action."



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## SUMMARY PROCEEDINGS.

See "Appearance."
Recovery of possession by landlord, see "Landlord and Tenant," § 6.

## SUMMONS.

See "Process."

## SUPERSEDEAS.

On appeal, see "Appeal," § 6.

## SUPPLEMENTAL PLEADING.

See "Pleading," § 5.

## SUPPLEMENTARY PROCEEDINGS.

See "Execution," § 1.

## SURETYSHIP.

See "Principal and Surety."

## SURRENDER.

Of insurance policy, see "Insurance," § 6.

## SURROGATES' COURTS.

See "Executors and Administrators," § 2.
Collection of transfer taxes, see "Taxation," § 4.
Mandamus, see "Mandamus," § 1.

## SURVIVORSHIP.

Of devises or legatees, see "Wills," § 6.

## SUSPENSION.

Of benefit insurance, see "Insurance," § 10.

## TAXATION.

Assessments for municipal improvements, see "Municipal Corporations," § 3.
License taxes, see "Intoxicating Liquors," § 1; "Licenses," § 1.

**§ 1. Place of taxation.**

A certain tract of land *held* not a farm or lot within Tax Law, Laws 1896, p. 801, c. 908, § 10, as amended by Laws 1902, p. 504, c. 200.—People v. Wilson (Sup.) 1080.

**§ 2. Levy and assessment.**

*Basis for assessment of franchise tax against foreign corporation, under section 182 of the Tax Law, Heydecker's Gen. Laws, p. 1919, c. 24, held the capital, not the capital stock, employed in the state.—People v. Miller (Sup.) 751.

*On reversal of determination of State Comptroller as to assessment of franchise tax and license fee case remitted for new hearing.—People v. Miller (Sup.) 751.

**§ 3. Payment and refunding or recovery of tax paid.**

In an action to recover taxes paid *held*, that the question whether the property in question was within Tax Law, Laws 1896, p. 797, c. 908, § 4, subd. 7, was one for the jury.—Stony Wold Sanatorium v. Keese (Sup.) 1088.

**§ 4. Legacy, inheritance, and transfer taxes.**

A bequest to a priest for masses *held* not exempt from transfer taxes as funeral expenses.—In re McAvoy's estate (Sup.) 437.

Under Laws 1896, p. 874, c. 908, § 230, an application by the Comptroller of the state upon information and belief *held* sufficient to require the surrogate to designate some person to appraise property subject to a transfer tax.—Kelsey v. Church (Sup.) 535.

Laws 1896, p. 874, c. 908, § 230, relative to duties of surrogate with reference to proceedings to collect transfer tax, *held* mandatory.—Kelsey v. Church (Sup.) 535.

Provisions of Laws 1869, p. 2399, c. 917, authorizing consolidation of New York railroad company, and providing mode of assessment and taxation of stock, *held* inapplicable to assessment, under transfer tax law, of stock of consolidated company owned by nonresident.—In re Cooley's Estate (Sup.) 1006.

*The transfer tax is not a property tax.—In re Cooley's Estate (Sup.) 1006.

*Shares of stock owned by a nonresident of New York in a Massachusetts railroad corporation formed by the consolidation of a New York railroad company with a Massachusetts company under the authority of the Legislature of Massachusetts and Laws 1869, p. 2399, c. 917, *held* subject to the transfer tax law of New York, and assessable for the purpose of the tax at their full market value.—In re Cooley's Estate (Sup.) 1006.

## TAXATION OF COSTS.

See "Costs," § 4.

## TELEGRAPHS AND TELEPHONES.

Parties to contract with telegraph messenger, see "Contracts," § 2.
Telegraph company employing messengers as common carriers, see "Carriers," § 1.

## TENDER.

Of payment of note, see "Bills and Notes," § 5.
Of performance by vendee of land, see "Vendor and Purchaser," § 3.

*Where money is tendered into court by a defendant, it immediately becomes the property



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of the plaintiff, which he is entitled to take at any time.—Lackner v. American Clothing Co. (Sup.) 376.

*Where in an action for wages defendant admitted a certain amount and handed this sum to the justice, but tender, while pleaded, was not proven, plaintiff was entitled to judgment for the amount admitted to be due.—Wiener v. Auerbach (Sup.) 686.

## TENEMENT HOUSES.

Erection of as breach of covenant, see "Covenants," § 1.

## TERMS.

Of leases, see "Landlord and Tenant," § 8.

## TESTAMENT.

See "Wills."

## TESTAMENTARY CAPACITY.

See "Wills," § 2.

## TESTAMENTARY POWERS.

Restrictions on power to devise or bequeath, see "Wills," § 1.

## THEATERS AND SHOWS.

Punitive damages for ejection, see "Damages," § 2.

## THEFT.

See "Larceny."

## THREATS.

An attorney engaged to prosecute an action for a contingent fee *held* guilty of blackmail in attempting to induce defendant to settle.—People v. Wickes (Sup.) 163.

*It is no defense to a charge of blackmail that the crime threatened to be charged has been perpetrated, nor that accused has cause to believe that the crime has been committed, or does believe it.—People v. Wickes (Sup.) 163.

The privilege of an attorney *held* not to constitute a defense to his prosecution for blackmail.—People v. Wickes (Sup.) 163.

## TIMBER.

Reservation on conveyance of land, see "Deeds," § 2.

## TIME.

For performance of contract, see "Contracts," § 2.
For taking appeal, see "Appeal," § 5.

## TITLE.

Acquired by trustee in bankruptcy, see "Bankruptcy," § 1.
Color of title, see "Adverse Possession."
Effect of partition, see "Partition," § 1.
Sufficiency of title of vendor of land, see "Vendor and Purchaser," § 2.

## TOOLS.

Liability of employer for defects, see "Master and Servant," § 4.

## TORTS.

Causing death, see "Death," § 1.
Contract or tort, see "Actions," § 1.
Measure of damages, see "Damages," § 3.

*By particular classes of parties.*

See "Municipal Corporations," § 6.
Employés, see "Master and Servant," § 11.

*Particular torts.*

See "Fraud"; "Libel and Slander"; "Malicious Prosecution"; "Negligence"; "Nuisance"; "Trover and Conversion."

A successful plaintiff *held* not entitled to maintain an action against the defendant in such action for the fees plaintiff paid his attorney in such action.—Seligman v. Rosenzweig (Sup.) 221.

## TOWNS.

See "Municipal Corporations"; "Schools and School Districts," § 1.

## TRADE UNIONS.

Validity of requirement of union label on public printing as affected by public policy, see "Contracts," § 1.

## TRANSFER TAX.

See "Taxation," § 4.

## TRANSITORY ACTIONS.

See "Venue," § 1.

## TRESPASS.

Injuries to trespassers by operation of railroad, see "Railroads," § 1.

## TRIAL.

See "New Trial"; "Reference"; "Witnesses."
Disputed claims against estate of decedent, see "Executors and Administrators," § 3.
Instructions as to release, see "Release," § 1.



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tices of the Peace," § 2.
Validity of contract as question for jury, see "Contracts," § 1.

*Proceedings incident to trials.*

Entry of judgment after trial of issues, see "Judgment," § 3.
Place of trial, see "Venue," § 2.

*Trial of actions by or against particular classes of parties.*

See "Carriers," § 3; "Street Railroads," § 2.

*Trial of particular civil actions or proceedings.*

See "Negligence," § 3; "Work and Labor."
For causing death, see "Death," § 1.
For death caused by electricity, see "Electricity."
For death caused by operation of street railroad, see "Street Railroads," § 2.
For personal injuries, see "Carriers," § 3; "Master and Servant," § 10; "Street Railroads," § 2.
On note, see "Bills and Notes," § 6.
To recover taxes paid, see "Taxation," § 3.

*Trial of criminal prosecutions.*

See "Criminal Law," § 3; "Larceny," § 1; "Rape," § 1.

**§ 1. Dockets, lists, and calendars.**
Failure of an executrix, substituted as plaintiff in an action, to describe herself in her representative capacity in the title of the summons and complaint, *held* not to deprive her of the right to a preference, under Code Civ. Proc. § 791, subd. 5.—Chumar v. Melvin (Sup.) 351.

**§ 2. Reception of evidence.**
*Motion to strike out all testimony of witness, part being competent, *held* properly overruled.—Ventresca v. Beckwith (Sup.) 134.

*Objection to the admissibility of evidence *held* not to raise the point that there was no consideration for a new agreement between the parties.—Gurski v. Doscher (Sup.) 588.

In an action in which a counterclaim was interposed, *held* error to exclude evidence in support thereof on the ground that it had been already covered by the testimony.—Brill v. Barnett (Sup.) 755.

**§ 3. Arguments and conduct of counsel.**
A question to a venireman and court's remark thereon *held* improper, in an action against a corporation for injuries, as tending to lead the jury to believe that an insurance company was the real defendant.—Hoyt v. J. E. Davis Mfg. Co. (Sup.) 1031.

**§ 4. Taking case or question from jury.**
Under the evidence *held* there was no error in an action on a bond in the refusal of defendant's request to go to the jury.—Keene v. Newark Watch Case Material Co. (Sup.) 68.

Dismissing the action before plaintiff has finished putting in his proof *held* error.—Barish v. Knepper Realty Co. (Sup.) 218.

not preclude a party from requesting to have the case submitted to the jury.—Seddon v. Tagliabue (Sup.) 236.

*In an action for injury to property by interference with the easements of access, light, and air, a dismissal of the complaint *held* erroneous.—Niewenhous v. Manhattan Ry. Co. (Sup.) 501.

Dismissal of complaint because of unintentional failure of plaintiff to satisfactorily answer questions on cross-examination *held* not authorized.—Dougherty v. McCollum (Sup.) 590.

*Where both parties request the court to direct a verdict, and after direction and entry by the clerk the defeated party excepts to the direction, he cannot subsequently insist upon his right to go to the jury upon a disputed question of fact.—Zajic v. Elian (Sup.) 652.

**§ 5. Instructions to jury.**
In an action for wrongful discharge under an alleged contract of employment, an instruction *held* properly refused as inapplicable to the pleadings.—Summers v. Phenix Ins. Co. (Sup.) 226.

In an action against a carrier for injuries to a passenger, an instruction on the credibility of defendant's witnesses *held* proper.—Weir v. Union Ry. Co. (Sup.) 268.

Objection that a new contract between the parties, modifying a former contract, was invalid for want of consideration, *held* not raised by an objection to an instruction and a request for a charge.—Gurski v. Doscher (Sup.) 588.

*An objection to a charge, in an action for injuries to a servant, *held* insufficient to constitute a request for a modification authorizing consideration of plaintiff's statement of her age at the time she was employed, on the question of negligence.—Regling v. Lehmaier (Sup.) 642.

Instruction that "the burden of proof is upon plaintiff to prove his version of the transaction" *held* properly refused.—Hellthaler v. Teft Weller Co. (Sup.) 823.

## TROVER AND CONVERSION.

Bill of particulars, see "Pleading," § 6.
Harmless error in instructions, see "Appeal," § 15.

**§ 1. Acts constituting conversion a liability therefor.**
*Where plaintiff left property in defend building under an agreement that it be removed on notice if the building was and defendant leased the building to a who removed the property, defendant liable for conversion thereof.—Hun Herrman (Sup.) 48.

**§ 2. Actions.**
Under a complaint for conve covery can be had on any caus

*** Point annotated. See syllabus.**

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contract, nor without proof of a conversion.—Huntington v. Herrman (Sup.) 48.

In an action against a stockbroker's assignee for conversion of certain stock held by him as collateral to a claim transferred to plaintiff's assignor, evidence as to defendant's knowledge of the pledge at the time the claim was transferred, and as to how plaintiff's assignor came to buy the claim from the assignee, *held* erroneously excluded.—Flynn v. Smith (Sup.) 56.

*Measure of damages for conversion *held* the value of the property at the time of the conversion, with interest.—Corn Exch. Bank v. Peabody (Sup.) 78.

## TRUSTS.

See "Perpetuities."
Amendment of process in action against trustee, see "Process," § 2.
Creation by will, see "Wills," § 6.
Equitable conversion, see "Conversion."
Equity jurisdiction see "Equity," § 1.
Parties in action against trustees, see "Parties," § 1.
Trust deeds, see "Chattel Mortgages"; "Mortgages."

### § 1. Creation, existence and validity.

A bequest to individuals in trust for a religious corporation *held* to have gone to corporation, and not to the individuals, under Real Property Law, Laws 1896, pp. 570, 571, c. 547, §§ 73, 77.—In re Cooney's Will (Sup.) 676.

The provision of the statute of uses and trusts, that every valid express trust shall vest the whole estate in the trustee, is limited to the trust estate, and has no application to future legal estates in lands covered by the trust to take effect in possession on the termination of the trust.—Train v. Davis (Sup.) 816.

A trust created by deed *held* an express trust within Real Property Law, Laws 1896, p. 571, c. 547, § 76, so that life tenants took the trust property at the termination of the trust subject to a power to sell.—Train v. Davis (Sup.) 816.

*A trust considered as an active trust *held* void for indefiniteness.—Gueutal v. Gueutal (Sup.) 1002.

### § 2. Construction and operation.

*A trust *held* a passive trust, and the trustee at most took a naked trust, abolished by Real Property Law, Laws 1896, pp. 570, 579, c. 547, §§ 72, 73, 129.—Gueutal v. Gueutal (Sup.) 1002.

### § 3. Appointment, qualification, and tenure of trustee.

*An order appointing a person to execute a trust cannot be made without notice to the beneficiaries and those entitled to the remainder of the trust estate.—In re Wetmore (Sup.) 952.

On a petition to vacate an order setting aside an order appointing a trustee, the court properly appointed a referee to take proof of the facts alleged in the petition.—In re Wetmore (Sup.) 952.

An order appointing a referee to take proof of the facts set forth in a petition to vacate the appointment of a trustee, though irregular, because made when the beneficiaries were not parties, will not be disturbed when they ask that it be affirmed.—In re Wetmore (Sup.) 952.

### § 4. Management and disposal of trust property.

*Expenses incurred by testamentary trustees in defending a suit attacking the validity of the trust *held* not payable out of the amount fixed as compensation for the trustees.—Steinway v. Steinway (Sup.) 99.

Indorsers of notes to secure unauthorized loan by trustee *held* not liable to reimburse co-beneficiaries beyond their liability on the notes.—Blair v. Hampton (Sup.) 109.

Beneficiaries of trust fund failing to object to unauthorized loan on accounting by trustee *held* not entitled to require reimbursement from co-beneficiaries who consented to the loan.—Blair v. Hampton (Sup.) 109.

### § 5. Execution of trust by trustee or by court.

As between life beneficiary and remainderman, the former *held* entitled to a certain dividend on stock.—Robertson v. De Brulatour (Sup.) 15.

Where testator's will gave certain securities to trustees who were required to pay the income and profits to the widow with remainder to testator's heirs, the trustees had no authority to establish a sinking fund from income and profits to provide for depreciation in the value of the securities.—Robertson v. De Brulatour (Sup.) 15.

*On the dissolution of a corporation the shares of which had been bequeathed in trust subject to a remainder, the plant, equipment, and materials, together with the necessary working capital, should be treated as principal, and the invested surplus, accumulated surplus earnings, and surplus cash capital as income, as between the beneficiary and the remainderman.—In re Stevens (Sup.) 28.

A remainderman *held* not entitled to call on the life tenant to create a sinking fund out of the income for the purpose of reimbursing the estate for premiums paid for bonds in which a portion of the principal was invested.—In re Stevens (Sup.) 28.

Where a trust deed authorized the trustees upon the death of the persons entitled to the income for life to sell the property and distribute the proceeds among certain persons, who at the time fixed for distribution elected to treat the property as real estate, it was not necessary for the court to appoint a trustee to execute the power of sale.—Train v. Davis (Sup.) 816.

Where trustees were given power to dispose of the trust estate, which power remained unexecuted at the time the trustees died, the court



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had the power, without the appointment of a substituted trustee, to execute the power.—Train v. Davis (Sup.) 816.

**§ 6. Accounting and compensation of trustee.**

Under Code Civ. Proc. §§ 2802, 3320, a testamentary trustee *held* entitled to receive commissions on securities received by him.—Robertson v. De Brulatour (Sup.) 15.

A life beneficiary in a testamentary trust *held* entitled to commissions as trustee.—Robertson v. De Brulatour (Sup.) 15.

On an accounting by a trustee, an extra allowance of costs may properly be allowed the trustee.—Blair v. Hampton (Sup.) 109.

In an action by a trustee for accounting, extra allowance of costs to defendants *held* improper.—Blair v. Hampton (Sup.) 109.

Where testamentary trustee had charge of several trust funds, and all but one of them had by agreement with the parties been turned over to them, on accounting as to the one retained, it will be assumed that trustee held possession of the several trust funds that they might be charged with proper share of administration expenses.—In re Haskin (Sur.) 926.

*Where a trustee has for years paid over the income of the estate without making any charge for commissions, they will be deemed waived, and he cannot recover the same on final accounting —In re Haskin (Sur.) 926.

## UNDERTAKINGS.

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Nature and grounds of appellate jurisdiction to review order denying filing of, see "Appeal," § 1.

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**§ 1. Usurious contracts and transactions.**

*That a contract is in writing does not exclude parol evidence that it is but a cloak for a usurious transaction.—Campbell v. Connable (Sup.) 231.

## VACATION.

*Vacating particular proceedings.*

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Specific performance of contract, see "Specific Performance."

**§ 1. Requisites and validity of contract.**

Receipt *held* not to constitute valid contract for sale of land.—Rosenblum v. Liener (Sup.) 836.

**§ 2. Performance of contract.**

Default on the part of the vendors in a contract for the sale of land *held* to entitle the purchaser to recover a portion of the purchase price paid on the execution of the contract.—Zirinsky v. Post (Sup.) 132.

*The existence of a party wall on a lot and a covenant running with the land *held* an incumbrance within a contract for the conveyance of the lot free from incumbrances.—Oppenheimer v. Knepper Realty Co. (Sup.) 204.

A vendee's objection to the vendor's title on the ground that it did not appear that a guardian to whom a mortgage had been given had ever accounted *held* untenable.—Forbes v. Reynard (Sup.) 710.

*A vendee's objection to the vendor's title on the ground that a mortgage had not been satisfied held insufficient under Code Civ. Proc. § 381.—Forbes v. Reynard (Sup.) 710.

*A decree for the specific performance of a contract for the purchase of land by a city *held* authorized, though the corporation council refused to approve the abstract of title furnished by the vendor.—Lighton v. City of Syracuse (Sup.) 792.

**§ 3. Remedies of purchaser.**

*A purchaser *held* entitled to recover the money paid on the contract and damages for the vendor's inability to convey, without first ten-



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dering performance on his part.—Oppenheimer v. Knepper Realty Co. (Sup.) 204.

## VENUE.

**§ 1. Nature or subject of action.**
*In determining the place of trial, the place where the transaction occurred will have a controlling influence, as provided by general practice rule 48.—Hays v. Faatz Reynolds Felting Co. (Sup.) 386.

**§ 2. Change of venue or place of trial.**
*On showing made, party *held* entitled to change of venue for convenience of witnesses.—Nichols v. Riley (Sup.) 346.

Condition in order denying change of venue for convenience of witnesses, that plaintiffs should admit signatures to certain documents, *held* not effective to destroy necessity for witnesses for defendant.—Nichols v. Riley (Sup.) 346.

*The convenience of witnesses in the employ of a party to the action is not generally given the same consideration in determining an application for a change of venue as those witnesses not employés whose attendance the party must procure.—Hays v. Faatz Reynold Felting Co. (Sup.) 386.

*The granting of an application for a change of venue to subserve the convenience of witnesses *held* error.—Hays v. Faatz Reynolds Felting Co. (Sup.) 386.

## VERDICT.

Directing verdict in civil actions, see "Trial," § 4.
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*Of objections to particular acts or proceedings.*

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On indorsement of note, see "Bills and Notes," § 3.
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## WATERS AND WATER COURSES.

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Construction and execution of trusts, see "Trusts."
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Legacy and succession taxes, see "Taxation," § 4.
Opinion evidence of testamentary capacity, see "Evidence," § 9.
Restrictions on perpetuities, see "Perpetuities."
Validity of assent to contract to devise or bequeath, see "Contracts," § 1.

* Point annotated. See syllabus.

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Laws 1848, p. 448, c. 319, § 6, providing that no devise or bequest to a corporation formed under the act for benevolent, charitable, or scientific purposes shall be valid unless made two months before the death of testator, applies only to corporations organized under such statute.—In re Cooney's Will (Sup.) 676.

**§ 2. Testamentary capacity.**

*That testatrix was a woman 96 years of age when she made her will *held* insufficient of itself to raise a presumption against testamentary capacity.—In re Brower's Will (Sup.) 438.

In a proceeding for probate of a will, evidence *held* sufficient to sustain a finding that testatrix had testamentary capacity at the time the will was executed.—In re Brower's Will (Sup.) 438.

**§ 3. Contracts to devise or bequeath.**

*Evidence *held* to sustain claim against decedent's estate for services rendered.—In re Funk's Estate (Sup.) 934.

*Defense that services rendered decedent were gratuitous *held* not sustained by the evidence.—In re Funk's Estate (Sup.) 934.

*Where deceased in his lifetime had promised claimant for services rendered to remember her in his will, limitations did not begin to run against her claim until the death of decedent.—In re Funk's Estate (Sup.) 934.

Will construed, and legacy in addition to same provided for by antenuptial agreement *held* a general legacy.—In re Bostwick's Estate (Sur.) 932.

**§ 4. Requisites and validity.**

*Under 2 Rev. St. (1st Ed.) pt. 2, c. 6, tit. 1, § 42, a will *held* not to have been revoked.—In re Evans' Will (Sup.) 1042.

**§ 5. Probate, establishment, and annulment.**

The exclusion of the opinion of a witness as to whether certain acts of testatrix which had been fully described were rational or irrational *held* not ground for reversal, under Code Civ. Proc. § 2545.—In re Brower's Will (Sup.) 438.

*Under Code Civ. Proc. § 2623, positive evidence that testator was competent and not under restraint *held* necessary to probate of will.—In re Schreiber's Will (Sup.) 483.

**§ 6. Construction.**

A will construed, and *held* to vest remainders absolutely in testator's children.—Davidson v. Jones (Sup.) 265.

A devise of a remainder to the children of testator's sisters, the child or children of each to take an equal portion thereof, *held* a devise to the children of each sister as a class taking by representation.—In re Keogh (Sup.) 433; In re Jones' Will, Id.

A will creating a trust construed, and *held* that remainder did not vest in the remainder-

*Bequest to trustees of St. Francis Hospital *held* payable to the Sisters of the Poor of St. Francis, a corporation owning a hospital called St. Francis Hospital.—Johnston v. Sisters of the Poor of St. Francis (Sup.) 525.

*Will construed, and *held* to require the payment of a specified sum to a daughter of the testator, rendering her share equal to the share of the other daughters.—Saul v. Swartz (Sup.) 549.

Will construed, and rights of devisee on sale of real estate devised determined.—Hoffman v. Steubing (Sup.) 706.

*Where after execution of a will devising real estate the land is sold, the devise is revoked.—Hoffman v. Steubing (Sup.) 706.

Provision in will *held* an absolute devise to testator's son except in event of his death without children before the death of his wife.—Mull v. Masten (Sup.) 746.

Will construed, and gift to a class *held* to speak from the time of testator's death.—In re Woolsey's Estate (Sup.) 936.

Will construed, and certain advances *held* in addition to separate provisions made for testator's wife and sons during settlement of the estate.—Central Trust Co. v. Egleston (Sup.) 1055.

Under a will certain advances *held* not chargeable against any of the specific beneficial interests elsewhere provided, but to be made from the funds in the hands of the trustee under the will.—Central Trust Co. v. Egleston (Sup.) 1055.

A will construed, and precatory words therein *held* meant as a direction to a trustee under the will.—Central Trust Co. v. Egleston (Sup.) 1055.

A will construed, and *held* to require contributions to maintain the home to be made by each of several legatees, and not by them collectively.—Central Trust Co. v. Egleston (Sup.) 1055.

Will construed, and income of trust fund *held* alone available for support of life beneficiary.—In re Van Decar (Sur.) 309.

Evidence examined, and *held* that discretion of trustees in applying income of trust estate to beneficiary would be abused if any part of the income was withheld.—In re Van Decar (Sur.) 309.

Will construed, and term "above said nieces" *held* to apply to all nieces as a class.—In re Cunning (Sur.) 312.

**§ 7. Rights and liabilities of devisees and legatees.**

In a proceeding to collect debts of a decedent from devisees, an account filed by the executor, but not settled by the surrogate, nor made the basis of any decree, *held* insufficient, under Code Civ. Proc. § 1848, to show want of other assets.—Lawrence v. Binninger (Sup.) 279.

*** Point annotated. See syllabus.**

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Under Code Civ. Proc. § 1848, proof that a judgment has been obtained against an executor *held* not sufficient as against heirs and devisees, to show that the debt cannot be collected from the executor.—Lawrence v. Binninger (Sup.) 279.

In proceeding against devisees to collect a debt due from decedent, the complaint *held* not nullified by an improper prayer for a lien.—Lawrence v. Binninger (Sup.) 279.

Under Code Civ. Proc. § 1852, plaintiffs in proceeding to collect from devisees a debt due from testator *held* not entitled to a lien upon a fund arising from the condemnation of the real property devised.—Lawrence v. Binninger (Sup.) 279.

*Under the express provisions of Code Civ. Proc. § 1843, devisees are liable for the debts of the decedent to the value of the realty which was devised to them.—Lawrence v. Binninger (Sup.) 279.

Where the income of a trust fund was payable to the life tenant on semiannual rests, income accrued but not paid at the time of the life tenant's death passed to his personal representatives.—In re Keogh (Sup.) 433; In re Jones' Will, Id.

*Will construed, and right of devisee on revocation of bequest of real estate by sale before testator's death determined.—Hoffman v. Steubing (Sup.) 706.

*A general legacy draws interest from one year after letters are issued.—In re Bostwick's Estate (Sur.) 932.

*Legacy in lieu of dower does not draw interest until one year from the issuance of letters.—In re Bostwick's Estate (Sur.) 932.

## WITNESSES.

See "Depositions"; "Evidence."
Convenience of as ground for change of venue, see "Venue," § 2.
Experts, see "Evidence," § 9.
Harmless error in examination, see "Appeal," § 15.
Opinions, see "Evidence," § 9.

**§ 1. Competency.**

In an action by the administrator of a deceased partner, defendant *held* not precluded from denying that he made any contract such as that testified to have been made between witness and defendant, under Code Civ. Proc. § 829.—Lefevre v. Silo (Sup.) 321.

*In an action by an executor at the instance of the residuary legatee, the executor *held* not entitled to object that defendant was disqualified, under Code Civ. Proc. § 829, to testify to the whole of transactions which had been proved by the executor in part.—Cole v. Sweet (Sup.) 625.

Under Code Civ. Proc. § 829, in an action against a corporation for death of plaintiff's intestate, a stockholder *held* incompetent to testify that he did not put deceased to work on the scaffold furnished by defendant which fell from defects therein.—Andrews v. Reiners (Sup.) 658.

*A broker suing the representative of a decedent representing to act as an agent for an owner in employing a broker to procure a purchaser *held* not competent, under Code Civ. Proc. § 829, to prove that he notified deceased that a purchaser had been found.—Bloodgood v. Short (Sup.) 775.

A witness *held* not shown competent to testify as to payments made on a bond given under Laws 1897, p. 239, c. 378, § 686.—Tully v. Levitz (Sup.) 829.

**§ 2. Examination.**

Where, in an action for money received, defendant claimed that the action was barred by limitations, refusal of the court to permit plaintiff's assignors to be asked on cross-examination why they had uniformly omitted to mention an alleged payment, relied on to bar the statute, *held* error.—Lefkowitz v. Reid (Sup.) 695.

*That the court interrogated a witness is not error.—People v. Dinser (Gen. Sess.) 314.

**§ 3. Credibility, impeachment, contradiction, and corroboration.**

*Cross-examination of witnesses to show interest *held* proper.—Sakolski v. Schenkel (Sup) 190.

*A party *held* not precluded from contradicting his witness by other witnesses.—In re Bailey (Sup.) 725.

*In an action for assault, defendant *held* entitled to show bias of plaintiff's witness.—Salzman v. Mandel (Sup.) 825.

*Instruction as to credibility of witnesses *held* not error.—People v. Dinser (Gen. Sess.) 314.

## WORK AND LABOR.

Claim against estate of decedent, see "Executors and Administrators," § 3.
Contract to make devise in payment of services rendered, see "Wills," § 3.
Liens for work and materials, see "Mechanics' Liens."

Where, in an action on a contract, the court found that there was no contract, but that plaintiff performed labor and services, etc., it should have ascertained how much had been done, the reasonable value thereof, and balance due.—Moriarty v. Board of Education of City of New York (Sup.) 251.

In a suit to establish a claim against the estate of a decedent, the amount allowed *held* excessive.—Koebel v. Beetson (Sup.) 408.

*The question whether a father-in-law expected to pay and a daughter-in-law expected to be paid for services rendered by her for him *held* for the jury.—Koebel v. Beetson (Sup.) 408.



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*Where a daughter-in-law, after the death of her husband, while she was maintaining a household of her own, rendered services for her father-in-law, there was no presumption that the services rendered were gratuitous.—Koebel v. Beetson (Sup.) 408.

*No implied promise to pay arises on the rendition of services by a member of a family continuing to live therewith after attaining his majority.—In re Milligan's Estate (Sup.) 480.

In an action for services, evidence *held* sufficient to justify a judgment in favor of plaintiff.—Herschkovitz v. Bradley (Sup.) 756.

## WRITS.

See "Process."

*Particular writs.*

See "Certiorari"; "Execution"; "Injunction" "Mandamus"; "Prohibition"; "Replevin."

## WRONGS.

See "Torts."

## YEAR.

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*** Point annotated. See syllabus.**

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